

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

September 20, 2016

To: Subcommittee on Communications and Technology Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Subcommittee Hearing on “Modernizing the Telephone Consumer Protection Act”

On **Thursday, September 22, 2016 at 11 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Communications and Technology will hold a hearing titled “Modernizing the Telephone Consumer Protection Act.” At this hearing, the subcommittee will explore how to update the law to better protect consumers from unwanted telephone calls and texts.

I. BACKGROUND

Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 finding that action was necessary to help the “many consumers [who were] outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”¹ The TCPA: (1) prohibits making telemarketing calls using a prerecorded voice to wireline residential phones without prior express consent;² and (2) prohibits any non-emergency call using an autodialer or prerecorded voice to a wireless phone without prior express consent.³ Prior express consent can be oral or written for informational calls to wireless phones.⁴ Prior express consent, however, must be in writing for

¹ See TCPA, Pub. Law No. 102-243, at § 2(6).

² 47 U.S.C. § 227(b)(1)(B).

³ 47 U.S.C. § 227(b)(1)(A).

⁴ *Id.*

any call that includes an advertisement or is telemarketing.⁵ The FCC implemented the statutory provisions of the TCPA in 1992.

The TCPA gives the FCC enforcement authority including the ability to fine companies who violate the rules. The TCPA also includes a private right of action that allows consumers to receive up to \$500 for each violation and treble damages for each willful or knowing violation.⁶ Consumers have brought many lawsuits against companies under this provision of the law.

Certain industry sectors often seek rulings from the FCC to exempt those sectors from provisions of the law, usually the requirement for explicit consumer consent. In response, the FCC has issued declaratory rulings over the years, clarifying its interpretation of various provisions of the TCPA. The most recent major FCC action was an Omnibus Declaratory Ruling and Order released in July 2015.⁷ With each decision, the FCC has sought to balance consumers' rights to privacy with potential legitimate business interests of telemarketers and other callers.⁸

In addition to the TCPA, Congress enacted the Do-Not-Call Implementation Act in 2003, which required the Federal Trade Commission (FTC) to establish and enforce a Do-Not-Call registry to supplement the consumer protections afforded by TCPA.⁹ Under the law, telemarketers are prohibited from calling consumers who place their phone numbers on the registry absent an established business relationship.¹⁰ Additionally, telemarketers are required to pay for access to the registry, to use the registry,¹¹ and to delete any residential number from its call list within 31 days of a consumer registering his or her phone number.¹² The FTC enforces violations of the Do-Not-Call registry and can impose fines of \$16,000 per violation, with each call constituting a separate violation.¹³

⁵ See Federal Communications Commission, *Report and Order*, CG Docket No. 02-278 (rel. Feb. 15, 2012, ¶¶ 20-34 (apps.fcc.gov/edocs_public/attachmatch/FCC-12-21A1.pdf)).

⁶ 47 U.S.C. § 227(b)(3).

⁷ Federal Communications Commission, *Declaratory Ruling and Order*, CG Docket No. 02-278 and WC Docket No. 07-135 (rel. July 10, 2015) (apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1_Rcd.pdf).

⁸ *Id.* at ¶ 4.

⁹ Public Law No. 108-10.

¹⁰ Federal Trade Commission, *Q&A for Telemarketers & Sellers About DNC Provisions in TSR*, Question 60 (accessed Sept. 15, 2016) (ftc.gov/tips-advice/business-center/guidance/qa-telemarketers-sellers-about-dnc-provisions-tsr#downloading).

¹¹ 16 C.F.R. § 310.8.

¹² FTC Q&A for Telemarketers and Sellers, *supra* n. 10, at Question 61.

¹³ *Id.* at Question 59.

II. ISSUES FOR DISCUSSION TO REFORM TCPA TO BETTER PROTECT CONSUMERS

When Congress passed the TCPA twenty-five years ago, the smallest cell phones were the size of bricks and barely fit the definition of mobile. At that time, people still relied almost exclusively on their landlines—only 7.5 million cellphones were in use in the entire country. A few years after that, cellphone service was still expensive with average rates of 47 cents per minute.¹⁴

In contrast, today we have more cellphone connections than people,¹⁵ and nearly half of Americans are using them as a replacement to the once essential landlines.¹⁶ Even the way landline phones function is changing drastically. Old copper lines are giving way to high-speed fiber-optic lines with Voice over Internet Protocol in over half of residential landline connections.¹⁷

In recent years, the FCC and the FTC have been using the existing laws to stem the tide of unwanted calls. The wave of consumer complaints is nonetheless on the rise. The FCC now receives more TCPA complaints than any other type of complaint—more than 170,000 in 2015 alone. This number is nearly five times the 37,702 complaints received by the FCC in 2004, the inaugural year of the Do Not Call list.¹⁸ Similarly, in Fiscal Year 2015, more than 222 million consumers were active on the FTC's Do Not Call Registry. The FTC received more than three million related complaints just last year.

This hearing should provide the Subcommittee with an opportunity to consider several issues in this area:

- Technology Neutral Rules: The TCPA draws a distinction between wireless and landline phones, treating each service differently.

¹⁴ Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd 9664, Table 20 (2011).

¹⁵ CTIA, *Annual Wireless Industry Survey* (www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey) (accessed Sept. 30, 2015).

¹⁶ Centers for Disease Control and Prevention, *National Health Interview Survey Early Release Program, Early Release of Selected Estimates Based on Data from the January–March 2015 National Health Interview Survey* (Sept. 2015) (www.cdc.gov/nchs/data/nhis/earlyrelease/earlyrelease201509.pdf).

¹⁷ Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2014* (Oct. 2014) (apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf).

¹⁸ See *FCC Quarterly Consumer Complaint Reports for Calendar Year 2004*.

- Autodialer Definition: The TCPA defines a prohibited autodialer as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.”¹⁹
- Enforcement: The TCPA provides both specific statutory penalties for violations, and requires that persons receive notice from the FCC before the Commission may impose a forfeiture under the TCPA.
- Declaratory Rulings: The FCC continues to act on petitions for declaratory ruling from various parties and companies that seek to increase calls to consumers’ cellphones without prior express consent.
- Common Carrier Exemption: Under the FTC Act, the FTC is prohibited from taking enforcement action against common carriers generally, including to address unwanted calls from telemarketers or robocalls.
- Blocking Technologies: Carriers are allowed to provide customers with blocking technology to help with unwanted phone calls, but are not mandated to provide such options.

III. WITNESSES

The following witnesses have been invited to testify:

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

¹⁹ See 47 U.S.C. § 227(a)(1).