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MODERNIZING THE TELEPHONE CONSUMER PROTECTION ACT

THURSDAY, SEPTEMBER 22, 2016

House of Representatives,

Subcommittee on Communications and Technology,

Committee on Energy and Commerce

Washington, D.C.

The subcommittee met, pursuant to call, at 11:00 a.m., Room 2322, Rayburn House Office Building, Hon. Greg Walden [chairman of the subcommittee] presiding.

Present: Representatives Walden, Latta, Shimkus, Blackburn, Lance, Guthrie, Pompeo, Bilirakis, Long, Collins, Eshoo, Doyle, Welch, Clarke, McNerney, and Pallone (ex officio).

Also Present: Representative Schakowsky.

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Staff Present: Rebecca Card, Assistant Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Grace Koh, Counsel, Telecom; David Redl, Chief Counsel, Telecom; Charlotte Savercool, Professional Staff, Communications and Technology; Dan Schneider, Press Secretary; Gregory Watson, Legislative Clerk, Communications and Technology; Jeff Carroll, Minority Staff Director; David Goldman, Minority Chief Counsel, Communications and Technology; Elizabeth Letter, Minority Professional Staff Member; Jerry Leverich, Minority Counsel; Lori Maarjberg, Minority FCC Detailee; Dan Miller, Minority Staff Assistant; Matt Schumacher, Minority Press Assistant; and Andrew Souvall, Minority Director of Communications, Outreach and Member Services.

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Mr. Walden. We will call to order the Subcommittee on Communications and Technology and welcome our witnesses here today. We look forward to your participation in this hearing.

We are here today to talk about modernizing the Telephone Consumer Protection laws. As you all know, it has been 25 years, 25 years, quarter of a century since Congress passed the Telephone Consumer Protection Act. And I don't have to tell you the world has changed pretty dramatically in that time period. Back in '91, virtually everybody had a landline, and that is what they used to call each other on. Today, half of U.S. households or thereabouts have become wireless-only, eliminating their landline phones entirely. And there are more cell phones than people in the United States.

Current law is not reflective of these incredible technological changes in our culture. Despite an extraordinary number of lawsuits over the years, calls and texts from bad actors continue to happen. Clearly, this approach isn't a deterrent to those who place harassing, malicious calls. We all share the goal of preventing harmful phone calls, but it is increasingly clear that the law is

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outdated and, in many cases, counterproductive. We will hear about that today from our witnesses.

The attempts to strengthen the TCPA rules have actually resulted in a decline in legitimate informational calls that consumers want and need. The FCC has granted narrow exceptions to specific industries in attempts to clear up ongoing uncertainty, but the number of petitions still pending before the Commission demonstrate that it is time to examine how effective this approach has been.

Industries across the board have real needs to communicate with their customers in a positive and beneficial way, and today we will hear from those whose daily operations have been impacted by this 25-year-old law. We have a public utility co-op from Georgia that needs to inform their customers of neighborhood tree maintenance, for example, and ways to reduce their energy footprint during peak energy consumption periods.

We will also hear from a managed health care provider that is seeking clarification to be able to provide critical information to patients to help lower the cost of their health care. And these folks, like many others, struggle with how to serve the needs of the consumers and the economy

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with the lack of clarity in the current law.

I heard from a staffing company that operates in Oregon and in my district that connects blue-collar workers to temporary, short-term job opportunities. It used to be these workers would have to sit around the waiting room all day waiting to hear if a job that met their skill set was available. The company figured a way to use technology to improve the lives of these people, the company instead used text messages to communicate with workers when a job that matched their skill set is available. That gave the people looking for the jobs the opportunity to continue with the rest of their lives rather than sitting around a waiting room, while still finding the chance to work, which sounds great and efficient and kind of the modernization of the workplace we all expect today.

Unfortunately, the 25-year-old law, TCPA, they were smacked with a lawsuit for their efforts. For a business like this, a massive class-action lawsuit could actually mean bankruptcy.

So I think we can all agree there is a big difference between the call fraudulently purporting to be the IRS and a legitimate reminder from the doctor's office of an upcoming

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appointment or a job agency of a temporary job now available. This is the critical distinction we need to recognize in order to strike the correct balance.

How can we protect consumers from the harassing, spoofed calls they do not want to receive -- none of us do -- while at the same time ensuring they do receive the legitimate calls that improve quality of life? What are the solutions out there that can be used to determine the differences, and are there changes to the law that would actually help consumers?

I want to thank my Democratic colleagues for requesting this hearing and all of our members for the commitment to a productive conversation about taking a look at a 25-year-old law.

Just yesterday, the full committee passed the Anti-Spoofing Act in a bipartisan manner, legislation prohibits bad actors from deliberately manipulating a text message number for illegal purposes. Spoofing is a major component of the robocall problem, but just one piece of this complicated puzzle. There is no silver bullet here to solve the problem of unwanted calls, but if there are legislative changes that will protect our constituents, we owe it to them

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to make every effort to mitigate the problem. So I hope the momentum from our accomplishments yesterday can carry on to our efforts today to work toward the shared goal of protecting consumers from illegal phone calls.

We have a unique set of perspectives here today that I hope will guide us through a productive discussion. From a professor who has studied the law extensively, to a couple of businesses concerned about violating the law while trying to providing their services, and those who have been developing technical solutions to these issues at stake; this hearing should set the stage for a constructive consideration about protecting consumers in this new technological era.

So I thank our witnesses for being here and our members and look forward to the discussion we are going to have today.

[The prepared statement of Mr. Walden follows:]

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Mr. Walden. And I will yield back the remaining 3 seconds of my time and recognize my friend from California, Ms. Eshoo, for her opening comments.

Ms. Eshoo. Thank you, Mr. Chairman --

Mr. Walden. But before I do, could I ask unanimous consent to insert into the record a letter from the Indiana Attorney General Greg Zoeller, a letter from the National Association of Federal Credit Unions, a letter signed by several consumer groups, a statement from several banking associations, along with the very, very distinguished paper from our professor today and from 2014, the Telephone Consumer Protection Act of 1991 adapting consumer protection to changing technology. Without objection, we will enter those into the record.

[The information follows:]

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Mr. Walden. Now, I recognize my friend from California.

Ms. Eshoo. Thank you, Mr. Chairman. Good morning, everyone. Welcome to the witnesses.

There is one issue that I hear consistently about from my constituents, and that is the need to put an end to unwanted phone calls. Whether I am in the grocery store -- now, I am going grocery shopping late at night so that I can just get it done quickly because, I mean, people see me, recognize me, and this is what they come up to me to talk about. And they are 40,000 feet and climbing over it. Their sleep is interrupted. The day doesn't belong to them. It is a consistent form of harassment the way they view it. For many seniors, there are many scams, and they are susceptible to them.

So this barrage of unwanted calls using auto-dialers and prerecorded messages, they are disruptive to say the least and they really are intrusive. And I can speak for myself when I get them because I consider my home my oasis, and I can't stand hearing from these people.

Now, how bad is the problem? Obviously, from what I have said, it is pretty bad. And estimates have found that robocalls make up nearly 35 percent of calls that consumers

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receive today. And it keeps climbing. The robocall blocking service YouMail tracked the number of robocalls made last month, August of this year alone, and found that there were 2.64 billion with a B. We usually talk about dollars with a B, these calls. That is a 9 percent increase over the previous month of July of this year. And that is just one month's worth of robocalls, so it is no wonder that these kinds of calls are the number-one source of consumer complaints at the FCC.

Now, Congress sought to address this 25 years ago, a quarter of a century ago, by passing the Telephone Consumer Protection Act, the TCPA. At that time the law put important protections in place to restrict the use of technology used to place robocalls. We took other steps to crack down on unwanted calls, including the passing of the Do Not Call -- well, I call it the Do Not Call list. That worked for a long time. People were really thrilled with it. And I was proud to be a cosponsor of that effort. So the TCPA was, for a long time, an effective way to limit the number of unwanted calls.

Now, the FCC, I think, has done its best to implement the law in a way that keeps pace with today's practices. But

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the law, along with the technologies that were embedded in it or referred to, have aged in plenty of ways. And it is up to us and I think it is very clear to us that it is time to start thinking about how we can update the TCPA to better protect consumers. And it is exactly why Ranking Member Pallone, Congresswoman Jan Schakowsky, and I called for a hearing on this. And thank you, Mr. Chairman, all our thanks on behalf of our constituents that we are doing this today.

Now, there are a number of issues for us to consider as we examine the TCPA. For instance, does the FCC and the FTC have the tools they need to effectively enforce the law? Well, we are going to examine that. Are intentional violations sufficiently punished under the current structure of the law? We have come to a time and a place in our country where people break the law and then they settle with the regulators, and no one is punished really for anything. And that is a great source of frustration to people, and I don't think it is fair. How do we target calls from overseas? This is a big thing because so much is coming from overseas that can result in fraud.

So I look forward to hearing from the witnesses.

And I think one thing Congress should not be doing is

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passing more exemptions to the TCPA. The 2015 Budget Act contains an exemption allowing robocalls for Federal debt collection, including calls to cell phones. So I am glad that the FCC put some limits on that exemption, but the fact remains that we still -- and our constituents most importantly, people across the country -- are asking us for more protection, not more loopholes. And I think we have to keep our eye on that ball, too, Mr. Chairman.

So, again, thank you for holding this hearing today, and I look forward to hearing from today's witnesses and some solid suggestions about how we can actually update the TCPA to eliminate these issues that are plaguing all of our constituents.

Thank you, and I yield -- I have no time to yield back. Thank you.

Mr. Walden. The gentlelady yields back.

The chair recognizes the vice chair of the subcommittee, Mr. Latta.

Mr. Latta. Well, thank you, Mr. Chairman, and thanks for holding today's hearing. The Telephone Consumer Protection Act is clearly outdated and needs to be reformed to accommodate current technological challenges. It is not

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reasonable to govern communications based off technology available in 1991. While it is essential we continue to protect consumer privacy, we must find the right balance between consumer rights and expectations and allowing institutions to provide information to their customers.

Additionally, we must recognize the importance of distinguishing the content of communications on modernizing this act. Our goals should be to deter the bad actors and not punish businesses and organizations with the best of intentions.

The FTC has attempted to modernize the TCPA. However, these reforms have not necessarily made the law better and it still remains far from perfect. In fact, the broad interpretation of the FTC's definition of auto-dialer is concerning as it creates greater uncertainty for consumers and companies.

Today's hearing will provide robust conversation and ideas on how to best update the TCPA, and consumers' privacy needs to be protected and businesses need an avenue to inform and communicate with their customers.

And with that, Mr. Chairman, I yield back.

Mr. Walden. The gentleman yields back.

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Any others seeking time?

Then we will go to Mr. Pallone, the ranking member of the full committee, for opening comments.

Mr. Pallone. Thank you.

If you think you are getting more robocalls than ever, you are probably right. Just this past month, a record 2.6 billion robocalls flooded our cell phones, work phones, and home phones. And these calls are more than just a nuisance; they can add up to harassment or even outright fraud.

When Congress first passed the Telephone Consumer Protection Act 25 years ago, we stated that consumers were already "outraged over the proliferation of intrusive nuisance calls their homes." Back then, we sought to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade. And for a time, the law worked.

Unfortunately, a little over a decade later, these nuisance calls were on the rise again, but this time the calls did not only cause a nuisance, many of them sought to defraud consumers. According to the FTC, consumer complaints of unwanted telemarketing calls increased over 1,000 percent between '98 and 2002. Congress stepped in once more to stop

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this dramatic surge in calls, and we required the FTC to create a Do Not Call Registry, among other things, again turning back the tide of unwanted calls.

But almost like clockwork, however, nuisance calls were rebounding again nearly a decade later. Robocalls were finding new ways to circumvent the system, and the law simply wasn't keeping up.

The FCC tried to reduce these robocalls, but they keep coming. By 2012, the FCC was receiving an average of over 10,000 complaints per month from mobile phones alone, and that number has only continued to grow to a point where last year, the FCC received more than 170,000 robocall and telemarketing complaints.

So last month, the FCC convened a new Robocall Strike Force hoping to leverage the industry in the FCC's ongoing effort, and I commend the Commission for working so diligently to address this issue. But the fact that the FCC's actions are not reducing the number of robocalls demonstrates that it is time for Congress to once again step in.

So I urge the strike force to continue to look for technical and regulatory solutions to this problem, but

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Congress has a role as well. So that is why I joined Ranking Member Eshoo and Schakowsky last month in asking that the committee hold a hearing on updating the TCPA. Our constituents are rightfully growing impatient with these calls, and they expect us to fix the problem.

And I appreciate that Chairman Walden agreed to our request for this hearing, and I also want to thank the phone carriers for offering to work with us to address this problem. It is not a moment too soon, and we all need to work together to solve it.

Now, we acted to protect consumers in '91 and 2003. Now, 13 years later, we should again put the FTC and the FCC back on firm footing so they can step up to protect consumers from these annoying and so often dangerous calls.

And again, I want to thank our witnesses, and I yield the balance of my time to Ms. Schakowsky.

Ms. Schakowsky. I am so grateful for the opportunity to join you today. I thank Ranking Member Pallone for yielding time to me.

As has been mentioned, last month, I joined Ranking Members Eshoo and Pallone to request a hearing on updating the Telephone Consumer Protection Act for the 21st century.



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This year marks the 25th anniversary of TCPA. Congress has made some updates over that time such as the Do Not Call Registry, but the law is beginning to show its age.

Consumer complaints about unwanted calls are on the rise. I think Ranking Member Eshoo really described what all of us are hearing. I have heard from many constituents in recent months trying to stop robocalls. I have received many on my cell phone. We need to close loopholes and improve enforcement tools.

My Democratic colleagues and I have introduced many bills to protect consumers as they use their phones. For instance, I introduced the Protect Consumers from Phony Pay Charges Act in June to stop telephone companies from including unauthorized charges on phone bills. Until we act on such improvements, we are going to continue to see family meals disrupted, fraudsters exploiting seniors, consumers subjected to unwanted charges. And it is time to reform TCPA.

I am going to apologize that I have to leave in a moment because the Consumer, Manufacturing, and Trade Subcommittee, on which I am the ranking Democrat, is also having its hearing right now. But that said, I hope this is just the

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beginning of this discussion and that we will have the opportunity for joint hearings with this subcommittee and the CMT in the future.

The Federal Trade Commission and Federal Communications Commission frequently work together on these issues and the subcommittees with jurisdiction over those agencies should as well.

So I thank the opportunity to be here this morning, and I yield back.

Mr. Walden. All time has been consumed. I will now go to our witness panel. And again, thank you all for being here this morning.

And our first witness is Michelle Turano -- we appreciate you being here -- vice president, Government Affairs and Public Policy for WellCare. Good morning.

Ms. Turano. Good morning.

Mr. Walden. Pull that microphone fairly close. Make sure the light is on on the base there, and you are good to go.

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STATEMENTS OF MICHELLE TURANO, VICE PRESIDENT, PUBLIC POLICY AND GOVERNMENT AFFAIRS, WELLCARE HEALTH PLANS; SHAUN MOCK, CHIEF FINANCIAL OFFICER, SNAPPING SHOALS ELECTRIC MEMBERSHIP CORPORATION; SPENCER WEBER WALLER, PROFESSOR AND DIRECTOR, INSTITUTE FOR CONSUMER ANTITRUST STUDIES, LOYOLA UNIVERSITY CHICAGO; AND RICHARD SHOCKEY, PRINCIPAL, SHOCKEY CONSULTING

STATEMENT OF MICHELLE TURANO

Ms. Turano. Thank you. Mr. Chairman, Representative Eshoo, Ranking Member Pallone, members of the committee, I am Michelle Turano, vice president of Public Policy and Government Affairs for WellCare Health Plans. Thank you for your invitation to appear today.

We fundamentally agree with the premise of this hearing that we need to minimize nuisance and unsolicited phone calls while ensuring laws and regulations keep pace with the evolution of telecommunications technology. We also share the goal of maintaining privacy, consistent with strict Federal standards such as under the Health Insurance Portability and Accountability Act, or HIPAA.

Let me begin by telling you a little bit about WellCare. Headquartered in Tampa, Florida, WellCare focuses exclusively

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on providing government-sponsored managed health care through Medicare Advantage, Medicaid, and Medicare prescription drug plans to families, children, seniors, and individuals with complex medical needs.

Our members tend to be vulnerable older or disabled Americans with limited access to resources who are often transitory and rely heavily on cell phones versus a dedicated landline, which underscores the need for laws and regulations to be updated to reflect cell phone use.

I would like to be clear. Our communications with these members is for the purpose of sharing health care information, not for sales and not for marketing. WellCare has statutory and contractual mandates from Federal and State governments to serve our members. Communication with our members to coordinate and assist with care often requires the use of a cell phone. In many cases, we receive an enrollee's contact information via the State or Federal Government.

Beneficiaries can be randomly assigned to WellCare and might not apply to us directly. Sometimes we have no way of verifying if the number provided to us is a cell phone or a landline, yet we are still required to contact them.

State Medicaid contracts require WellCare to make

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telephone contact with members for health-related purposes. For example, Florida requires outreach to enrollees within 30 days to complete a health risk assessment. Georgia requires outreach to parents with newborns within 7 days to inform them of certain health services. These are not marketing calls but are directly tied to providing critical care to our members and making the best and most efficient use of taxpayer dollars.

The uncertainty surrounding the FCC's interpretation of the TCPA has had a chilling effect on the ability of WellCare and other managed health care plans to conduct this kind of outreach to members. This adds cost while reducing efficiency and negatively affects the health of our members.

While the TCPA serves an important privacy-enhancing purpose, the FCC's interpretation does not acknowledge that there is comprehensive regulation of the use of protected health information by HIPAA that governs not only treatment, payment, and health care operations messages but severely restricts marketing communications.

Recent interpretations of the TCPA could be read to provide that companies like WellCare cannot conduct automated outreach to a cell phone to deliver a health care message

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unless the calling party can also prove prior express consent, a requirement that the HIPAA privacy rule expressly does not require. These are the exact same phone calls that health care providers like doctors and pharmacies can make today. But the FCC has excluded managed health care firms from making these same sorts of calls.

WellCare and others recently petitioned the FCC seeking clarification around the use of member telephone numbers under the TCPA compared to the use of the same information under HIPAA. In doing so, we are hoping the Commission will protect non-telemarketing calls allowed under TCPA in light of their unique value to and acceptance by consumers and do so in an expedited manner.

Legislatively, it would be helpful if Congress could clarify that the provision of a phone number to a HIPAA-covered entity or business associate constitutes prior express consent for health care communications to that number. The TCPA's protection of a consumer's right to control unwanted calls would still be respected by allowing the consumer to revoke that consent at any time.

In closing, I want to reiterate that the health and well-being of our enrollees is WellCare's top priority. We

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need to work together and we look forward to working together with this committee and Congress on modernizing the TCPA.

Thank you for your invitation to testify, and I look forward to answering your questions.

[The prepared statement of Michelle Turano follows:]

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Mr. Walden. Thank you, Ms. Turano. That was very helpful testimony as we look at this law and the consequences out in the real world.

We will go now to Mr. Shaun Mock, who is chief financial officer of the Snapping Shoals Electric Membership Corporation.

Mr. Mock, welcome. Thanks for being here. We look forward to your counsel.



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STATEMENT OF SHAUN MOCK

Mr. Mock. Thank you for the opportunity to address this committee regarding the impacts of the Telephone Consumer Protection Act on my electric cooperative, Snapping Shoals EMC. We are a nonprofit, consumer-owned co-op headquartered in Covington, Georgia, where we provide electric service to about 97,000 mostly residential members southeast of Atlanta.

Snapping Shoals has a proud tradition of member service and innovation. We constantly strive to improve our services not because of earnings targets but rather to improve the lives of our members.

Our members of the 21st century expect and demand uninterrupted electric service, along with a host of modern communication tools. In recent years, our ability to communicate with our members has been stymied by the uncertainty surrounding existing TCPA regulations. Like most complicated matters, the existing regulations are neither all good nor all bad.

We are absolutely in favor of protecting our members from unwanted communication. However, we are also in favor of removing undue liability found within the confines of the

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existing regulation. Our industry welcomed recent FCC rulings when the Commission recognized the importance of timely utility notifications. However, these orders did not go far enough in patching up the increasingly archaic regulations associated with existing law.

Beginning in 2010, Snapping Shoals offered a prepaid electric program that now serves over 11,000 residential members. This program allows members to take control of their electricity usage much the same pay-as-you-go manner as fueling up the family car. In addition, there are no up-front deposits and no disconnect or reconnect fees.

Upon consent, members are provided with low-balance and disconnect notifications. Most members establish a default low balance, which becomes the notification threshold once active. Timely information is vital to providing these members with a member-friendly program.

Since launching the program, we have learned that our prepaid membership needs are very different than traditional members. We have found that not only does the typical prepaid member use less electricity but will also paid towards their electric balance at least five times each month.

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In short, prepaid members are more engaged with our co-op on a daily basis and require more up-to-date information than traditional members. We have found that our low-income populations are more likely to choose our prepaid billing option. This fact is especially relevant when we consider that liability concerns over current TCPA regulations prompted Snapping Shoals to discontinue all automated telephone notifications in June 2014.

In late 2013, Snapping Shoals faced legal action alleging improper unsolicited phone calls under the strict liability portion of the TCPA statute. Although the case has since been resolved, Snapping Shoals made substantial negative changes to our member notification offerings as a result of this complaint.

The mobile number at issue was provided by a prepaid member upon establishing service. The member provided consent and verified the phone number at least seven times through a series of member-initiated phone calls. Without our knowledge, sometime in late 2011, our member changed phone numbers but continued to receive electric service at the original address while also receiving almost daily email and phone low-balance notifications until disconnecting

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service in April of 2013. Daily notifications sound excessive but reflects the member's practice of paying small amounts, often daily, to maintain the lowest balance possible.

Unfortunately, our original automated phone system did not allow for the member to simply opt out from within the phone call. Our automated systems were in their infancy, and we acknowledged that these systems should be improved and have continued to work with our service providers to develop a more robust member solution.

The prepaid billion program at Snapping Shoals was certainly not the first within our industry, but the rapid growth of our program meant that we would be one of the first to experience the growing pains associated with reassigned phone numbers. At best, the FCC has offered a patchwork of best practices intended to protect members and reduce liability concerns. However, the strict liability provisions within the statute leave no room for reasonable application of the law that would reflect the modernization of communication.

By June of 2014, our co-op reluctantly made the unpopular decision to discontinue all automated phone

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notices. Every attempt was made to notify our members of the change in hopes of avoiding any unnecessary service interruptions. Despite our best efforts, we still receive numerous complaints from angry members that had grown to depend on these phone notifications.

The only remaining channel to safely and effectively communicate with our members is through email. Unfortunately, email-only notifications can exclude a large portion of our membership who do not have Internet-connected devices or reliable Internet service. We need help from Congress and the FCC to mitigate concerns over costly and burdensome TCPA litigation for businesses like Snapping Shoals EMC.

This hearing is a great first step, and I look forward to taking your questions today and working with you to improve the TCPA moving forward.

[The prepared statement of Shaun Mock follows:]

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Mr. Walden. Thank you, Mr. Mock. We appreciate the testimony, and sorry for what you all have gone through as a result of current status of this law.

We will go now to Mr. Spencer Waller, interim associate dean for Academic Affairs and professor at Loyola University Chicago and director of the Institute for Consumer Antitrust Studies.

Mr. Waller, thank you for being here. We look forward to your testimony.

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STATEMENT OF SPENCER WEBER WALLER

Mr. Waller. Thank you very much. Chairman Walden, Ranking Member Eshoo, and other members of the subcommittee, I appreciate the chance to be here today and discuss with you the important issues raised regarding the continued effectiveness of the TCPA and appropriate proposals for its reform. I thank you for also including our 2014 study of the TCPA in the record of these hearings.

[The information follows:]

\*\*\*\*\*COMMITTEE INSERT 5\*\*\*\*\*

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Mr. Waller. The only thing I would emphasize is that I am here in my individual academic capacity and that our institute is nonpartisan. We don't take positions in individual cases.

As I said, my comments are drawn from that 2014 study, and as the committee is aware, in the late 1980s, spurred by advances in technology, the telemarketing industry began to aggressively seek out consumers by the hundreds of thousands. They were able to do so as a result of then-technological advances involving robocalls, prerecorded messages, automatic dialing, and the development of what was then the fax machine.

Consumers and businesses became overwhelmed with unsolicited telemarketing calls and fax advertisements. Calls for action grew louder. States enacted laws but could not reach the interstate aspects and international aspects of telemarketing. And after reviewing and debating 10 different pieces of legislation, Congress ultimately enacted the TCPA that we are here to talk about.

And the TCPA was borne out of abusive telemarketing practices, made more invasive by the technology of that time. And since 1991, Congress has enacted other statutes relevant



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to the discussion of the TCPA, some of which have already been mentioned today.

The original purpose of the TCPA was to regulate certain uses of technology that were abusive, invasive, and potentially dangerous and also to some extent cost-shifting to the consumers. And the TCPA effectively regulates those abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered.

And the expansion of the TCPA into areas outside of marketing and new technologies such as text messaging and cell phones over the years is consistent with its original purpose.

On the enforcement side under the current scheme, private parties are largely responsible for the TCPA and have done so primarily through the class-action mechanism. This is in part due to the small statutory damages for any single plaintiff under the TCPA and the lack of statutory attorneys fees except through the class-action mechanism.

And while this aspect of private enforcement has drawn some criticism because of the potential for large total damages faced by certain defendants, the threat of class

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actions has also provided significant direct and indirect deterrence to violators and is the only meaningful source of potential compensation to victims of TCPA violations.

Historically, the Federal Government, through the FCC, has only enforced the TCPA directly against violators to a limited extent, and yet the statute has been relatively successful in reducing the conduct it was enacted to regulate.

Obviously, technology continues to evolve rapidly, and there are a number of trends that are emerging. The number of entities that are operating in intentional disregard of the TCPA are growing, and they are using more sophisticated technology to evade detection and enforcement.

According to the Federal Trade Commission, about 59 percent of phone spam cannot be traced or blocked because the calls are routed through "a web of automatic dialers, caller ID spoofing, and voiceover-Internet protocols."

Although the traditional scheme of TCPA enforcement, with its strong reliance on private rights of action, has been successful in the past, two main issues are becoming clear. The private right of action is limited in terms of its ability to deter actions of intentional violators, and

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FCC direct enforcement through forfeiture proceedings is limited by its slow processes, limited resources, and limited remedies.

So in order for the TCPA to continue to remain relevant and effective going forward, our report from 2014 makes the following recommendations: We recommended increasing government enforcement of the TCPA by providing State attorneys general with a larger incentive to bring TCPA cases and also authorizing the FTC to bring enforcement actions under the TCPA. It is involved in the enforcement of obviously portions of the laws relating to abusive telemarketing and is also the prime enforcer of most of our country's consumer laws, and we think they are better able to tackle this problem in concert with the FCC.

We also recommended increased uniformity of the application of the TCPA by encouraging more frequent and quicker FCC rulemakings, focus more on the definition of terms and ambiguities in the law, less so with respect to carve-outs and exemptions for individual industries and actors.

We hope to continue to protect cell phones by requiring express prior consent for any communication by call or text

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made to a cell phone. And we have other recommendations relating to the junk fax portion of the TCPA, which may also be of interest to the committee.

We oppose efforts to remove or otherwise modify the private right of action in view of its importance in the enforcement of the statute, and we support placing increased restrictions both through law and through technology on entities that seek to manipulate caller ID.

These recommendations and other issues are discussed more fully in our report. And I thank you for your time, and I am happy to answer any questions.

[The prepared statement of Spencer Weber Waller follows:]

\*\*\*\*\*INSERT 6\*\*\*\*\*

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Mr. Walden. Thank you very much for your testimony.

I will now go to our final witness, Mr. Richard Shockey, principal at Shockey Consulting. We are delighted to have you here, sir. Please go ahead.

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STATEMENT OF RICHARD SHOCKEY

Mr. Shockey. Chairman Walden --

Mr. Walden. Be sure to push the button on your microphone there. There we go.

Mr. Shockey. There we go. Chairman Walden, Ranking Member Eshoo, and members of this committee, thank you for the opportunity to speak with you today.

My name is Richard Shockey, and I am a consulting telecommunications engineer by profession advising telecommunications companies, their supplier community, the investment community, and actually other national governments on any number of issues related to our communications networks.

I am also the chairman of the board of the SIP Forum. SIP, or the Session Initiation Protocol, is the fundamental Internet building block by which all modern voice communications networks in the United States are designed around, including those deployed by cable, enterprises, including the Congress I might add, and advanced residential networks.

I am only speaking for myself here and none of the other

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members of the SIP Forum, et cetera, et cetera.

I have been a working member of the Internet Engineering Task Force for over 15 years, and I currently serve on the FCC's North American Numbering Council, and I have previously served on the FCC's Communications Security, Reliability, and Interoperability Council.

I am here to discuss many of the technical issues involving TCPA, robocalls, caller-ID spoofing, which are interrelated with each other and inter-tangled with each other. This committee is clearly aware of the new Robocall Strike Force. Though I am not a member of the strike force, I am intimately aware of the work the engineering community is contributing to that effort and happy to share it with you.

I look forward to answering your questions.

[The prepared statement of Richard Shockey follows:]

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Mr. Walden. All right. Thank you very much. And you win the prize for the shortest testimony. We appreciate all our panelists here and for what you have shared.

I have got a couple of questions just that come my way. Obviously, we all don't want the unwanted robocalls, the spoofing, all of those things, but I keep getting asked what is a robocall? What is an auto-dial call? And, Mr. Waller, maybe you can help because I haven't been able to get a definitive answer that if I pick up this device called a mobile phone and in the address book push a number, it auto-dials. Some would argue that constitutes an auto-dial, a robocall. If I manually dial the number, some would argue, well, that gets around it, but others say not necessarily because the device is capable of doing that. Do you believe there is clarity in the law on this matter, and if so, which is it?

Mr. Waller. Mr. Chairman, it is a good question. I would have to go back and look carefully, particularly at the 2015 FCC omnibus rulings to see what their current position is --

Mr. Walden. Yes.

Mr. Waller. -- and I don't have that at the tip of my



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tongue.

Mr. Walden. All right.

Mr. Waller. I would certainly take the position, I think, that manual-dial call on a device is a manual-dial call and would not be captured by the auto-dial --

Mr. Walden. Because one of the other issues that comes up is if you have a list of customers in a system and you need to communicate with them, does it really in today's technology make sense that you have to hire people to manually punch in a number that otherwise could come down and mechanically be dialed. That is treated as a robocall because it is auto-dialed, right?

I mean, Ms. Turano, you seem to be agreeing with me on this point. Is this something you all have run into? Mr. Mock?

Ms. Turano. You are right. I am nodding over here.

Mr. Walden. Why?

Ms. Turano. The reason that I am -- I appreciate the question and I think there is an important distinction is because frankly of the cost related to those types of calls. For us to hire an employee to make manual phone calls, depending on the length of the call, it could be anywhere

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between \$6 to \$10. If it were an auto-dialed call, it could be anywhere between 35 to 65 cents. And so those are funds that could otherwise --

Mr. Walden. And you are allowed to make that call one way or the other, right? If you have permission into the cell phone and to use a cell phone number, then you can do the auto-dial? You could use technology like we all do with our -- anybody have an address book with phone numbers? Anybody really know phone numbers anymore? Do you still go around in the wheel? I don't think so, right?

Ms. Turano. Right, the --

Mr. Walden. But this antiquated law makes you do that, doesn't it?

Ms. Turano. It distinguishes between a landline and a cell phone, yes.

Mr. Walden. All right. Mr. Mock, what have you run into in that respect?

Mr. Mock. Well, certainly, from Snapping Shoals' standpoint, we operate at cost for our members, and any additional manual processes that are added ultimately would have to be passed along through our electric rates onto our members.

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Just to give the committee an idea of volume and our issue with prepaid --

Mr. Walden. Right.

Mr. Mock. -- particularly highlights the volume of phone calls. But Snapping Shoals' 11,000 prepaid consumers in August of 2011 received in excess of 220,000 low-balance notifications. That is 23 notifications per member per month.

Mr. Walden. Now, some people might say that is too much; I don't want that.

Mr. Mock. I would absolutely agree, but we are dealing with a population that will quite literally pay \$5 and \$10 towards their electric account every single day. And so as we maintain, say, a \$20 minimum balance and as that balance goes below \$20, the member pays \$10, that may only buy them a few days. In some cases with the lower payments, these members are receiving phone calls day after day after day and to have a small business such as ours place that volume of phone calls just simply is not feasible cost-wise or --

Mr. Walden. Are these calls your consumers actually want?

Mr. Mock. Absolutely. Since --

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Mr. Walden. What happens if they fall behind? Does their power get cut off? And what does that cost them if that happens?

Mr. Mock. Because they are a prepaid member, there are no additional fees. At this point, once the balance falls below zero, the meter automatically disconnects. Once they make a payment, automatically comes on.

Mr. Walden. All right.

Mr. Mock. Outside of the prepaid program, we have also experienced some difficulty with our regular consumers. Just a simple phone call for a member of 20 years goes out of town for 5 or 6 weeks, forgot to pay the bill before he left --

Mr. Walden. Right.

Mr. Mock. -- paid a little extra as a matter of fact but not quite enough, he comes home to a house with thawed freezers, ruined floors, and in conversations, he simply wanted a phone call. Prior to June of 2014, he would have received a phone call.

Mr. Walden. But because of the class-action lawsuits or whatever else --

Mr. Mock. Absolutely, and --

Mr. Walden. -- you have backed off doing that?

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Mr. Mock. We have a strong practice of verifying phone numbers at every opportunity.

Mr. Walden. Right.

Mr. Mock. And for us, the issue of reassigned phone numbers and the volume particularly that can stack up with a reassigned phone number is really where our --

Mr. Walden. All right.

Mr. Mock. -- material concern is.

Mr. Walden. I wish I had more time. I would pursue that course because that is the next --

Mr. Mock. Thank you.

Mr. Walden. -- big issue on my list. But we will go now to the gentlelady from California, Ms. Eshoo.

Ms. Eshoo. Thank you, Mr. Chairman, and thank you to the witnesses.

I think what I would like to do is just ask a straightforward question of three out of the four of you. Mr. Waller, you made recommendations of what you thought we should do, and that is most helpful. So one or two sentenced, Ms. Turano. What do you recommend that we do to address what we are here for?

Ms. Turano. Sure. Thank you.

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Ms. Eshoo. What is your top recommendation, quickly?

Ms. Turano. Thank you. My top recommendation has to do with a reconciliation comparing the language within TCPA and certain language within HIPAA. They are both statutes that govern this practice and the Medicare Advantage and Medicaid programs. However, there is a disconnect --

Ms. Eshoo. I have it. I got it. Okay.

Ms. Turano. Thanks.

Ms. Eshoo. Thank you. Mr. Mock?

Mr. Mock. Thank you. I think our top recommendation simply would be to introduce some measure of reasonability in application into the law. Additional exemptions --

Ms. Eshoo. But something specific. I understand everybody will say here, even if they disagree with each other, that they are all reasonable, so be specific.

Mr. Mock. Thank you. The definition of called party at this particular point in time leaves absolutely no liability on the called party, and in our case, whenever the called party is not the intended, the reasonable application that might ask a --

Ms. Eshoo. Well, I understand --

Mr. Mock. -- called party --

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Ms. Eshoo. -- what you are talking about, but in your written testimony, if I read it correctly, you all made 500 calls over, I think, 13 months to a reassigned number. I mean, 500 calls and you want to put the burden on the person that receives the call? Is that what you are saying?

Mr. Mock. Five hundred phone calls absolutely sounds excessive. Again, these --

Ms. Eshoo. Well, it is excessive.

Mr. Mock. These are members that have requested for these daily notifications. If a member does not receive a notification, their power is out. In this particular case a reasonable application of the law might have looked at this case and just asked the question would it be reasonable --

Ms. Eshoo. Well, I understand reasonable, and I don't know how we do this, but we can't reshape TCPA based on your co-operative. I mean, we are going to have to look for something that is going to help you, but it is a very unusual, in my view, business model.

Mr. Shockey?

Mr. Shockey. These are policy questions, and I defer to the other witnesses --

Ms. Eshoo. So ask the engineer and consultant? You

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don't have even one --

Mr. Shockey. Well, I think you can't look --

Ms. Eshoo. -- recommendation for us?

Mr. Shockey. There are a number of things I would bring up. The number one thing I would is you can't look at TCPA in isolation. We are going to have to look at the Truth in Caller ID Act specifically. The act is creating a great deal of the problems with robocalls because the way it is constructed.

Ms. Eshoo. But tell us the fix. Everybody is telling us the problems. We know what the end result of the problems. What do you recommend we fix? How would you do it? You are the expert. That is why you all came here to testify.

Mr. Shockey. There are issues involving what I would consider adding safe harbor, as well as --

Ms. Eshoo. Safe harbor for whom?

Mr. Shockey. Safe harbor for the entity making the calls. And the telecommunications companies really do need to safe harbor. It is also in good-faith provisions that in good faith here for these entities such as a co-operative and health care providers and financial institutions that if they



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are trying to do this is in good faith, they should have some reasonable protection from unwarranted lawsuits.

Ms. Eshoo. And what is --

Mr. Shockey. What is in good faith?

Ms. Eshoo. Are there limits to what they do or are there -- I mean, is it you just enter a safe harbor and then do whatever you want?

Mr. Shockey. No, that I think can be worked out --

Ms. Eshoo. I mean, there are financial institutions but then there are some that abuse. They never stop calling to market their goods. Is that considered safe harbor in your view?

Mr. Shockey. No, but I mean safe harbor I would say there is a difference between marketing and also financial protection, which is I get occasionally both telephone calls as well as text messages when I make a purchase, say, for instance, over \$500. I need that. I want that. And within reason I am willing to accept a certain amount of, you know, marketing materials one way or the other. It is a fine line. It is discretionary.

However, I think that the problem we have seen in the act, in TCPA, is it has been unreasonable. And especially

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for smaller firms. It is one thing for AT&T or Bank of America or Dominion Resources to be able to protect themselves. It is another for a relatively small firm or manufacturing firm or a small electric co-operative to defend themselves against these kinds of class-action suits.

A longer-term, again -- you know, my belief is we have to look at this as a larger machine. There is TCPA, there was the Truth in Caller ID Act. I believe the telecommunications firms are committed to injecting cryptographically secure material into the networks itself that begins to reduce the problem of spoofing and robocalls at its source.

Mr. Walden. We need to --

Ms. Eshoo. Yes. I am waiting for him to finish. Mr. Chairman, can I just ask unanimous consent to place Electronic Privacy Information Center's letter --

Mr. Walden. Sure. Oh, absolutely.

Ms. Eshoo. -- in the record? Thank you.

Mr. Walden. Yes, without objection.

[The information follows:]

\*\*\*\*\*COMMITTEE INSERT 8\*\*\*\*\*

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Mr. Walden. And I thank you for your answer.

I will now go to the gentleman from New York, Mr. Collins, for questions.

Mr. Collins. Thank you, Mr. Chairman.

You know, I think we are here today really talking about unintended consequences. And there is no perfect solution. There can never be a perfect solution. And certainly I appreciated Mr. Shockey's comments about safe harbor, common sense, and really small businesses -- I am a small business guy -- who really live in fear of some of these class-action lawsuits and in some cases might be withholding the information that somebody -- like Mr. Waller saying, you know, if somebody is going to -- for every purchase over \$500 I would like to know it just in case, things of that sort.

But my question, Ms. Turano, is in your business -- in fact, health care today, you know, patients come in, they are treated, they may have a high deductible plan. They may not even realize that. After they have come, they have gone, they are treated, I would have to expect sometimes left with people owing substantial money. And you are in business and have to stay in business based on cash flow and collecting money. And you are not a telemarketer, but I have to expect

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you worry about and are frustrated by making a follow-up call to someone who, you know, through ObamaCare or some other reason is stuck in a high deductible plan. They could owe you thousands of dollars.

You need that money to stay in business and provide your service, and yet, you know, under the TCPA what are you? Are you a collection firm, which you are not, or are you just trying to protect the financial interests for all your other patients, and unfortunately, having to call folks to say you owe us some money, you know, based on your insurance plan and high deductible, others, could you just maybe comment on maybe some of those unintended consequences relative to you providing health care, something we all know we need?

Ms. Turano. Sure. Thank you. And actually, the law provides that we do not make these types of phone calls to cell phones about payment. We make automated phone calls with consent for health-related purposes. So we are not behaving like a collections agency. In fact, we are only making calls, sharing health care information with the members.

Mr. Collins. So what can you or can't you do relative to try to collect money that is owed to you by a patient that

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has come in, been treated, and now they owe you money?

Ms. Turano. Well, I would assume use traditional other methods, whether that be sending them a bill in the U.S. mail or we certainly have the ability to, if there were a landline available, we could use that. But using an auto-dialer to a cell phone or using an auto-dialer to text a cell phone is not something that we would do to attempt to collect --

Mr. Collins. Which, again, as the chairman noted in his opening comments, as many as half of Americans now don't even have a landline.

Ms. Turano. Correct.

Mr. Collins. Well, thank you very much. Again, it is the unintended consequences -- I think really we all want the same thing. No one wants the annoying calls, trying to sell something but, you know, where does the fine line come? And with the fear of litigation, at what point do good phone calls stop or reasonable phone calls?

Mr. Shockey. Congressman, I think what a lot of people are struggling with here are what are genuinely legitimate calls from people who have a prior business relationship. And what some of us are worried about, which is the really fraudulent calls that are attacking vulnerable populations,

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the aged one way or the other, those of us such as myself and the engineering community, you know, we would like to crush the fraudulent calls immediately. You know, hang them, please.

But these issues that you are bringing, Congressman, up, I mean, there is fine lines here, and I certainly understand the frustration of small business owners that they are getting entrapped with a lot of ambulance-chasers -- let's put it bluntly -- who are using TCPA to extract -- you know, it is fraudulent in its own sense to a certain extent.

I am just a poor, dumb engineer here. It is very hard for me to distinguish issues involving policy versus issues involving engineering, but I certainly understand your concern.

Mr. Collins. And I think this hearing is really an informational hearing to bring some of these issues forward. We are not going to solve the issues today, but your testimony is certainly much appreciated. And, Mr. Chairman, I think it is a very timely committee, and my time has run out so I yield back.

Mr. Walden. The gentleman yields back.

Ms. Turano, just before I go to Mr. Pallone, when you

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talk about sharing health care information, is that the results of a blood test? Is that what you are talking about?

Ms. Turano. Those are the types of calls I am talking about, yes. It could be a reminder to fill a prescription, to pick up your prescription. It could be a reminder to receive or to seek out preventative tests or screenings. It is those types of calls that I am --

Mr. Walden. Okay.

Ms. Turano. -- talking about.

Mr. Walden. All right. Thank you.

Mr. Pallone.

Mr. Pallone. Thank you. I wanted to ask Mr. Shockey, in your written testimony you note that Congress can be helpful in ensuring that consumers benefit from the various technological solutions that can help reduce robocalls. Can you just, you know, tell me more specifically what technological steps you think Congress could take to better protect consumers and stop the robocalls?

Mr. Shockey. Thank you, Congressman, for your excellent question there. The technological solutions that we are proposing, the engineering community, basically looks upon the fraudulent robocall problem as essentially a form of

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cybersecurity attack. Therefore, we need to go into the core of the voice communications network and use modern cryptographic methodology such as public infrastructure to basically sign the caller ID, sign the CNAME data, potentially make more information about the call party available to the consumer.

One of the things that we are working very diligently on on a technology side is in those cases where there is a clear prior business relationship allowing for more information to be displayed to the consumer. We are looking at some things like a green check box which is this call has been validated, a big red check box, no, this is not really the IRS involved, some kinds of other form of visual indicators that the call, at least from the network's perspective, has been authenticated from the called party, and we can do better things like track and trace one way or the other.

Those are the technological solutions that we have. As for whether or not Congress needs to further enhance the existing portions of title 47, I am not sure at this particular point. The relevant sections of the act that I know of, which are 251(e)(1), which is plenary authority over the numbering plan. The Commission already has that. They



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use that for numbering plan administration, local number portability.

I believe, at least in my own -- I am not a lawyer and I don't play one on TV so I can't answer that question, but I think they actually have sufficient authority to act if other aspects of the statutes are clear as to what the truth intent of Congress is.

Mr. Pallone. Okay. Rather than fraudulent calls, I wanted to talk about telemarketers that we never want or we never asked for. And, Professor Waller, you note in your written testimony that Congress should require that telemarketers receive express consent from consumers before they call their cell phones. Can you explain why you think strong consent is so important for consumers?

Mr. Waller. Yes. Thank you. I think that the requirement of consent has been a core provision of the TCPA from the very beginning, and I would urge that it be strengthened if anything.

The situation that Chairman Walden referred to with respect to text messaging, making temporary job opportunities available is a perfect illustration of how valuable it is when the consumer has consented and how it is simply

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unwelcome -- perhaps not harassing but simply unwelcome and invasive in their lives if they have not consented.

And some of the examples and many of the horror stories that are presented are really about consent, and services are valuable if the consumer has consented and services are unwelcome and telemarketing is unwelcome when they haven't, and that is a critical component of the act.

Now, some of the other horror stories that have been presented are not about consent but about reassigned numbers and reaching out to people who perhaps they intended to get someone who had given consent but they didn't reach someone, and in that case, the person they reached has not consented. There are still cost consequences to the 75 million consumers who have some form of prepaid cell phones. These calls are unwelcome. And it is the caller or the people they use who are the best cost-avoiders in that circumstance using currently available databases and some of the things that are in development that Mr. Shockey has talked about.

Mr. Pallone. Let me just ask quickly. The FCC has been issuing more rulings on the TCPA recently. Do you think this recent uptick in FCC action has been beneficial for consumers?

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Mr. Waller. I think it has. I think the 2015 omnibus ruling has been helpful by focusing on certain definitions, in particular, this reassigned number issue, the question of vicarious liability and the definition of auto-dialers that Chairman Walden was asking about. I think rulemaking by its very nature is a lengthy process and I commend the FCC for doing the best job it can, but it is really hit with a flood of petitions over and over again by the firms or industry seeking special treatment.

Mr. Pallone. Thank you. Thank you, Mr. Chairman.

Mr. Walden. Okay. The gentleman's time is expired.

I now go to the vice chair of the subcommittee, Mr. Latta.

Mr. Latta. Well, thank you, Mr. Chairman, and thanks to our panel for being here this morning, appreciate it.

Ms. Turano, if I could start with you, in your testimony you stated that health care-related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers. It seems obviously that public health and safety notifications, along with individual health reminders, are helpful and important. Under current law, am I right to believe that these types of notifications

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are underutilized due to liability risks?

Ms. Turano. Yes, sir, I believe that is accurate.

Mr. Latta. Let me follow up then. How can we better update then the TCPA to ensure that actors with good intentions are able to reach the consumers and patients to better serve them?

Ms. Turano. Sir, currently, there is an exemption within the TCPA that is extended to health care providers to make these types of phone calls that I have been referring to. Unfortunately, that is a vague term. Within the HIPAA statute, however, there is language that could be imported that is far more clear and has a much more specific definition, and that is a term called HIPAA-covered entity. If that language were to be imported within the TCPA, that would make things much more clear for companies like WellCare, and that would allow us to make these types of phone calls.

Mr. Latta. Well, you know, I was going to kind of follow up on that. And let me ask you this because under HIPAA is it more clear for landlines than it is for cell phones?

Ms. Turano. Is it more clear within HIPAA for landlines

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Mr. Latta. Right, is that --

Ms. Turano. -- or cell phones? HIPAA covers all health care communications. It does not make a distinction between cell phones and landlines from my understanding.

Mr. Latta. Okay. But is there any type of confusion out there today for folks out there then --

Ms. Turano. Operate --

Mr. Latta. -- if you are looking on the cell phone side?

Ms. Turano. No.

Mr. Latta. There isn't? So there is not a problem then for people that -- especially for you all to go to contact folks on that and then --

Ms. Turano. Well, if we were operating under HIPAA guidelines, those are very clear, and it is very prescriptive about what we can say, whom we can contact, how, and why. If those types of guidelines were transferred over to be consistent with the TCPA, it would be much more straightforward with us. There would be no gray area in terms of who we can contact, whether it is a landline or a cell phone.

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Mr. Latta. Okay. Thank you.

Ms. Turano. Thanks.

Mr. Latta. Mr. Waller, I am wondering, how many of the complaints -- and maybe if you might know this, how many of the complaints that the FCC and FTC receive are from the same numbers, any idea? Do we have any kind of knowledge out there as to who the bad actors are out there that are making a lot of these calls that people receive? Is there a way to find that out?

Mr. Waller. It is my understanding that the way the FCC tracks complaints on this issue that they accumulate complaints with respect to specific numbers and senders when they can identify them. So I believe the FCC can provide that information. I am not clear on how the FTC tracks robocall complaints, but I am aware that they receive between 200,000 and 300,000 per month.

Mr. Latta. All right. Thank you.

Mr. Shockey. Congressman, can I address some of that because --

Mr. Latta. Yes. Yes.

Mr. Shockey. -- it is slightly tactical?

Mr. Latta. Yes.

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Mr. Shockey. It is correct that the way that the FCC and the FTC track this is via the number, but the number is inaccurate because it has been spoofed --

Mr. Latta. Right.

Mr. Shockey. -- in most of the cases.

Mr. Latta. And as the chairman mentioned in his opening statement that we just passed out of full committee --

Mr. Shockey. Correct.

Mr. Latta. -- the bill especially on the spoofing end, correct, yes.

Mr. Shockey. And they are coming in through intermediary providers and the current legislation, which was passed yesterday, that requires intermediary transit providers to identify themselves with the FCC makes a great deal of sense.

What we do know anecdotally, by the way, is that the number of actors creating particularly the fraudulent robocalls is in fact relatively small. They are quite sophisticated and I might add I have done consulting work for the CRTC in Ottawa and Ofcom in the United Kingdom, and on a per capita basis the problem in Canada and in the United Kingdom is in fact worse. And the technical solutions that

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we are looking at deploying may actually have international implications as well and offer United States leadership to our friends, allies, and partners, on this area as well.

One of the things that I know law enforcement is concerned about is this track-and-trace issue and the call validation technology that we want to interject into the network should be able to provide law enforcement with considerably better tools than what they have now.

Mr. Latta. Yes. Thank you very much, Mr. Chairman. My time is expired and I yield back.

Mr. Walden. I thank the gentleman. And we have a list for the committee at some point here of the conflicts in statute that require people to make calls that then put them in conflict with TCPA. We do have that, too, as part of our discussion.

Mr. Doyle.

Mr. Doyle. Thank you, Mr. Chairman.

Mr. Waller, I want to follow up on Mr. Pallone's questions about expressed consent. I want to ask you if you think we need to reexamine the rules about prior express consent through an intermediary because it seems to me recent court cases seem to affirm the notion that debt collectors



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can harass consumers even when they have not explicitly been given consent to do so.

So I am concerned that this practice of consent through a third party sometimes leads to loopholes where consumers are harassed by debt collectors or advertisers in situations that they haven't expressly consented to. What problems do you see in this practice and how would we deal with that?

Mr. Waller. I share your concern. Consent should mean express consent expressed in a reasonable fashion that is part of the TCPA. There is growing amount of case law, plus the notion of reasonableness as an accepted standard throughout consumer protection law, most of American law. Third-party consent I think should be extremely limited or simply abolished whenever humanly possible.

The area that you talked about particularly with debt collection is one of the top areas of consumer complaints. I think it is unfortunate that there was a carve-out for debt collection from the Federal Government or its contractor recently in the Budget Reconciliation Act.

So I think the number of people who are now exposed to those calls are certainly greater. It is 60-some million people depending on which debt programs you are talking

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about. So I would like to see a return to the definitions that were used when consumers directly consented, whether it is in writing or some other fashion that can be legitimately recorded by the sender so they get the information they want and simply not be deemed to consent by the actions of a third party.

Mr. Doyle. Thank you. Let me ask you, historically, phone carriers have had an obligation to connect all phone calls, but recently, when the FCC loosens this restriction in order to promote the development and deployment of robocall-blocking technologies, I want to ask you, do you think the common carrier exemption should be reexamined as there will be an onus on carriers to connect the right calls? I mean, what safeguards are necessary to ensure that carriers aren't overzealous in their call-blocking?

Mr. Waller. I think in some ways Mr. Shockey may be better able to answer that than I do, but I do think it is a combination of legal and technological solutions, so the gold standard would be a single rule that applies across all technology platforms, whether it is landlines, whatever is left of fax machines, cell phones, and whatever is yet to come -- and email obviously -- where a consumer can opt out

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and be done with it where we would be, in my view, aiming for a universal do-not-contact register, not just do not call, and that obviously involves a sensible drafting of interaction of legal and technological requirements.

Mr. Doyle. Mr. Shockey, do you want to answer?

Mr. Shockey. I agree with Mr. Waller completely, Congressman. I have serious problems with blacklists. We have problems with blacklists in the past in this country in one way or the other. The problem in getting on a blacklist is how do you get off of it, and I have personally run into this problem myself trying to send email to this committee because my domain, Shockey.us, was thrown into your junk mail pile and how do I get off.

Ms. Eshoo. And look it, you got here.

Mr. Shockey. I got here, yes. I had to use my Gmail account. But these are the kinds of things that concern me about blacklisting, which is why those of us in the engineering community have tried to look at this from a much more holistic point in the core of the network, namely, that the originating call is cryptographically signed by the call originating network, it is authenticated and verified by the terminating network, and that the call detail records and the

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call routing records reflect that so that we have got appropriate track-and-trace mechanism here.

And recourse in the event that you are thrown into a black hole has to be somehow constructed either possibly through regulation, hopefully by best current practices among the service providers one way or the other. If we march down this road, we are very, very concerned about that and we know where the problem is.

Mr. Doyle. Thank you. Mr. Chairman, thank you.

Mr. Walden. Thank you, Mr. Doyle.

We will now turn to Mr. Long from Missouri.

Mr. Long. Thank you, Mr. Chairman.

And, Mr. Shockey, I hear from constituents about robocalls, as everyone else does, and we all find them extremely annoying, I believe. Finding a solution, of course, is very important so my question is this: This issue seems to involve all segments of telecom, including the carriers, equipment-makers, standard-setting bodies, cable, voiceover-Internet protocol providers, basically everyone.

Mr. Shockey. Yes.

Mr. Long. You are nodding your head. So is it important to have these groups involved in finding a solution

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to stopping these unwanted calls? Is it important to have all these different folks at the table and involved?

Mr. Shockey. Well, thank you, Congressman. The answer to your question is absolutely. And in fact I personally have been involved in this for the last 4 years with our nation's service providers. I have been involved in the tactical standards work directly involving all of this. Of course it is difficult to get all of these people to consensus. We are much like, you know, any other group of professionals in one way or the other. It is hard to get agreement, which is why it has taken so long.

But I believe we have a general outline of a plan, and that is where we hope -- and I believe the Robocall Strike Force, when it reports on October the 17th, I believe, can at least outline a plan. And this committee and the FCC can move forward with all deliberate speed in implementing those recommendations.

Mr. Long. Okay. Thank you. But my point is that everyone needs to be involved in this process.

Mr. Shockey. And everyone is, sir.

Mr. Long. Yes, okay.

Mr. Shockey. I guarantee you that.

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Mr. Long. Ms. Turano, the types of calls that WellCare is making to its clients, you have mentioned it a few times but can you kind of just give an encapsulated what your company does, what these calls are?

Ms. Turano. Certainly. Thank you.

Mr. Long. Can you pull that a little closer to you? It has got a long cord on here. Pull her up. There you go.

Ms. Turano. Is that better?

Mr. Long. You bet.

Ms. Turano. Okay. Thank you. The types of phone calls that we are referring to really are about health care reminders --

Mr. Long. And that is something somebody would want to hear about?

Ms. Turano. One would think so, yes.

Mr. Long. Okay.

Ms. Turano. Our members tend to be vulnerable older Americans, disabled Americans, or folks that have less access to resources, less access to an infrastructure, a support core if you will. And so we feel it is important to be able to make these calls to them. They increasingly rely on cell phones. We want to be able to help them with their health

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care, and this is an efficient and effective way of doing that.

Mr. Long. Okay. Well, I think I agree and most reasonable people would agree that those are the type of calls that folks are anxious to have, glad to have prescription reminders, whatever they may be. But has the FCC's order impacted WellCare's calling practices, and if so, how?

Ms. Turano. Yes, absolutely. Currently, we do not make auto-dialer calls or texts to cell phones. That is a practice that there --

Mr. Long. You mean you can still talk on a cell phone? You can still call?

Ms. Turano. We could call you on your cell phone --

Mr. Long. Really? I didn't even know you could talk on these anymore. I tell everyone to text me, and you are not allowed to text.

Ms. Turano. I would be happy to text you a reminder to go pick up --

Mr. Long. You could even call me. I mean --

Ms. Turano. -- your prescriptions but --

Mr. Long. -- I haven't talked on a phone in so long --

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Ms. Turano. -- I am currently not allowed to do that.

Mr. Long. All right. Especially being from Mizzou, you know.

Ms. Turano. Yes, sir.

Mr. Long. Get that in there. So these patients will potentially not be able to get the information that they need for their health care, correct?

Ms. Turano. If they are relying on a cell phone, I am -  
-

Mr. Long. Which everyone does.

Ms. Turano. -- extremely hampered from being able to contact them.

Mr. Long. Okay. I have another question here for you. In your testimony you highlight the importance of using cell phones to reach all these -- and you just now mentioned how important it is. Why not just communicate with mail or landlines?

Ms. Turano. Well, sir --

Mr. Long. Do you know what a landline is?

Ms. Turano. I do, thank you. In fact, I think I might still have one. Because when you are talking about the members that we typically have, I think I mentioned that in



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many cases they have unstable housing, and therefore, they might not have a consistent home address so U.S. mail is not going to be an effective way to reach them.

Relatedly, they might not have a consistent landline if they are not in stable housing, so therefore, those two methods can't be guaranteed to be an effective way of reaching them.

Mr. Long. Okay. Thank you. As they say, the commonsense problem is it is not common, and I think that some of these things we are looking at, a little common sense would help with the FCC.

Ms. Turano. Thank you.

Mr. Long. So, Mr. Chairman, I yield back.

Mr. Walden. The gentleman yields back.

The chair recognizes the gentleman from California, Mr. McNerney.

Mr. McNerney. Wow, what a great hearing, Mr. Chairman. Thank you. And I thank --

Mr. Walden. You got it.

Mr. McNerney. -- the panelists.

Mr. Shockey, I was really thrilled to hear that public-key cryptography is used to authenticate caller ID.

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Mr. Shockey. It will be.

Mr. McNerney. Oh, it will be? Okay. That was my next question. How widely adopted is that technology? Or when is it going to be adopted in a wide fashion?

Mr. Shockey. As Congressman Long pointed out, there are a lot of people here involved, obviously, our nation's carriers, the equipment suppliers, the Congress potentially but certainly the Federal Communications Commission. We have what we believe is the outline of a plan and how long that plan will take to implement I would choose not to speculate about.

Mr. McNerney. Okay.

Mr. Shockey. However, it is reasonable -- public-key cryptography is used all over our economy. The electric meter on the side of your house uses PKI, your credit card uses PKI, obviously the Web browsers when you buy something from Amazon use PKI. This is proven, well-understood technology.

We have the standards now pretty much ready to go. All they need is testing. They need to be put into the actual kit that our nation's carriers have. We are very concerned that we don't break what we already have. We need to

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maintain the security, the reliability, and the interoperability of at least what we have today when we inject this new technology in there, but we can do this.

Mr. McNerney. Well, thank you. I understand that another potential solution to unwanted and fraudulent calls is malicious call tracing. Can you describe that a little bit?

Mr. Shockey. Well, malicious call tracing is in fact partially solved by this call validation technology using PKI because the basic concept -- and I will just try and walk you through it. Basically, when you place a phone call from any access network -- that would be cable or mobile or traditional landline or enterprise from within this building, the service provider would actually sign the underlying call signaling that says, yes, I am, well, AT&T and I want this other carrier to terminate the call.

So it signs what is known as the SIP invite. It sends it along its merry way, and somewhere along the line level 3 gets the call. It uses PKI to verify that AT&T was sending this call and then terminates the call in the normal manner. So we actually now have an origination and a termination, cryptographically sound methodology for track and trace.

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Now, beyond that, we could actually display to the consumer validated, good to go. We could also display to the consumer such as on your mobile device, on your enterprise phone here in the Congress or on your television set if you are using advanced network, you know, more information about whether or not this call has been trusted or if it is valid or not. So empowering the consumer is one of the key advantages of trying to deploy this technology and give enforcement in law enforcement that are track-and-trace.

Mr. McNerney. So the trace back is another form of this technology is that --

Mr. Shockey. Yes.

Mr. McNerney. -- right?

Mr. Shockey. Yes.

Mr. McNerney. And then I guess the last thing is the do-not-originate. And again, they sound like they are all sort of based on the same technology, those three methods.

Mr. Shockey. Do-not-originate is a little bit different.

Mr. McNerney. Is it?

Mr. Shockey. That is going to require, I think, a little bit of study. I know the public safety folks are

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extremely concerned about do-not-originate because of the various phishing attacks on public safety institutions one way or the other. It is certainly worth investigation, and people are actively talking about it. And I certainly want to wait and see what the final report of the strike force is before making a determination, but it is technologically feasible. Let's put it that way.

Mr. McNerney. What is the most effective thing we can do here then is to --

Mr. Shockey. Clarity. Again, as has been discussed by better policy experts than I am, having clarity in the legislation. I think you also have to look at the Truth in Caller ID Act. You also have to look at some other aspects of current legislation. Truth in Caller ID Act is bound to the problem with TCPA. If we can't secure the identity of the calls themselves, we can't fix the problem.

Mr. McNerney. Mr. Chairman, I need another 5 minute but I will yield back anyway.

Mr. Walden. Thank you. We will have more time later on probably to talk about this issue.

But we will now, let's see, go to the gentleman from Florida, Mr. Billirakis.

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Mr. Bilirakis. Thank you, Mr. Chairman. I thank the Ranking Member Eshoo as well for holding this very important hearing.

Modernizing the 1991 TCPA statute has long been a goal of mine, and I am glad the subcommittee is holding this informational hearing today. I appreciate it so much.

Ms. Turano -- and I apologize if these questions were already asked. I understand that WellCare filed a petition with the FCC seeking clarity on the TCPA provisions. Can you briefly outline the basis for WellCare's petition, please?

Ms. Turano. Certainly. Thank you. WellCare and others filed a petition asking for clarity around some of the language within the 2015 declaratory order. That order uses the term health care provider, which is basically undefined. And there is quite a bit of vagueness around what entities fall within that definition.

What we have asked for instead is a reconciliation between the language in the TCPA and the language in HIPAA, which is our governing statute for health care communications from Health and Human Services. If FCC were to import the language and use the term "HIPAA-covered entity," that would clear up a lot of confusion around who falls within that

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definition, what rules govern that communication, and that would go a long way towards clarifying the guidance.

Mr. Bilirakis. Okay. In your opinion, how long are petitions pending with the FCC before receiving a response?

Ms. Turano. Well, we filed our petition -- WellCare and others filed our petition July 28 of this year. My understanding of FCC's process is that there is a comment period for 30 days. Then, there are additional comment periods that stack up on top of that. However, my understanding is that there is no deadline or time frame within which the FCC has to respond. Therefore, we wait.

Mr. Bilirakis. Wow. How would the failure --

Ms. Eshoo. We can help you with that.

Mr. Bilirakis. Excuse me. We have a bill to fix that.

Ms. Turano. Thanks.

Mr. Bilirakis. Let's fix it. How would the failure to receive a timely answer hurt your patients? That is the bottom line.

Ms. Turano. Certainly. The way that -- as we wait, the way our consumers are being impacted is that we are hindered from being able to use an efficient and effective means of communication with them. So that means for those of our

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members who rely on cell phones, we are not making calls or we are not using the auto-dialer technology to make calls to remind parents about getting their children vaccinated. We are not using the most efficient technology to remind members to get preventative health screenings.

And in what I think is a very significant example, if we were to have a member -- and we frequently do have a member -- being discharged from the hospital, as I have said a couple of times already, if we have a member who doesn't have a strong support system around them, which is frequently the case, we feel like we take on some responsibility for assisting them in the care provided after their discharge. So we would want to be able to contact them using this technology via cell phone to remind them to get their medications, to remind them to take them as the doctor prescribed them, to remind them about proper wound care and follow-up care.

If we are able to do all that, it is only going to help their outcome versus if they are without those types of reminders. You are looking at a potential for infection, you are looking for a potential for a hospital readmission, which is a problem for the whole system, which is something we are



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hoping to avoid.

So as we wait, we are severely hampered in our ability to be able to do that in the most efficient and effective way possible.

Mr. Bilirakis. Thank you. To the panel -- and you know I submitted questions to FCC Commissioner O'Rielly asking if he supports expediting petitions to provide clarity on obligations under the TCPA pending any congressional action. The commissioner expresses support for such efforts. Is this something that members of the panel can support since we don't know how long it will take for callers to act? But we will act. And I wanted to ask the panel. We will start with Ms. Turano, please.

Ms. Turano. Yes, sir. That is certainly something we would support.

Mr. Bilirakis. Please, sir.

Mr. Mock. I think I can say absolutely we would support more timely response from the FCC. In our particular case there were facts within the lawsuit we were faced with that, had definitions been more clearly defined, the situation might have turned out very different, so absolutely.

Mr. Waller. Congressman, we are on record in supporting

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expedited review, but sometimes you don't always get the answer you want.

Mr. Bilirakis. Thank you.

Mr. Shockey. The answer is yes, that would be perfect.

Mr. Bilirakis. Very good. Thank you very much. I yield back, Mr. Chairman.

Mr. Walden. The gentleman yields back.

The chair recognizes the gentlelady from Tennessee, the vice chair of the full committee, for 5 minutes.

Mrs. Blackburn. Well, thank you, sir. And I am so pleased that we have the hearing today, that it is on the agenda. And sorry that I was late. We have had other hearings that we are dealing with this morning, and since our main room is under construction, we have to go to the Capitol and use a room there.

Mr. Mock, I want to come to you. When we were preparing for this hearing and talking with some folks that are in the health care space and all, I was struck by how trial lawyers have seemed to use this as a piggy bank with the lawsuits. And looking at from 2010 to 2015 there was a 940 percent increase in the lawsuits under the TCPA. And the average payout for an attorney filing one of those suits was \$2.4

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million. I mean, this is just unbelievable. That tells us something is terribly wrong with this process.

So the Snapping Shoals experience, and you had said in your testimony although the case has since been resolved, Snapping Shoals made substantial negative changes to our member notification offerings as a result of the complaint. So I want you to elaborate just a little bit if you will for the record on your experience of being sued and how that movement, you know, how you followed through to that movement. I know you articulated the changes that you made, but talk a little bit about that experience. Just one minute will suffice.

Mr. Mock. Well, thank you very much for the question.

In our example, we really felt like these were communications that were requested by our member. At any time those notifications could be discontinued, numbers could be changed, and certainly as we have looked to the future, our goal is to provide more flexible notifications.

I should say that over the last few years it has been a more-common-than-I-would-like practice to maybe see a 1-800 ad late at night for any unwanted communications. In our experience I really felt like it would have been a very

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reasonable thing for someone to have received 500 phone calls to complain at least once. And so I think that is where the good-faith provisions and safe harbor provisions --

Mrs. Blackburn. Got it.

Mr. Mock. -- for small businesses --

Mrs. Blackburn. Yes.

Mr. Mock. -- like Snapping Shoals would be very important.

Mrs. Blackburn. Okay. Got that.

Mr. Shockey, just a little bit on reassignment and the difficulty of these reassigned numbers and tracking that. Listening to all of this today makes you wonder why there isn't a way to track reassignment more carefully or more easily so that companies can determine when there has been reassignment of a number. Do you have anything to add to that?

Mr. Shockey. Not -- well, actually, there is one thing I would like to add. The problem of reassigned numbers is real. We do have numbering databases that are currently deployed. Obviously, the number portability database is one of them. These have been altered from time to time. They could be repurposed to be able to add a telephone -- some

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sort of a field in the databases on when they would have been modified in some way, shape, or form. I don't think we necessarily need a new database.

The other thing is one of the issues that is actually personal to me and I think is also relevant is I also am a big believer in national number portability, which is why can't we just have one telephone number and keep it, you know, basically whenever you move? Twelve percent of the entire United States population moves very single solitary year, and that is actually creating the churn in the system because even if you go from the west side of New York to the east side of New York, you actually have to change your phone number because you have actually moved out of a boundary. And that is actually pretty ridiculous for the consumer if you sort of ask me.

So we in the North American Numbering Council have actually recommended to the Commission that they consider a notice of proposed rulemaking on national number portability, which could reduce the churn that we see in the numbering plan quite a bit and increase the size of the North American Numbering Plan by 20 percent virtually overnight so that we don't have the kinds of problems in 408 area code for

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constantly splitting and splitting and splitting one way or the other.

So it needs a little bit of study. I don't necessarily want to recommend that in advance of where the strike force could be reporting on that, you know, in the middle of October, but it certainly needs active consideration.

Mrs. Blackburn. Okay. I appreciate that. And as we wrap up, I would like for each of you to send me the three things you think we need to make certain we change as we look at the updates on the TCPA. I would just love to see that in writing.

And with that, I yield back. Thank you.

Mr. Latta. [Presiding.] Thank you very much. The gentlelady yields back.

And seeing no other members to ask questions, I have a letter from the American Health Insurance Plans, their comments that they submitted before the FCC and also the Credit Union National Association. And I ask unanimous consent that these letters be inserted in the record.

[The information follows:]

\*\*\*\*\*COMMITTEE INSERT 9\*\*\*\*\*

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Mr. Latta. And on behalf of the gentleman from Oregon, the subcommittee chair; the gentlelady from California, the ranking member; and myself, we thank you all for participating in this panel today. It has been very informative and we appreciate it.

And if there is nothing else to come before the subcommittee, we stand adjourned.

[Whereupon, at 12:38 p.m., the Subcommittee was adjourned.]