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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION HEARING, “THE TELEPHONE CONSUMER PROTECTION ACT AT 25: EFFECTS ON CONSUMERS AND BUSINESS”

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The Senate Committee on Commerce, Science and Transportation convened a hearing May 18 to examine the *Telephone Consumer Protection Act*, a law designed to protect consumers from unwanted calls which was written some 25 years ago. It was a relatively short hearing, but the number of Senators who made an appearance, even if not asking any questions, showed some level of engagement on the issue among Senators serving on the Commerce Committee. The testimony and Q&A clearly showed a diverse array of viewpoints, as TCPA reform is not an issue that falls strictly down party lines.

It is clear Senators, Representatives, and other policymakers often hear from their constituents regarding unwanted calls. Unfortunately, for those seeking to update the law to provide more flexibility for established business relationships, the term “robocall” has been defined as any call using an automated telephone dialing system (ATDS). Several Senators struggled to understand the differences between a device designed to more efficiently contact existing customers and those designed to blast marketing calls across large swaths of a given area code to play a recording and/or connect with the first person to answer.

Despite the continual conflation of telemarketing calls with those made to existing customers (including students), several Senators at the hearing seemed aware of the recent spikes in lawsuits relating to TCPA and acknowledged the growth of the cottage industry of plaintiffs’ attorneys filing complaints on calls. There also seemed to be agreement among the witnesses on a need for a national registry of reassigned numbers to prevent calls where consent was previously given, but the mobile number has subsequently been reassigned. The testimony from consumer groups did note such databases did exist in the private market, with some claiming verification rates of 99 percent, but also said they would support a national registry of these numbers.

The pending rules from the Federal Communications Commission (FCC) to implement the TCPA exception relating to the collection of federal debts was also specifically mentioned by numerous witnesses and Senators throughout the hearing. In addition to the traditional debate between consumer groups and privacy hawks who often claim that calls to try to help a borrower get out of delinquency or default constitute harassment and industry groups who want to reach their customer on their mobile phones in the most efficient way possible, Indiana Attorney General Greg Zoeller indicated the law could threaten the constitutionality of his state’s prohibition of robocalls of any type.

In an interview with *Politico* following the hearing, Chairman John Thune (R-SD) suggested he was open to considering in his committee Sen. Edward Markey’s (D-MA) *HANG-UP Act*, which would repeal the TCPA exemption for the collection of federal debts. Thune also said he was inclined to push for a national registry of

reassigned numbers to protect against TCPA litigation abuse, but acknowledged that proposal would receive significant pushback, particularly from wireless carriers.

MEMBERS PRESENT FOR ALL OR PART OF THE HEARING

Republicans: Chairman John Thune (SD), Roy Blunt (MO), Dean Heller (NV), Steve Daines (MT), Cory Gardner (CO), Kelly Ayotte (NH), Dan Sullivan (AK), Deb Fisher (NE)

Democrats: Ranking Member Bill Nelson (FL), Amy Klobuchar (MN), Richard Blumenthal (CT), Claire McCaskill (MO), Edward Markey (MA), Joe Manchin (WV), Cory Booker (NJ), Maria Cantwell (WA)

WITNESSES

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

OPENING STATEMENTS

Chairman Thune opened the hearing by noting that no politician wants more telemarketing calls, as they are always among the top complaints from constituents. However, Thune also acknowledged the increasing lawsuits—reviewing the more frivolous lawsuits and petitions before the FCC for normal contact with consumers—and said the Congress needs to ensure the TCPA “strikes a balance” between unwanted harassment and allowing businesses to efficiently contact their customers. Thune noted the increasing number of “cord cutters” who have discarded their landlines. He said, “If you can’t reach people on their mobile phones, you’re not likely to reach them at all.”

Though he did not ask any questions, **Ranking Member Nelson** was forceful in his comments and nearly laughed while scoffing at the suggestion that TCPA needed to be revised to allow for more calls. According to the Ranking Democrat, many people are “cutting the cord” on their landlines due to robocalls. Nelson also said businesses seeking to contact their customers with an ATDS had an easy solution—“just get the consent.” This point was echoed by multiple Democrats throughout the hearing.

WITNESS STATEMENTS

Greg Zoeller, the Republican Indiana Attorney General, was a witness for the minority, the Democrats, and the first to speak. Zoeller has been one of most vocal AGs in opposition to any amendment to the TCPA to allow for more calls via ATDS, even for existing business relationships. He was particularly opposed to the TCPA exemption for federal debts, arguing this exemption could bring the constitutionality of his state’s own law into question. According to Zoeller, courts upheld the Indiana law because it bars *all parties* from using an ATDS system to contact individuals on their cell phones. Once the exemption is put in place, Zoeller is concerned his state’s restriction of calls will face more problems with the First Amendment. He was clearly focused on these concerns, but also raised the prospects of increased tax related scams due to the use of private collection agencies (PCAs) and indicated student borrowers would likely be subject to harassment from debt collectors due to the TCPA changes.

Speaking on behalf of a variety of industries impacted by TCPA liability risk, **Monica Desai, Becca Wahlquist, and Rich Lovich** all laid out the case as to why the law needs an update. Wahlquist, representing the Chamber’s Institute for Legal Reform, spoke to the “cottage industry of plaintiffs attorneys” who constantly

file lawsuits seeking TCPA damages. In deference to time, Wahlquist did not get into specifics, but told the Committee she would be happy to discuss the example of a woman who carries 85 cell phones with her in the hopes of receiving a call in violation of TCPA as well as statistics showing how certain law firms are responsible for a disproportionate number of TCPA lawsuits. Desai reviewed the impact of the law on financial services providers and other industries, such as utilities, where customers are seeking information from businesses in real time. She noted that Consumer Financial Protection Bureau Director Richard Cordray praised banks for new programs to alert customers of low account balances to avoid overdraft charges. However, sending these alerts via text message without prior express consent may expose financial institutions to potential TCPA liability. Speaking to the issue of the recent exemption for federal debts, Desai pointed to information from student loan servicers indicating upwards of 90 percent of potential defaults are avoided if contact is made with the borrower. She also noted that from a borrowers' perspective, "not getting a call does not mean the debt is going away." Closing out the industry-supportive witnesses, Lovich highlighted the TCPA related issues in the healthcare industry and said the barrage of lawsuits, and subsequent focus on compliance and risk-aversion by health care companies, is preventing health care providers from effectively communicating with their clients and diverting resources from patient care.

Margot Saunders of the National Consumer Law Center (NCLC) argued the law did not need to be updated and suggested the consumerists lobby was pleased with the FCC's recent declaratory ruling on the TCPA. According to Saunders, the concerns of an overly litigious environment on TCPA are vastly overblown and the courts have other tools to address meritless lawsuits. Her testimony was littered with examples of cases where consumers claimed numerous contacts via text and cell phone. She also called for the repeal of the TCPA exemption for federal debts, alleging that federal contractors will use this new ability to reach borrowers via an ATDS as a means for harassment. Saunders also pointed to the same statistics as the industry representatives on the declining number of households with a landline, noting cell phones were the only way to reach the consumer. Industry representatives say the exact same thing, but point to the declining number of landlines as a reason to ease TCPA restrictions whereas Saunders claims this is a reason to ensure the law remains highly restrictive. The NCLC attorney also suggested TCPA exemptions are a safety issue because many people will answer their mobile phone while driving—a point echoed by multiple Democratic Senators.

MEMBER QUESTIONS

Chairman Thune began the questioning with specific questions on the petition from Edison Electric before the FCC regarding the ability of electric companies (and all utilities) to use an ATDS to alert customers of potential outages; he wanted to know if a response from the FCC was "long overdue." Wahlquist said that yes a response from the FCC was long overdue, but emphasized the issue is much bigger than utilities. Thune also asked Desai about banks' use of automated dialers to alert consumers, stating "wouldn't they already have their customers' consent when they provided the number?" Desai responded this is often the case, but the issue of reassigned numbers makes financial institutions wary of making use of ATDS to reach their customers.

After **Ranking Member Nelson** declined to offer any questions, **Sen. McCaskill** was the first Democrat to address the witnesses. The Missouri Democrat was clearly angry from the outset of her remarks, stating she receives numerous complaints from all types of constituents on unwanted calls. She then turned to the industry representatives at the witness table and said "stop whining." According to McCaskill, this is a very simple issue and business should "just get the consent!" and wondered why it was so "economically difficult" to do so. She also suggested other forms of communication, such as email or snail mail, could be equally as effective. In response, Zoeller, the attorney general, indicated the "massive calls" McCaskill referenced "are not coming from the people represented here." McCaskill's impassioned remarks made it into multiple press reports on the hearing.

Following up on his Missouri colleagues fiery exchange, **Sen. Blunt** spoke in much more measured tones. He acknowledged that people are frustrated with telemarketing robocalls, but said it seemed clear these are "two

different problems” and later said “surely we can separate the two.” He wondered if the massive telemarketing calls from overseas could be stopped. Zoeller indicated there was little legal recourse in the US, but also suggested wireless carriers could do more to stop the practice. Blunt was also interested in more details on reassigned numbers, particularly how long did it take for the carriers to reassign numbers. The panelists all agreed it varied by carrier, with times before reassignment generally ranging from 30 days to six months. During this exchange, Saunders of the NCLC indicated consumer groups would likely support a national database of reassigned numbers, and Zoeller reiterated that legitimate businesses needed better defense protections against TCPA lawsuits. Closing out his time, Blunt again said by “dividing the discussion” policymakers were “much more likely to fix both problems.” Chairman Thune said that could be a solution and later again made note of the appearance of some common ground between the industry representatives and consumer groups.

Senator Klobuchar focused most of her remarks on the *HANG-UP Act*, of which she is a cosponsor. Both Zoeller and Saunders indicated they were very supportive of *HANG-UP*. Zoeller again mentioned his First Amendment concerns, while Saunders noted the Federal Trade Commission (FTC) has been telling consumers if someone contacts them claiming to represent the IRS, it is a scam, so allowing collection agencies more contacts regarding delinquent taxes could lead to increased confusion and potential scams.

Senator Daines held up a brick-size cellular phone from 1992 to drive home just how outdated the law has become. He asked about the growth of TCPA lawsuits. Wahlquist responded the increase in lawsuits exemplifies how a law designed to protect consumers has now been distorted to “serve the trial lawyers.” Representing Montana, Daines was also concerned on the impact to rural healthcare and small businesses. The industry representatives on the panel indicated both sectors would be acutely harmed by onerous laws and regulation in this area.

Senator Blumenthal noted unwanted calls were the top complaints he received as Attorney General of Connecticut, and they’ve continued in his days in the Senate. Zoeller responded that if Congress really wanted to see the populace become angry, or “bring out the pitchforks,” they should open up TCPA to allow more calls. Blumenthal also wanted to know if more could be done to prevent the “blast” telemarketing calls that blanket a given area code from locations outside of the US. Saunders responded to “ask the carriers” and suggested increased liability for these calls could be a great incentive for communications companies to take a more proactive approach in blocking unwanted blast calls.

The sponsor of the *HANG-UP Act*, **Sen. Markey**, closed the Q&A session. He started his remarks/questions by remembering the initial passage of TCPA when he was in the House and stated, “This is my law.” According to Markey, because of TCPA, individuals are likely to answer their cell phones when a caller with an unknown number tries to reach them. He also said that businesses could easily manually dial their customers and “connect them with a real person,” suggesting all ATDS-initiated calls carry recordings. He asked the minority witnesses if there was a better way to address the issue of federal debts than the TCPA exemption in the *Bipartisan Budget Act of 2015*. Zoeller, the Indiana Attorney General, said Congress should work to improve the defense side of TCPA to help legitimate businesses avoid frivolous lawsuits. Saunders, the longtime consumer attorney, indicated she was highly skeptical that “calling about a debt multiple times will help the consumer.”

At the conclusion of Chairman Thune’s remarks, Markey asked for permission for further questions, which was granted. He asked if the combination of re-engaging private collection agencies for IRS related work combined with this new exception increases the risks for potential harm to consumers. Zoeller and Saunders responded affirmatively, suggesting the combination could lead to increased scam attempts and customer confusion.

CONCLUSION

In his closing remarks, Chairman Thune emphasized “no one is saying a consumer can’t stop calls,” but did acknowledge the current situation is one that calls for a “balanced solution.” Thune was also critical of the “Obama Robocall carve-out” suggesting he is not entirely on board with the TCPA exemption in last year’s budget deal. In a nod to these concerns, but a desire to reach a “balanced solution” Thune indicated that, while it is not on the agenda in the near future, the Senate Commerce Committee could bring up and approve Markey’s *HANG-UP Act* to repeal the TCPA federal debt exemption. However, he also said that he would push for a national database on reassigned numbers to help address TCPA liability issues.

"I suspect the carriers would push back against that, but I think it's something we ought to maybe take a look at," Thune told *Politico* in an interview. "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."

Additional Information

Additional information on the hearing, including an archived webcast, witness statements, and opening statements from the Chairman and Ranking Member, is available online: <http://goo.gl/fnrZKL>