

Statement of U.S. Chamber Institute for Legal Reform and U.S. Chamber Of Commerce

**BY: Becca Wahlquist, Partner, Snell & Wilmer L.L.P.
On Behalf of the U.S. Chamber Institute for Legal Reform and
U.S. Chamber of Commerce**

ON: The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227

TO: U.S. Senate Committee on Commerce, Science & Transportation

Testimony of Becca Wahlquist
On Behalf of the U.S. Chamber Institute for Legal Reform and U.S. Chamber
of Commerce
Regarding the Telephone Consumer Protection Act

Chairman Thune, Ranking Member Nelson, and distinguished members of the Committee, thank you for inviting me to testify on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) and U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America’s free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation’s civil legal system simpler, faster, and fairer for all participants.

I appreciate the opportunity to testify about the impact of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”) on American businesses big and small, in a manner never intended by the drafters of this 25-year-old statute.

The TCPA is a well-intentioned statute that established our nation’s Do Not Call list and carried forward important policies. But portions are horribly outdated; in particular, Section 227(b), which addresses technologies used for cold-call telemarketing in the early 90’s, is now being expanded to attach liability to all manner of calls (i.e., informational and transactional) placed by businesses small and large to customer-provided numbers. TCPA litigation is also fueled by statutory damages that are untethered to any actual harm, and that can quickly balloon to staggering amounts of potential liability.

Unfortunately, it is American businesses, and not harassing spam telemarketers, who are the targets for these suits. As FCC Commissioner Pai recently noted, “The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.”¹ Indeed, businesses reaching out in good faith to customer-provided telephone numbers are now the most common target of TCPA litigation.

It is time for this statute to be revisited and brought in line with other federal statutes that provide for statutory damages when there is no actual harm. While protections should remain for consumers, businesses too need protection from astronomical liability for four years’ worth of communications to customer-provided numbers (with no stated statute of limitations, courts have applied the default four-year period in TCPA litigation). As further detailed below, the TCPA has created perverse incentives for persons to invite calls from

¹ See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961, 8072-73(2015) (Pai Dissent).

domestic businesses and then sue for those calls, and for lawyers to search avidly for deep-pocket defendants calling their potential clients, even offering smartphone applications to help generate those lawsuits. TCPA litigation abuse is rampant, and its negative impact on American businesses is not what was intended when this statute was passed in a different technological era.

I. Background: The Destructive Force of TCPA Litigation

The TCPA was enacted twenty-five years ago to rein in abusive telemarketers. But in recent years American businesses have discovered that if they reach out to customers via call, text, or facsimile for any reason, their company is at risk of being sued under the TCPA.

A plaintiff claims that a communication was made without his or her consent using certain technologies, and more often than not, that plaintiff claims to represent a nationwide class seeking the \$500 (or \$1,500, if willful) statutory damages available under the TCPA for each communication. Thus, the small business that sent 5,000 faxes finds itself being sued for a minimum of \$2.5 million dollars; the restaurant that sent 80,000 text coupons is sued for trebled damages of \$120 million dollars; and the bank with 5 million customers finds itself staring at \$2.5 billion in minimum statutory liability for just one call placed to each of its customers.

Individual plaintiffs can also stockpile calls they believe violate the TCPA for years, and then make demands or sue once they reach critical mass—seeking \$20,000 to \$60,000 in individual damages, for example, for 40 unanswered calls a company thought it was placing to its own customer’s number over a three-year period. The targeted company must then decide whether to pay plaintiffs’ counsel or the complaining individual, or to spend significant money defending an action in which, when a class is alleged, has statutory damages that can reach into the millions or billions of dollars.

For over a decade, I have defended various companies sued under the TCPA for a variety of communications made via phone, text, and facsimile. I have been witness to the growing cottage industry of TCPA plaintiffs and lawyers targeting American businesses that reach out to their own customers for any reason (transactional, informational, or marketing), and I can confirm that in the past few years, the problems with TCPA litigation abuse have only worsened. Over-incentivized plaintiffs and a growing TCPA plaintiffs’ bar, as well as an anti-business July 2015 Order from a sharply divided FCC majority,² have led to an explosion of litigation throughout the country—litigation that is less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits.

² See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015) (hereafter, “July 2015 FCC Order”). Various appeals of this Order have been consolidated and are now pending before the D.C. Circuit Court of Appeals.

Indeed, while the TCPA itself does not provide for attorneys' fees, it is clear that TCPA class lawsuits are a lawyer-driven business, with attorneys' fees awards (pulled from common class funds) dwarfing any recovery for individual consumers. For example, one survey of federal TCPA settlements found that in 2014, the average attorneys' fees awarded in TCPA class action settlements was \$2.4 million, while the average class member's award in these same actions was \$4.12.³

And it is not just large companies who find themselves targeted: Small businesses throughout the country are finding themselves brought into court when they had no intention of violating any law and had no knowledge of the TCPA. One family-owned company from Michigan, Lake City Industrial Products, Inc., struggled for several years to defend a TCPA class action for 10,000 faxes, providing a chilling example of how the risks of unknowingly violating the TCPA can be exacerbated by lead generators who reach out to small companies and promise an inexpensive and legal way to get new businesses. Lake City received a faxed advertisement suggesting a way to generate new business: faxes to be sent to approximately 10,000 targeted businesses, all for the low sending cost of \$92.⁴ The family-run company believed it was engaging in a legal marketing tactic and worked with the fax advertiser to design the facsimile it would send; on summary judgment, the court found Lake City liable for approximately 10,000 violations of the TCPA for the unsolicited marketing facsimiles, even though Lake City noted that statutory damages of \$5,254,500 would force its bankruptcy.⁵ This is just one of the small businesses that has found itself facing annihilating statutory damages and accruing staggering defense costs for sending faxes in the modern age, when facsimile machines are no longer expensive and, indeed, most "facsimiles" are converted to email pdf and sent to a recipient's email by company servers.

With such riches to be had through TCPA lawsuits, between 2010 and 2015, the amount of TCPA litigation filed in federal court increased by 940%.⁶ For just one example of how this has impacted the already-crowded federal court system, look to Florida: in 2015, at least 170 TCPA actions were filed just in Florida's federal courts, compared with less than 30 such federal actions in 2010.⁷

³ See Wells Fargo Ex Parte Notice, filed January 16, 2015, in CG Docket No. 02-278, p. 19, available at <http://apps.fcc.gov/ecfs/document/view?id=60001016697>.

⁴ See *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 1:09-CV-1162, 2013 WL 3654550 (W.D. Mich. July 12, 2013) (business retained fax blaster to send faxes; no question that the business first inquired whether such faxes were legal and received assurances that they were).

⁵ See *id.* at *6.

⁶ See <http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/>.

⁷ Source: Bloomberg Law Litigation & Dockets (searched on May 10, 2016 with a search of "TCPA" OR "telephone consumer protection" in the Florida District Courts).

The dramatic increase in TCPA litigation has been spurred by multi-million dollar settlements (such as Capital One's \$75 million settlement in 2014), as well as news of individual awards in the hundreds of thousands of dollars (such as one New Jersey woman's \$229,500 verdict against her cable provider in July 2015,⁸ or a Wisconsin woman's \$571,000 verdict in 2013 against the finance company calling her husband's phone after she defaulted on car payments⁹).

Attorneys have profited as well, often teaming up to split the costs of "investing" in a TCPA litigation, so that multiple firms split the business risk and share in the reward when companies facing enormous statutory damages end up settling. In the Capital One action, for example, when considering the appropriate attorneys' fees (rather than the 33-40% of the award the named plaintiffs had agreed to with their various lawyers), the court recognized that while Capital One had many defenses that could extinguish the plaintiffs' TCPA claims, the *in terroem* value of settling an action with even a slight chance of billions of dollars in statutory damages was "bankruptcy-level exposure" that made settlement (and a fees award) more likely than not, so that a fees award of a little over 20% was more appropriate.¹⁰ The plaintiffs' law firms were awarded their costs and \$15,668,265 in fees out of the settlement fund.¹¹

Businesses of all sizes in a wide range of industries—from social media companies, electric companies, banks, sports teams, and pharmacies, to a family-owned plumbing company, a ski resort, an accountant, and a local dentist's office—have found themselves defending against TCPA litigation and demands. Indeed, the TCPA is not only a liability trap, but also a vicarious liability trap as well. For example, companies (such as manufacturers) who place no phone calls to consumers are finding themselves defending class action litigation for millions of calls or texts placed by downstream resells simply because those communications purportedly mentioned their name-brand products. Companies are subject to the expense of defending against claims such as, for example, a text message was sent on their behalf, when the company did not send the message, did not authorize that such messages can be sent, and had no knowledge of which business partner (if any) would breach its contract to perform illegal telemarketing (as often the actual senders of spam text messages spoof the originating number that would show in the Caller ID field to hide their identity). Even the simple mention of the company's name in the text message subjects it to class-wide TCPA

⁸ *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015).

⁹ *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009 (W.D. Wisc., March 8, 2013), a decision later vacated by agreement of the parties as part of a confidential settlement.

¹⁰ *See In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 805 (N.D. Ill. 2015), appeal dismissed (May 5, 2015), appeal dismissed (June 8, 2015), appeal dismissed (June 26, 2015) (also recognizing "the strong incentives to settlement created by the magnitude of Capitol One's potential liability").

¹¹ *Id.* at 809.

litigation by plaintiffs' attorneys hoping for the big payday of a settlement (because so many companies do settle due to the *in terrorem* specter of billions of dollars in potential damages, if a large enough class could be certified.¹²).

To better explain the current TCPA landscape, Part II of my testimony below first addresses the original intent of the TCPA and the language that, in 1991, was designed to target certain abusive and harassing marketing calls, and then explains how the statute has been twisted and expanded without Congress' input to apply to modern technologies. Part III examines the current driving forces behind TCPA cases, and the reasons that companies cannot fully protect themselves from suits under Section 227(b). Part IV provides examples of just some of the rampant litigation abuse by both serial TCPA plaintiffs and by attorneys incentivized to bring TCPA lawsuits at an ever-increasing pace. I conclude in Part V by voicing the hope of the thousands of businesses being sued under the TCPA: that Congress should act to update the TCPA in order to provide the greatest degree of clarity and to alleviate the intolerable and unfair burdens that portions of this statute are placing on businesses. In order to start that discussion, I provide several recommendations that would bring the TCPA's private right of action in line with that of other federal statutes offering consumer remedies and that could help protect American companies and federal courts from the repercussions of litigation abuse, and allow business to continue communications helpful and important to their customers.

II. THE ORIGINAL INTENT, AND CURRENT APPLICATION, OF THE TCPA

The TCPA was enacted during a very different technological era, and is now twenty-five years removed from modern technologies. The telemarketing calls and faxes that the TCPA was designed to curtail were made by aggressive marketers employing tactics—such as random number generation or sequential dials—that systematically worked through every possible number in an area code, with the hope of getting someone to answer the phone or look at a fax with a marketing pitch for a product or service. Facsimile machines required expensive thermal paper; cellular phones were extremely uncommon (and very bulky) with expensive usage costs—thus, special protections were put in place for unsolicited calls made to cell phones and for unsolicited faxes that did not provide an easy opt-out. Caller ID was not in use, and so the only way to know who was calling was to pick up the ringing telephone. Text messages did not exist (indeed, email was still uncommon), and today's smart phones were science fiction fantasies.

¹² As Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has explained, certification of a class action—even one lacking in merit—forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

An understanding of the technologies available in 1991 is crucial to an understanding of the TCPA's intent: Businesses reaching out to their own customers were not doing so through what the statute defined as "ATDS machines"—systems capable of randomly and sequentially generating and dialing numbers,¹³ which were being used by telemarketers who did not care whom they reached, as long as they could get a certain number of people to pick up the phone. Congress was focused on the belief that limiting calls from ATDS autodialers would stop a certain kind of calling technology that "seized" phone lines that had been called randomly or sequentially.¹⁴

The TCPA was designed to address consumer privacy concerns and serious intrusions from that type of aggressive marketing. As the Supreme Court has noted, "Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls."¹⁵ The TCPA set rules about the kinds of consent required to make certain communications to phones and facsimile machines,¹⁶ and further authorized the establishment of a national Do Not Call (DNC) list that would record consumers' requests to not receive any telemarketing calls.¹⁷ The FCC was tasked with implementing the TCPA and promulgating the regulations that would create the national DNC, and over time the FCC has updated its regulations to add new requirements (such as the need for companies to maintain their own internal DNC list for requests to stop telemarketing otherwise permissible because of an Existing Business Relationship (EBR)).¹⁸

On the Senate floor, the TCPA's lead sponsor, Senator Hollings (D-SC), explained that the TCPA was intended to "make it easier for consumers to recover damages" from

¹³ See 47 U.S.C. § 227(a) "Definitions: As used in this section— **(1)** The term "automatic telephone dialing system" means 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."

¹⁴ See, e.g., Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 10 (1991) (discussing "Automatic Dialing Systems" as follows: "The Committee report indicates that these systems are used to make millions of calls every day. . . . Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. Once a phone connection is made, automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.")

¹⁵ *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012).

¹⁶ See 47 U.S.C. § 227(b).

¹⁷ See 47 U.S.C. § 227(c).

¹⁸ See, generally, 47 C.F.R. §64.1200.

computerized telemarketing calls, and that the intent was for consumers to go into small claims courts in their home states so that the \$500 in damages would be available without an attorney:

The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court

Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer **and the telemarketer**. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.¹⁹

It is clear that the private right of action focused on allowing consumers to sue **telemarketers**. Moreover, it was so clear that TCPA claims were intended to be handled on an individual basis in small claims court, the few early TCPA litigants in federal courts were told that there was no jurisdiction in federal court to hear TCPA claims, a matter only finally resolved by the U.S. Supreme Court in 2012 in its *Mims* decision (when the question had essentially been mooted for large TCPA class actions by the earlier Class Action Fairness Act's provision that class actions alleging over \$5 million in damages could be removed to federal court).

There was no real debate over the TCPA at the time of its passage; certainly, there was no indication of what the TCPA would grow to become. But now, a statute designed to provide a private right of action for consumers to pursue their own claims against entities placing intrusive and aggressive telemarketing calls, preferably in small claims court and without an attorney, now threatens to bankrupt any legitimate company placing legitimate business calls, as well as any "deep-pocket" entity that plaintiffs can claim could be vicariously liable for another person's or entity's communications.

¹⁹ 137 Cong. Rec. 30821–30822 (1991) (emphasis added).

The largest driver of TCPA litigation these days is claims of “autodialed” calls or texts to cellular phones placed without prior consent, because so many Americans now use their cell phones as their primary point of contact—as of 2014, 90% of American households had cellular phones,²⁰ and almost 60% were wireless-only households.²¹ Unlike in 1991, the modern owners of cellular numbers often opt to provide those numbers to companies with whom they do business. And unlike in 1991, companies often use computerized systems to efficiently contact these numbers—systems that TCPA plaintiffs argue are “autodialers” subject to the TCPA’s restrictions.

As already noted above, the TCPA defines an “autodialed” call as one made on an automated telephone dialing system (ATDS), “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.”²² TCPA plaintiffs and their attorneys have been arguing in lawsuit after lawsuit that if a call was placed with equipment that has even a hypothetical, **future** capacity to store or produce random or sequentially generated numbers (i.e., through reprogramming), that call or text was placed with an ATDS. And in an Order now on review before the D.C. Circuit Court, a divided majority of FCC commissioners agreed in June 2015 that “capacity” to randomly/sequentially dial need not be an operative feature in dialing equipment for the call to be considered “autodialed” and subject to the TCPA’s restrictions.²³ (The two dissenting commissioners vehemently disagree.²⁴)

The central problem to businesses with Section 227(b)’s prohibition on “autodialed” calls to cellular phones is that legitimate companies are being swept into the strict liability intended for the bad actors who, in 1991, were cold-call telemarketing random or sequential telephone numbers using a specific kind of equipment. No legitimate company in 1991 was trying to reach its own customers by randomly dialing numbers with equipment that fit the definition of an “ATDS (as it would make no sense to try to reach a customer by dialing random numbers), so as to be subject to \$500 or \$1500 per call liability for “autodialed” calls. Thus,

²⁰ Pew Internet Project, *Mobile Technology Fact Sheet*, Pew Research Center (2014), *available at* <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

²¹ Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014*, at 1-3 (Dec. 16, 2014).

²² 47 U.S.C. § 227(a)(1) (emphasis added).

²³ *See* July 2015 FCC Order, 30 FCC Rcd. at 7974-7976.

²⁴ *See also id.*, Pai Dissent, 30 FCC Rcd. at 8074 (“That position is flatly inconsistent with the TCPA. The statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the “capacity” to do. If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition? It *cannot*. To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not.”); *see also id.*, O’Rielly Dissent, 30 FCC Rcd. at 8088-90.

it makes sense to see no affirmative defenses built into Section 227(b), because no one making cold calls to random telephone numbers would have a defense for such practices.

On the other hand, many companies in 1991 did conduct some form of targeted telemarketing to customers, former customers, or prospective customers, and were bound by Section 227(c) to adhere to all the telemarketing rules established as to the DNC list. The separate private right of action in Section 227(c)(5) gives more protection to the legitimate companies that could violate DNC provisions: having exceptions during existing business relationship periods; allowing one free mistake each twelve months per number; setting statutory damages at the less draconian “up to” \$500 per communication; and providing affirmative defenses for companies who are making good faith efforts to comply with the law (i.e., by establishing written DNC policies and training employees on such policies²⁵). Thus, companies were given instructions needed to comply with the DNC section of the TCPA, and could defend themselves in the instances when the inevitable human error, such as a customer representative not accurately recording a DNC request, would occur.

It should come as no surprise that most TCPA litigation is now being brought under Section 227(b)'s unforgiving prohibitions on autodialed or prerecorded calls placed to cellular phones without prior express consent. Plaintiffs argue that calls or call attempts were autodialed. While the FCC has opined that “prior express consent” for transactional and informational calls exists when a customer opts to provide his or her cellular telephone number to a company (i.e., on an application),²⁶ the FCC majority has also now stated that companies are liable (after the first call) to all “autodialed” calls placed to those customer-provided numbers if, unbeknownst to the company, the customer has changed his or her telephone number or provided a wrong number in the first place.²⁷ Thus, a company reaching out to a customer-provided number can unknowingly be contacting a new subscriber to the cellular phone, who then can claim calls were made with an autodialer in violation of Section 227(b) without prior consent.

As further addressed in Part IV below, this has created “gotcha” litigation, where someone signs up for a credit card with a friend’s telephone number, and then the friend sues for calls received, or where someone keeps acquiring dozens of new cellular telephone lines in the hopes of “striking it rich” with a phone number receiving calls from deep-pocket companies

²⁵ See 47 U.S.C. § 227(c)(5) (“It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.”).

²⁶ See *In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 564–65 ¶ 10 (F.C.C. Jan. 4, 2008).

²⁷ See July 2015 FCC Order, 30 FCC Rcd. at 8001.

trying to reach the prior owner of the line.²⁸ Because the private right of action in Section 227(b)(3) lacks the affirmative defenses that Congress intended should apply to legitimate businesses (whom it was known could be targets of litigation under Section 227(c)(5), which does have such defenses), TCPA plaintiffs and their lawyers argue that there is strict liability for all these calls placed without consent, regardless of the company's good faith belief and adherence to practices meant to comply with the TCPA.

One final note on the 1991 statute and the technology of that time: Text messages did not exist twenty-five years ago when the statute was drafted, nor did any phones capable of displaying such a message. However, some courts and now the FCC majority have decided that a text message is the same thing as a "call" to a cellular phone, and is subject to the \$500 to \$1,500 per communication liabilities under the TCPA for autodialed calls (even though Commissioner O'Rielly vehemently dissented to extending the TCPA to text messages).²⁹ Many recent TCPA litigations focus on text messages—and even though companies ensure that a "STOP" response to a text message will stop all future messages, a consumer has no obligation to ask for texts to "STOP", but instead can simply keep collecting messages until there are enough for his or her lawyer to make a hefty demand. It is difficult to imagine that Congress, had it conceived of text messages in 1991, would not have had separate provisions to address this very different kind of communication that so many consumers welcome for easy and quick delivery of information.

It should be clear that the technological shift since 1991, particularly the advent of cellular phones and now smart phones, should have made portions of the TCPA inapplicable to such new technologies. However, the opposite has happened. While foreign-based scam telemarketers continue to barrage consumers with calls, legitimate domestic businesses find themselves targeted primarily for transactional and informational calls never intended to be subject to the TCPA's restrictions—calls placed via modern technologies not contemplated by the TCPA. As Commissioner Pai has pointed out, this is something Congress should address:

Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set

²⁸The Third Circuit recently made such matters worse, in a ten-year battle over a single phone call one roommate picked up on March 11, 200, by ruling in October 2015 that a "habitual user" of a shared telephone such as a roommate was in the "zone of interests protected by the TCPA", and had alleged sufficient facts to pursue a claim under the TCPA if he answered a "robocall" intended for his roommate (who may herself have given prior consent for that call). See *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 327 (3d Cir. 2015).

²⁹ See July 2015 FCC Order, O'Rielly Dissent, 30 FCC Rcd. at 8084 ("I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991 — before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.³⁰

But the FCC majority in issuing its recent July 2015 Order (now in litigation in the D.C. Circuit) instead continued to expand the reach of the TCPA, allowing litigation against businesses across all industries to proceed aggressively.

III. CORE FACTORS DRIVING TCPA LITIGATION AGAINST BUSINESSES

For many years, as it was intended to do, TCPA litigation focused primarily on unsolicited marketing facsimile, DNC violations, and prerecorded cold-call telemarketing calls. Around 2010, however, there was a sea-change in TCPA litigation. I recall that year defending one client sued on a class action basis for fraud alert calls placed to cellular telephones alerting the recipient that he or she might be a victim of identity theft. I thought that as soon as I alerted plaintiff's counsel that she had not received a marketing call, plaintiff would dismiss her lawsuit (as was usual); however, because the TCPA's protections for cellular telephones did not specifically apply to "marketing" calls, and my client was a large and well-funded corporation, the litigation went forward with tens of millions of dollars in statutory damages in play for fraud alert calls placed in the previous four years. Plaintiff argued that she had not given her prior consent for a prerecorded message from my client, but only to the credit reporting agency.

We did win in summary judgment, with the court recognizing that Plaintiff had requested fraud alert calls be placed to her cellular phone through an intermediary and that there was indeed "prior express consent" to receive said calls, but that victory required my client to take on the costs of eighteen months of hard-fought litigation. In the end, Plaintiff's counsel walked away to file more TCPA lawsuits, only on the hook for my client's costs (and not for the significant expenditures in attorneys' fees, under the default American rule that leaves companies left holding the bag when a litigation ends).

Before 2010, I defended just a few TCPA cases each year. By 2012, however, a critical mass of plaintiffs' attorneys had discovered the TCPA and its uncapped statutory damages and saw the expansion of TCPA litigation as a legal "gold rush." By that time, I had become an almost full-time TCPA defense lawyer. And, given the amount of TCPA litigation being filed across the country, law firms also started TCPA defense practice groups. Now, TCPA litigations consume significant court resources across the country.

In my experience, TCPA actions have been fueled in the past few years primarily by the following four issues:

³⁰ July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8076.

a. “Capacity” to Autodial Remains Hotly Contested

A debate continues as to whether “capacity,” as used in Section 227(b) of the statute, refers to a system’s present actual capacity, or includes a system’s potential capacity, and the FCC’s July 2015 Order only adds to the confusion. Under the FCC’s view, any telephone call placed with equipment that is not an old-fashioned rotary dial telephone may encourage plaintiffs’ lawyers to take a shot at a TCPA lawsuit.

Some courts have rejected the theory that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS. For example, the Western District of Washington noted that such a conclusion would lead to “absurd results” and would “capture many of contemporary society’s most common technological devices within the statutory definition.”³¹ But other courts have accepted the “potential” capacity argument forwarded by the plaintiffs’ bar. One judge in the Northern District of California, for example, has held that the question is “whether the dialing equipment’s present capacity is the determinative factor in classifying it as an ATDS, or whether the equipment’s potential capacity with hardware and/or software alterations should be considered, regardless of whether the potential capacity is utilized at the time the calls are made.”³² And the FCC majority refused, in its July 2015 Order, to find that “capacity” should reflect a system’s present and actual abilities, with challenges to that opinion now pending in the D.C. Circuit.

Thus, there is no certainty for American businesses as to whether the expansion of the “ATDS” definition advocated by TCPA plaintiffs does indeed cover all modern, computerized systems used to dial telephone numbers or send text messages. A company whose employees are dialing calls that use any form of a computer in the process might find itself a target in a TCPA lawsuit, even when calls could not have been placed unless a human representative initiated the one-to-one call. To have uncapped statutory damages available that may or may not apply based on the interpretation of an undefined term in an outdated section of a federal statute is an untenable situation for companies to find themselves in, when facing claims under the TCPA.

³¹ *Gragg v. Orange Cab. Co., Inc.*, 995 F. Supp. 2d 1189, 1192-93 (W.D. Wash. 2014); see *Hunt v. 21st Mortg. Corp.*, No. 2:12-cv-2697-WMA, 2013 WL 5230061, *4 (N.D. Ala. Sept. 17, 2013) (noting that, as, “in today’s world, the possibilities of modification and alteration are virtually limitless,” this reasoning would subject all iPhone owners to 47 U.S.C. § 227 as software potentially could be developed to allow their device to automatically transmit messages to groups of stored telephone numbers).

³² *Mendoza v. UnitedHealth Grp. Inc.*, No. C13-1553 PJH, 2014 WL 722031, *2 (N.D. Cal. Jan. 6, 2014).

b. Calls Made To Recycled Or Wrongly Provided Cell Phone Numbers Are Generating New Suits.

On a daily basis, companies across the country make calls or send texts to numbers provided to them by their customers, and prior express consent should exist for such communications even if they are made to cellular numbers with an “autodialer” or if they provide information via a prerecorded message. However, cell phone numbers can easily be relinquished and reassigned without notice to anyone, let alone to the businesses that were provided the number as a point of contact by their customer. Indeed, every day, an estimated 100,000 cell phone numbers are reassigned to new users.³³

Further, sometimes a customer makes a mistake when providing a contact number, or enters one belonging to a friend or roommate, or in these days of family plans, enters a number for a phone line shared with or later bequeathed to another family member. Then, when the company attempts to reach out to its customer at the provided number, it can unintentionally be sending communications to a non-customer, i.e., the new or actual owner of the number. This seemingly innocent mistake has become the most significant driver of new TCPA litigations. Indeed, a statute intended to cover abusive telemarketing has morphed into one supporting claims against well-intentioned companies attempting to communicate with their own customers, generally for transactional or informational purposes.

As another example, automated calls set up by a cell phone owner to be sent to his or her cellular phone as a text message can be received instead by a new cell phone owner if the prior owner forgets to turn off such requested messages relinquishing a phone line. One California restaurant chain’s automated voicemail systems sent 876 food-safety-related text messages intended to reach one of its employees’ cell phones, after that employee had set a forwarding feature on his work telephone that was designed to message his own phone. However, after he changed numbers, those messages were unintentionally sent to the new owner of that telephone line.³⁴ That restaurant was sued for over \$500,000 in statutory damages, and after a protracted fight, the small restaurant chain informed me that it ended up settling for an undisclosed amount after incurring hundreds of thousands of dollars in defense costs to fight the allegations. Again, it is difficult to believe that Congress intended companies to be sued for “set it and forget it” messaging services set up by the prior owner of a phone line, once that line is recycled to a new owner.

³³ July 2015 FCC Order, O’Rielly Dissent, 30 FCC Rcd. at 8090.

³⁴ See Rubio’s Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Aug. 11, 2015).

c. Vicarious Liability Theories Are Targeting New Defendants (In Particular, Those With Deep Pockets).

Another driver of TCPA litigation is vicarious liability: it is no longer just the entity placing a call, sending a text, or faxing a document that needs worry about defending a TCPA lawsuit. In a 2013 Order long-anticipated by the plaintiffs' bar, the FCC opined that vicarious liability could attach under the TCPA to companies who themselves had not initiated the communications in question, so long as the calls were placed "on behalf of" the company, using the federal common law of agency.³⁵ Thus, a person or company can find itself defending a TCPA lawsuit with claims it is responsible for someone else's decisions to communicate via phone, text, or fax.

The FCC's vicarious liability order invites the plaintiffs' bar to reach up the chain to the defendant with the deepest possible pocket. This, in turn, has led to a dogpile of lawsuits being brought against security equipment manufacturers for calls mentioning their branded equipment (even when the calls were not made to sell that equipment, but rather the caller's own \$39.99 a month monitoring services). Further, lawsuits are being brought against major corporations for third-party calls made by independent contractors not authorized in any way to call as, or on behalf of, the company.

And in the case of an employee gone rogue who violates the TCPA's rules by breaking all of his own company's policies, the company finds itself facing potentially annihilating liability if it loses on the vicarious liability fight, and enormous pressure to settle. One insurance company, for example, recently completed settlement of a \$23 million class action that was brought by the recipient of a facsimile sent against company policy by an insurance agent who contracted on his own with a fax blaster to set up a server and send faxes in a home garage. When alleged vicarious liability for millions of faxes would be in the billions of dollars, it is easy to see how enormous the pressure to settle can be. And when there is a deep pocket defendant to put on the ropes, it is no wonder that the fax blaster who actually sent the faxes (after ensuring clients that such transmissions were legal) was not sued by the plaintiff.

Companies are facing allegations of vicarious liability for calls and texts for which no source can even be ascertained; if a prerecorded marketing message promises a free gift card for a certain retailer, that retailer finds itself facing demands under the TCPA under the argument that it is liable under some ratification or apparent authority aspect of vicarious liability.

³⁵ See *In the Matter of The Joint Petition Filed By DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Order, CG Docket No. 11-50 (issued Apr. 13, 2013).

d. Revocation of Prior Express Consent Also Driving New Lawsuits.

A fourth breeding ground for modern TCPA litigations is found in situations in which a company is calling its customer, at the customer-provided number, but then the recipient claims to have revoked consent for further calls. The Third Circuit stood alone in 2013 when it held that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular telephones by autodialing systems.³⁶ Before this point, there were no revocation-based TCPA litigations; now, with the FCC majority stating in its July 2015 Order that prior consent can be revoked at any time and in any manner, claims that consent was revoked has become one of the fastest growing areas of TCPA litigation.³⁷

The problem with allowing revocation by any means when larger businesses are making informational and/or transactional calls (sometimes through a variety of vendors) is that TCPA plaintiffs and their lawyers plan to generate suits by “revoking consent” for further calls with an oral statement, in the hopes that the customer representative does not capture that oral request.³⁸ Other plaintiffs are sending convoluted text messages that a system might not recognize as a “STOP” message, and then claiming consent had been revoked. One demand I recently dealt with for a client involved someone who never replied “STOP” as the text messages instructed him to do whenever he wanted to opt out of the text reminders, and instead sent a wordy text message “withdrawing permission for future calls to his cellular phone number.” The system did not recognize this language, and in any case would only have been able to stop text messages and not phone calls; the determined consumer insisted that he had revoked consent for all communications, and was entitled to tens of thousands of dollars for later calls he received.

Another issue with the newly announced “revocation” right is that the FCC majority implies that it should be instantaneous in implementation, without giving the business time to receive and process DNC requests from its vendors and/or to adjust its outbound calls. (In contrast, a business knows that DNC prohibitions attach to a number 30 days after it is

³⁶ *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 272 (3d Cir. 2013).

³⁷ Commissioner O’Rielly points out that the TCPA itself had no mention of revocation or a means to do so, and that the FCC majority has simply invented a vague and unworkable new “common-law” based rule never vetted by Congress. *See* July 2015 Order, 30 FCC Rcd., O’Rielly Dissent, at 8095.

³⁸ For example, in April 2014, the Davis Law Firm of Jacksonville, Florida, posted an article providing 5 steps to “stop calls” from a targeted company and to potentially make money under the TCPA. *See* http://davispllc.com/lawyer/2014/04/16/Consumer-Protection/How-to-Get-DirecTV-to-Stop-Calling-You_bl12785.htm, last accessed November 6, 2014. Step 2 instructs cell phone owners to say “I revoke my consent for you to call me” and then to hang up. Thereafter, the firm asks the cell phone owner to keep a detailed call log regarding any additional calls to be the basis of a TCPA lawsuit. *See id.*

entered into the DNC list.³⁹) Thus, claims of “immediate” revocation rights are leading to even more “gotcha” litigation, including claims that a consumer revoked prior consent on a Monday morning but received three more calls over the next few days before all calls stopped—and that \$4,500 in willful calling damages for the three calls are thus owed to that consumer under the TCPA.

Thus, revocation-based claims—like those claims based on “capacity” arguments, recycled or wrongly-provided numbers, and vicarious liability allegations—are certain to increase in number as TCPA litigation continues to grow exponentially throughout the country. Another certainty is that litigation abuse, too, will spread.

IV. Examples Of TCPA Litigation Abuse

As I mentioned at the start of this testimony, I have defended various companies facing TCPA claims for more than a decade. As a junior associate in 2001, I began working on a then-rare TCPA case in which a client was sued for millions of faxes an affiliated company had sent in a three-day period using a fax blaster service. I was shocked to see a statute (which I had not heard anything about in law school) that could create such staggering statutory liability—my client settled for millions rather than face billions of dollars in statutory liability, and because its insurance policy covered the claims (something that is no longer the case). My introduction to the TCPA was during a time when the few lawsuits being brought still focused on the kinds of unsolicited facsimiles and cold-call telemarketing that the statute was intended to address when it was authored and adopted in 1991. But seeing just how lucrative TCPA lawsuits can be, various serial TCPA plaintiffs and TCPA-focused attorneys are doing everything they can to find and bring TCPA actions against American businesses.

a. Serial TCPA Plaintiffs

Serial plaintiffs amassing multiple phone numbers at which to receive calls are making a living through TCPA demands and litigation. Some focus on sending copious demand letters to businesses, seeking several thousand dollars from each company. An early example was a man in San Diego who acquired a telephone number of 619-999-9999, even though such telephone numbers were normally not given out to consumers—he found out that companies at the time whose systems required some telephone number be entered into a phone number field had set a default of the 999-9999 to fill in after an area code, and his

³⁹ See 47 C.F.R. § 64.1200 (“Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.”).

number was getting thousands of calls each month from systems of various companies. As Commissioner Pai has noted, this man even hired staff to log every wrong-number call he received, issue demand letters to purported violators, file actions, and negotiate settlements; only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a “vexatious litigant.”⁴⁰ But what Commissioner Pai does not know (and I do, as I was brought in to deal with later demands from the phone’s new “owner” after this man was barred from his “TCPA business”), is that the man then leased this telephone number to a friend who started her own business, paying commissions to the owner of the 999-9999 number for the calls she received and acting with her part-time staff of paralegal support to send TCPA demand letters to hundreds of businesses. It was only after this contract came to light that her “TCPA business”, too, was finally shuttered.

But other consumers in the business of TCPA actions continue to make their living (and a good living, too) through this statute. For example, in the past year alone, one Pennsylvania woman has filed at least eleven (11) TCPA cases in the Western District of Pennsylvania and at least twenty (20) pre-litigation demand letters. When a company she had sued deposed her recently, it found that she had intentionally bought 35 cell phones and subscribed to cellular service lines for the sole purpose of receiving calls under which she can assert “wrong number” TCPA violations. Moreover, she specifically sought phone numbers in economically depressed area codes to make the receipt of collections calls more likely (i.e., she lives in PA, but acquires FL area code numbers). She carries all 35 plus phones with her when she travels so she can keep up on her recordkeeping—she logs all calls coming into the telephone numbers in efforts to reach the previous owner of the cellular phone. And she even loads more minutes as needed onto her phones to ensure she keeps the lines open for business.

Another constant TCPA litigant, an Ohio man, has been bringing TCPA actions for fifteen years, and in recent years he has lent his name to actions in federal court outside of Ohio as well, including in Wisconsin, Florida, Illinois, New York, West Virginia, California, and Connecticut. As an example of one recent suit, this consumer was the named plaintiff in a TCPA action settled by American Electric Power in 2015. He received two (2) marketing phone calls while on the federal DNC (entitling him to up to \$1,500 for the second call, if the company had no valid defenses), but his named-plaintiff incentive payment under the settlement is \$12,500. Tellingly, this man’s actual registration on the DNC list only happened ten years into his TCPA career. Because it was so clear he wanted marketing calls (and was making his living by receiving them), he was ordered by one state court in 2005 to register his phone lines with the federal DNC, but he appealed that order to the Ohio Supreme Court, which held in 2007 that he was not required to register his telephone numbers. Later, with the shift in TCPA litigation to autodialed/prerecorded calls, he registered his lines (via a settlement in 2011) and now sues for autodial/prerecorded calls, as well as violations of his registered federal DNC status. Like many persons supplementing

⁴⁰ July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8073.

their incomes or fully depending on TCPA monies, he has the usual mechanisms for trapping callers (recordings and logs) and generating demand letters.

Indeed, there are plenty of “do-it-yourself” guides on the Internet advising consumers how to bring TCPA claims and rake in significant money. What businesses are finding problematic in the past few years lawsuits and demands brought by family members, roommates, or partners of a customer who gave that person’s telephone number as his or her own. In actions I am currently defending for various companies, the plaintiff or class plaintiff is the daughter, the aunt, the boyfriend, the son, the mother-in-law, or the guardian of the customer who provided their telephone number to a company as his or her own number. There are indications that some such provisions are happening *on purpose*, to try to create viable fact patterns for a TCPA claim by that family member or friend. Indeed, I had one recent demand letter in which the telephone number the customer provided actually belonged to a well-known TCPA lawyer, who then of course threatened suit and demanded payment of thousands of dollars.

The consumers abusing the statute to ensure that calls are placed to them, so that they can support themselves from demands and lawsuits filed against American businesses, are bad enough; as detailed below, the tactics of some of the lawyers specializing in TCPA claims are even worse.

b. Over-incentivized TCPA Attorneys

As already detailed above, the TCPA (which has no attorneys’ fees provision) provides for hefty statutory damages that incentivize attorneys to start litigations and carve fees out of the uncapped statutory damages that are available. One Connecticut-based firm, Lemberg Law, LLC, even came out with a smartphone application, “Block Calls, Get Cash,” that potential clients could download to make their call data directly available to the firm, which could review inbound calls to look for potential litigation targets.⁴¹ The app’s website states that “with no out-of-pocket cost for the app or legal fees, its users will ‘laugh all the way to the bank.’”⁴² And at least one other firm has followed suit with its own competing application.

Lemberg Law is now engaged in litigation with an associate who withdrew to start up her own lucrative TCPA shop, and its business practices are being revealed. In counterclaims against Lemberg Law, which sued the associate for absconding with clients and the settlement monies they could engender, she claims that demands are filed by Lemberg Law for consumers who have no idea that they have “retained” a law firm to represent them and

⁴¹ See Reply Comments of the U.S. Chamber of Commerce, CG Docket 02-278, at 4 (filed Dec. 1, 2014) (citing *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), <http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/>).

⁴² *Id.*

who were not even consulted about complaints filed on their behalves.⁴³ In fact, the former associate claims that the first time some of these consumers find out about their own lawsuit is when Lemberg tries to contact the client to send them their portion of a settlement agreement (after accessing the consumer’s private phone call information, crafting demands based on calls, and carving out Lemberg’s own fees and costs, including a \$595 “PrivacyStar” Cost).⁴⁴

As just one more example of many, Anderson & Wanca is a Midwest-based firm focused on bringing facsimile actions after receiving, in discovery years ago, a roster of clients from a fax-blaster named B2B. In a recent decision, the Seventh Circuit upheld \$16,000 worth of statutory damages against a small digital hearing aid company in Terra Haute, Indiana, for 32 facsimile ads, but noted its distaste in doing so:

Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today. As a result, what motivates TCPA suits is not simply the fact that an unrequested ad arrived on a fax machine. **Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiff’s attorneys specializing in TCPA disputes.** We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of **targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs’ attorneys take a big cut.** Plaintiffs’ counsel in this case admitted, at oral argument, that they obtained B2B’s hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending.⁴⁵

As the Seventh Circuit has recognized in its recent decision quoted above, it is a perversion

⁴³ See, e.g., Amended Answer, Affirmative Defenses, and Counterclaim, Dkt. No. 32, Filed 11/12/15, in *Lemberg Law, LLC v. Tammy Hussin and the Hussin Law Offices, P.C.*, Case No. 3:15-cv-00737-MPS (D. Conn), at ¶¶ 1.k, 1.l, 1.o, and 1.p; see also 1.p (“Based on Hussin’s belief that her paralegal had confirmed the facts with the new clients, Hussin unknowingly filed complaints on behalf of Californians who were unaware of legal representation.”).

⁴⁴ See, e.g., *id.* at Affirmative Defenses, ¶¶ 1.f, 1.g, 1.k; see also 1.s (“Lemberg insisted on taking a 40% referral fee for new “clients’ without even having discussed legal representation with them and without having obtained a signed fee agreement. Upon reaching the new “clients” when Hussin transferred the cases to her firm, most of them had no knowledge of Lemberg’s firm and were unaware of legal representation, yet Lemberg insisted on taking a 40% referral fee on said cases.”).

⁴⁵ *Bridgeview Health Care Center, Ltd. v. Jerry Clark*, 2016 WL 10852333, *5 (7th Cir. Mar. 21, 2016) (emphasis added; internal citations and quotations omitted).

of the original intent of the TCPA to “target small businesses” who are not alleged to have caused actual harm. And I should note that Anderson & Wanca is not always so unlucky as to only get \$16,000 verdicts; that firm has been the recipient of multi-million dollar fees awards in the past few years from class action settlements as well.

V. CONCLUSION AND RECOMMENDATIONS

The TCPA was designed to protect privacy and to stop invasive and persistent telemarketing, primarily of the “cold call” kind, that ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to subject companies to claims regarding “autodialed” calls when they reach out to targeted, segmented lists of their own customers who have a common need for information using the telephone numbers (including cellular phone numbers) provided by those customers. It was not intended to apply to text messages, and it was not designed to cover collections calls, which have independent sets of rules to ensure that those calls are not abusive or overly intrusive.

Congress needs to take a hard look at updating the TCPA in a manner that provides more certainty and protection for businesses who need to legitimately communicate with their customers and employees, and who strive to comply with the law but who, for example, may unknowingly be calling a reassigned number, or have a customer representative err in recording a revocation request. If Congress wishes to pull text messages into the TCPA’s protection, then it should assess what rules should apply.

In sum, considering the unfair and unintended onslaught of TCPA cases hammering American businesses, the following updates to the statute could be taken under consideration.

Statute of Limitations: The TCPA contains no statute of limitations, and so has fallen into the four-year default, which makes no sense for calls/faxes that are supposedly invasions of privacy that the consumer knows about at the moment they are placed. Class actions reach staggering amounts of damages because class plaintiffs seek four years’ worth of calling data and liability. (I defended one putative class action brought against a company for a single text sent three years and ten months before Plaintiff filed his suit.) The TCPA’s time to bring suit should be reasonably limited, as is the case with the other federal statutes providing private rights of action for statutory damages.⁴⁶

Capping Statutory Damages and Adding Provisions for Reasonable Attorneys’ Fees: Like every other federal statute providing statutory damages and a private right of action to consumers to seek those damages, the TCPA should have a cap on the amount of individual

⁴⁶ See, e.g., Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m) (statute of limitations - 1 year); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k) (statute of limitations -- 1 year).

and class action damages that can be sought.⁴⁷ There is no better way to curb litigation abuse, bring the TCPA in line with its sister statutes, and avoid unconstitutional and excessive fines for technical violations causing no actual harm.

Affirmative Defenses: As businesses are targeted for calls under Section 227(b), as well as for the 227(c) calls that Congress knew could be made in error by a business acting in good faith to follow the appropriate policies and procedures (*see* Part II above), the affirmative defenses available in Section 227(c) should also be imported into Section 227(b) to provide protection to businesses working in good faith to comply with the TCPA.

Capacity: The “capacity” of an autodialer should be interpreted for past calls as written in the text of the statute, meaning only those devices that have the actual ability to randomly/sequentially dial telephone calls would be actionable. And if Congress wishes to limit some other sort of calling technologies or text messages, new and more precise language should be drafted, vetted, and implemented after a notice period to companies so that they can comply with statutory requirements.

Reassigned or Wrongly-Provided Number: Businesses should not be punished via TCPA lawsuits when they, in good faith, call a customer-provided phone number that now belongs to a new party unless and until the recipient informs the caller that the number is wrong and the business has a reasonable time to implement that change in its records. (If, after that notice and reasonable time the company continues to call, then lack of prior consent would be established for future calls.)

Vicarious Liability: The FCC has interpreted the TCPA to allow “on behalf of” liability for prerecorded/autodialed calls, something not specifically provided for in the statute. Among other things, the TCPA should be revised to define any such vicarious liability so that it would exist only against the appropriate entities—those persons who place the calls, or who retain a telemarketer to place calls, or who authorize an agent to place calls on their behalf.

Bad Actors: The TCPA should be reformed to focus on the actual bad actors (i.e., fraudulent calls from “Rachel from Cardmember Services”, with spoofed numbers in Caller ID fields to hide the identity of caller), instead of companies trying to contact their consumers for a legitimate business purposes.

Address New Technologies, Such As Text Messaging: A text message is not the same as a call, and courts are wrong in treating them equally. Should Congress wish to set rules on

⁴⁷ *See, e.g.*, Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k); Truth in Lending Act (15 U.S.C. § 1631 et. al), Section 1640; Fair Credit Reporting Act (15 U.S.C. § 1681 et. al.), Section 1681(o). (Several of these statutes also permit defendants to recover costs/fees when actions are shown to have been brought in bad faith.)

text messaging within the TCPA, it should do so through the regular channels of drafting, vetting, and implementing new statutory language.

Revocation: If a consumer that has provided a telephone number to a company no longer wishes to receive communications at that number, there should be a set process (as in the Fair Debt Collection Practices Act) on how the business should be told of the revocation, and a reasonable time for the company to implement that change.

Importantly, when considering these changes, Congress should keep in mind what TCPA reform should not include policies that will:

- Increase in the number of phone solicitations;
- Encourage abusive or harassing debt collection practices (which are addressed, in any case, by the FDCPA); and
- Create an end-run around the Federal and Internal Do Not Call List rules.

The changes discussed above—which would help to protect American companies from expensive and damaging litigation abuse—would not risk any of these repercussions. Thus, we urge this Committee to revisit the TCPA to bring this 20th Century statute in line with 21st Century challenges. Twenty-five years have passed, and it is evident that the TCPA has had a negative impact on businesses that Congress never intended when first enacting this law in 1991. We appreciate the Committee’s calling of today’s hearing and stand ready to work with you on this important issue.

* * * * *

Thank you for inviting me to testify. I am happy to answer any questions you may have.