

**ILLEGAL ROBOCALLS:
CALLING ALL TO STOP THE SCOURGE**

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS,
TECHNOLOGY, INNOVATION AND THE INTERNET
OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

APRIL 11, 2019

Printed for the use of the Committee on Commerce, Science, and Transportation



Available online: <http://www.govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

42-447 PDF

WASHINGTON : 2023

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

ROGER WICKER, Mississippi, *Chairman*

JOHN THUNE, South Dakota	MARIA CANTWELL, Washington, <i>Ranking</i>
ROY BLUNT, Missouri	AMY KLOBUCHAR, Minnesota
TED CRUZ, Texas	RICHARD BLUMENTHAL, Connecticut
DEB FISCHER, Nebraska	BRIAN SCHATZ, Hawaii
JERRY MORAN, Kansas	EDWARD MARKEY, Massachusetts
DAN SULLIVAN, Alaska	TOM UDALL, New Mexico
CORY GARDNER, Colorado	GARY PETERS, Michigan
MARSHA BLACKBURN, Tennessee	TAMMY BALDWIN, Wisconsin
SHELLEY MOORE CAPITO, West Virginia	TAMMY DUCKWORTH, Illinois
MIKE LEE, Utah	JON TESTER, Montana
RON JOHNSON, Wisconsin	KYRSTEN SINEMA, Arizona
TODD YOUNG, Indiana	JACKY ROSEN, Nevada
RICK SCOTT, Florida	

JOHN KEAST, *Staff Director*

CRYSTAL TULLY, *Deputy Staff Director*

STEVEN WALL, *General Counsel*

KIM LIPSKY, *Democratic Staff Director*

CHRIS DAY, *Democratic Deputy Staff Director*

RENAE BLACK, *Senior Counsel*

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, INNOVATION
AND THE INTERNET

JOHN THUNE, South Dakota, <i>Chairman</i>	
ROY BLUNT, Missouri	BRIAN SCHATZ, Hawaii, <i>Ranking</i>
TED CRUZ, Texas	AMY KLOBUCHAR, Minnesota
DEB FISCHER, Nebraska	RICHARD BLUMENTHAL, Connecticut
JERRY MORAN, Kansas	EDWARD MARKEY, Massachusetts
DAN SULLIVAN, Alaska	TOM UDALL, New Mexico
CORY GARDNER, Colorado	GARY PETERS, Michigan
MARSHA BLACKBURN, Tennessee	TAMMY BALDWIN, Wisconsin
SHELLEY MOORE CAPITO, West Virginia	TAMMY DUCKWORTH, Illinois
MIKE LEE, Utah	JON TESTER, Montana
RON JOHNSON, Wisconsin	KYRSTEN SINEMA, Arizona
TODD YOUNG, Indiana	JACKY ROSEN, Nevada
RICK SCOTT, Florida	

CONTENTS

	Page
Hearing held on April 11, 2019	1
Statement of Senator Thune	1
Letter dated April 11, 2019 to Hon. John Thune and Hon. Edward Mar-	
key from Genevieve Morelli, President, ITTA	52
Statement of Senator Schatz	3
Statement of Senator Wicker	4
Statement of Senator Blackburn	29
Statement of Senator Klobuchar	30
Statement of Senator Fischer	32
Statement of Senator Blumenthal	34
Article from <i>The Wall Street Journal</i> entitled, “The FCC Has Fined	
Robocallers \$208 Million. It’s Collected \$6,790.”	35
Statement of Senator Gardner	39
Statement of Senator Markey	41
Statement of Senator Capito	43
Statement of Senator Tester	45
Statement of Senator Young	47
Statement of Senator Sinema	50

WITNESSES

Hon. Doug Peterson, Attorney General, State of Nebraska	4
Prepared statement	6
Kevin Rupy, Partner, Wiley Rein, on Behalf of USTelecom—The Broadband	
Association	7
Prepared statement	9
Margot Freeman Saunders, Counsel, National Consumer Law Center	13
Prepared statement	14

APPENDIX

Letter dated April 11, 2019 to Hon. John Thune and Hon. Brian Schatz	
from Brad Thaler, Vice President of Legislative Affairs, National Associa-	
tion of Federally-Insured Credit Unions	55
Response to written questions submitted by Hon. Edward Markey to:	
Hon. Doug Peterson	56
Margot Freeman Saunders	56

ILLEGAL ROBOCALLS: CALLING ALL TO STOP THE SCOURGE

THURSDAY, APRIL 11, 2019

U.S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY,
INNOVATION AND THE INTERNET,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m. in room SH-216, Hart Senate Office Building, Hon. John Thune, Chairman of the Subcommittee, presiding.

Present: Senators Thune [presiding], Schatz, Wicker, Fischer, Blackburn, Klobuchar, Blumenthal, Gardner, Markey, Capito, Tester, Young, and Sinema.

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Good morning, everyone. Welcome to our hearing today, we will be addressing a topic that we can all agree on. Illegal and abusive robocalls must end.

No one is immune to these illegal and potentially dangerous calls. It's no surprise that unsolicited robocalls consistently rank among the top consumer complaints to the Federal Trade Commission and to the Federal Communications Commission.

One report estimated that robocallers rang Americans' mobile phones over 26 billion times last year alone. Illegal and abusive robocalls are a clear problem, but it's important to remember that automated calls are not inherently negative.

Many important services are carried out via such calls when companies and call recipients have a pre-established relationship. For example, if you're on your way to the airport and your flight is canceled, if there's a fraud alert on your credit card, or if you're being reminded of an upcoming medical appointment, these are calls that are important to consumers. Different rules of the road apply to these types of calls and they should.

Our focus today is on the unscrupulous use of robocalls, something that has earned bipartisan scorn. Almost a year ago, when I was Chairman of the Commerce Committee, I subpoenaed the mass robocallers Adrian Abramovich to testify about his operation. He's facing \$120 million in FCC penalties for making nearly a hundred million robocalls throughout the country.

His testimony shed light on the reality that many robocallers view the risk of getting caught and paying civil fines as a cost of

business. Illegal calling operations are often based abroad and can disappear quickly when authorities seek to hold them accountable.

Since subpoenaing Mr. Abramowitz, I have introduced the Telephone Robocall Abuse Criminal Enforcement and Deterrence or TRACED Act with Senator Markey, bipartisan legislation targeting the worst of the worst, scam artists and others who knowingly violate the law.

A credible threat of criminal prosecution is necessary and appropriate for those who knowingly flout laws to prey upon the elderly and other vulnerable populations.

The TRACED Act mandates that Federal law enforcement, state attorneys general, and telecommunications experts work together to determine what systems and what potential modifications to our laws will create a credible threat of prosecution and prison for those who intentionally violate the law.

I've also heard from Federal enforcers that requiring a warning citation before the FCC can act against an illegal robocaller and the current one-year statute of limitations necessitating the initiation of a fine within a year from when an illegal call is made are hampering their ability to hold bad actors accountable.

The TRACED Act will give the FCC three years to identify robocallers who intentionally violate the law and eliminates the need for a preliminary citation.

New technologies have also made it easier for scammers to hide from law enforcement and seek to gain their victims' trust by using a technique known as "spoofing" where they display fake caller ID information.

The goal of scammers using spoofed robocalls is often to get money out of unsuspecting recipients and some of their methods can be particularly malicious.

The TRACED Act tackles the frustrating issue of spoofing by requiring the FCC to adopt an industry-developed framework for call authentication and, importantly, the bill makes it easier for carriers to lawfully block calls that aren't properly authenticated.

Ultimately, this will help stop such calls from reaching your phone. These improvements may not stop every illegal robocall, but they will go a long way toward making it safe to answer your phone again.

That's why I'm pleased that the Commerce Committee unanimously reported the TRACED Act out of Committee last week and it is now moving to the Full Senate for consideration.

I'm also grateful for Senator Markey for partnering with me on this legislation. I will work to get the TRACED Act to the President's desk as soon as possible.

I mentioned earlier that solving this issue is going to require a variety of stakeholders to get together. Today, we have the opportunity to hear from the Honorable Doug Peterson, who serves as the Attorney General for the State of Nebraska.

State attorneys general are actively enforcing Do Not Call laws and educating consumers about scam robocalls. Industry's also been working diligently to develop new call authentication technology to provide consumers relief from illegal robocalls.

So I'm glad to welcome Mr. Kevin Rupy and Ms. Margot Saunders of the National Consumer Law Center who can speak to these efforts.

I want to thank you all for being here today, and I'll hand it off now to Senator Schatz for an opening statement.

**STATEMENT OF HON. BRIAN SCHATZ,
U.S. SENATOR FROM HAWAII**

Senator SCHATZ. Thank you, Mr. Chairman. Thank you for being here.

This is an important issue. It's an issue that crosses state lines, party lines, phone lines, and unites all Americans. We've all heard complaints from constituents about robocalls, stories about people being harassed by debt collectors, about calls on mobile phones with familiar-looking caller ID numbers that turn out to be fake.

I got a text from my mother on Tuesday, "I'm reaching out to my senator. I just got spam calls to my own landline supposedly from my landline. What is the regular person supposed to do except grin and bear it?" So I texted back, "On it!"

[Laughter.]

Senator SCHATZ. Robocalls have turned us into a nation of call screeners, only picking up when we are sure it is a number that we know, and I think this is an important sort of underappreciated downside to robocalls. It's not just a nuisance. Certainly the fraud is the biggest deal. But the fact that a lot of people don't use their phones as phones anymore for that reason is a significant economic issue and it needs to be addressed.

The first step toward taking on robocalls is to make sure that the enforcers have the authority that they need. That's why in the last Congress I reintroduced the Robocall Enforcement Enhancement Act which would extend the FCC's statute of limitations and give it authority to find bad actors without providing a warning and that's why I voted to advance Senator Thune and Markey's TRACED Act out of the Commerce Committee last week, but we're not going to stop this problem with enforcement alone.

We also need to scale our efforts with technology. We must fight bad technology with good technology. So I'm looking forward to hearing from our witnesses today about the prospects for using validation and blocking tools and other tech to fight back. These tools should not be an excuse for providers to make more money or invade consumers' privacy.

Finally, there may be more that we can do to educate consumers. Are we doing enough to help people avoid being tricked by scams in the first place? Do they know about the tools available to identify or block unwarranted calls or the best way to report illegal calls?

I look forward to the hearing today and working with Chairman Thune and members of the Subcommittee to address this frustrating issue.

Thank you.

Senator THUNE. Thank you, Senator Schatz.

We're glad to be joined today by the Chairman of the Full Committee, Senator Wicker, who was instrumental in helping us move the bill out of the Committee last week.

So, Senator Wicker, recognize you for an opening statement.

**STATEMENT OF THE HON. ROGER WICKER,
U.S. SENATOR FROM MISSISSIPPI**

Senator WICKER. Thank you, Chairman Thune and Senator Schatz.

I agree with both of you that this is an important hearing and a very important issue that has long plagued consumers, particularly the Nation's most vulnerable and underserved populations.

Senator Schatz, I, too, got a call from my dad in Pontotoc, Mississippi just last month about a malicious phone call, so join the club. I'm doing my best on the matter regarding illegal robocalls.

As technology evolves and becomes more sophisticated, criminals and bad actors in the marketplace take advantage of new calling features to engage in illegal activity. As the Chairman said, spoofing, there's neighbor spoofing where robocallers use local numbers in hopes that recipients will be more likely to pick up the phone. Other times, the robocallers engage in malicious spoofing where the perpetrator is able to alter or manipulate caller ID information. Many have fallen victim to scams and other fraudulent schemes of this sort.

I strongly support the TRACED Act which, as the Chair pointed out, passed out of the Full Committee last week. This legislation would provide meaningful reforms to curb fraudulent and abusive robocalls and so I thank the authors of this legislation for their leadership on this Act and I hope we can bring it to the Floor in a bipartisan fashion soon.

Thank you to the witnesses for being with us today. We look forward to a nice discussion.

Thank you, sir.

Senator THUNE. Thank you, Chairman Wicker.

We're going to have, I think, Senator Fischer is here and would like to recognize you, General Peterson, but I assume she's at another, I think, Armed Services Committee hearing. So she will be by later, but in the meantime, we'll let you all get going.

I want to thank you all for being here. We have with us today, as I mentioned, the Attorney General for the State of Nebraska, Mr. Doug Peterson; followed by Mr. Kevin Rupy, who is a Partner in Wiley Rein, representing USTelecom—the Broadband Association; and Ms. Margot Saunders of Washington, D.C., Counsel for the National Consumer Law Center.

So thank you all for being here. We look forward to hearing from you and asking you some questions.

We'll start with you, Attorney General, on my left and your right, and proceed and if you could confine your oral remarks to around 5 minutes, it'll give us optimum time to ask questions.

So thank you for being here. Please proceed.

**STATEMENT OF HON. DOUG PETERSON, ATTORNEY GENERAL,
STATE OF NEBRASKA**

Mr. PETERSON. Good morning, Chairman Thune and Ranking Member Schatz, and the Esteemed Members of this Subcommittee.

I'm Doug Peterson, the Attorney General from the State of Nebraska, and I'm here to provide a state attorney general's perspec-

tive on protecting consumers from the scourge of illegal robocalls and phone scammers.

Thank you for the opportunity to testify on this important issue.

State attorneys general are on the front lines of helping consumers who are harassed and scammed by unwanted calls. Robocalls and telemarketing calls are currently the Number One source of consumer complaints for many AG offices as well as both the FCC and the FTC.

In response, attorneys general bring enforcement actions against telemarketers and robocallers under state and Federal law, both in our individual capacities and collectively with the U.S. Department of Justice and the FTC.

In 2015, 10 attorneys general partnered with the FTC to sue a Florida-based cruise line company that conducted a telemarketing campaign that issued billions of robocalls. In 2017, four AGs and the U.S. Department of Justice obtained a \$280 million judgment against DISH Network for knowingly engaging in pervasive telemarketing misconduct, such as placing repeated calls to people on the Do Not Call Registry and using pre-recorded messages.

However, law enforcement alone is not enough. As acknowledged in the FCC's Staff Report on Robocalls released this year, stopping illegal calls before they reach consumers is especially important because, unlike legitimate callers, these nuisance callers will not be deterred by the prospect of enforcement knowing that they will be very difficult to locate.

For more than four years, we have been a loud and sometimes critical voice in the fight to make call blocking a reality for consumers. In September 2014, 39 AGs asked the FCC to clarify whether Federal law was interfering with efforts by service providers to implement call blocking technology.

Ultimately, in June 2015, the FCC clarified that Federal law does not prohibit voice service providers from offering upon consumer request call blocking technology.

In July 2017, AGs responded in support of the FCC's proposal to allow voice service providers to block several types of obviously spoofed robocalls, such as the originating from the unassigned telephone numbers or impossible telephone number combinations.

Thirty-five AGs submitted similar comments to the FCC in October 2018.

We have known for years that the technological solutions are a significant part of the answer. Since 2015, though, it has been up to consumers to find, purchase, and otherwise adopt call blocking technology. They have downloaded apps for their smart phones or enrolled in a service provided by their carrier, yet the problem continues to grow. So we must do more and that's why I appreciate the actions taken by the Senate in this matter.

In the last three years, industry participants have made significant progress toward development and implementation of the Call Authentication Framework, known as STIR/SHAKEN, but even the best solutions won't help consumers if industry participants and regulators fail to collaborate on the implementation.

This means the widespread adoption of STIR/SHAKEN so that many consumers benefit from the caller ID authentication as possible. It also means industry-wide cooperation on trace-back efforts

so that law enforcement can more easily identify perpetrators of these illegal mass callings.

For these reasons and just last month, attorney generals from all 50 states and the District of Columbia and 33 U.S. territories submitted a letter to Chairman Wicker expressing our support of the TRACED Act and I must say when you get 50 AGs and the District of Columbia and 3 territory AGs, you've accomplished a significant task and it shows really how significant this is to all the states.

We believe this legislation effectively addresses many of the concerns raised by the Federal regulatory service providers, private businesses, consumer advocacy groups, and other interested parties to combat illegal robocalls and spoofing.

We are pleased to see that the TRACED Act requires implementation of the STIR/SHAKEN, affirms that service providers' authority to block certain calls and creates a safe harbor for the inadvertent blocking of legitimate calls, and, furthermore, the attorney generals are very encouraged about the interagency working group because we feel it's going to be an important partnership for state AGs to work closely with Federal authorities in order to consult with solutions on this problem.

I thank you Senator Thune, Senator Markey, and Senator Fischer and many of the cosponsors of the TRACED Act for their support of this important fight. The AGs look forward to providing comments to the FCC if and when the time comes to implement accompanying regulations, and I look forward to answering your questions.

[The prepared statement of Mr. Peterson follows:]

PREPARED STATEMENT OF DOUG PETERSON, ATTORNEY GENERAL,
STATE OF NEBRASKA

Good morning Chairman Thune, Ranking Member Schatz, and esteemed members of the Subcommittee. I'm Doug Peterson, Attorney General for the State of Nebraska, and I am here to provide my office's perspective on protecting consumers from the scourge of illegal robocalls. Thank you for the opportunity to testify on this important issue.

State attorneys general are on the front lines of helping consumers who are harassed and scammed by unwanted calls. Robocalls and telemarketing calls are currently the number one source of consumer complaints at many of our offices, as well as at both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). In response, Attorneys General bring enforcement actions against telemarketers and robocallers under state and Federal law, both in our individual capacities and collectively with the U.S. Department of Justice and the FTC.

In 2015, ten state AGs partnered with the FTC to sue a Florida-based cruise-line company that conducted a telemarketing campaign resulting in billions of robocalls.¹ In 2017, four AGs and the U.S. Department of Justice obtained a \$280 million judgment against Dish Network for knowingly engaging in pervasive telemarketing misconduct, such as placing repeated calls to people on the National Do Not Call Registry and using prerecorded messages.

Law enforcement alone, though, is not enough. As acknowledged in the FCC's Staff Report on Robocalls released this year, stopping illegal calls before they reach consumers is especially important because—unlike legitimate callers—these nuisance callers will not be deterred by the “prospect of enforcement [action] and [are] especially difficult to locate.”²

For more than four years, we have been a loud—and sometimes critical—voice in the fight to make call blocking a reality for consumers. In September 2014, 39 attor-

¹ Caribbean Cruise Line, Inc. and the other defendants agreed to injunctive terms barring them from calling consumers whose phone numbers are on the DNC Registry, spoofing caller ID information, and placing illegal robocalls.

² Report on Robocalls, CG Docket No. 17–59 (released Feb. 14, 2019).

neys general asked the FCC to clarify whether Federal law was interfering with efforts by service providers to implement call-blocking technology.³ Ultimately, in June 2015, the FCC clarified that Federal law does not prohibit voice service providers from offering, upon a customer's request, call-blocking technology.⁴

And in July 2017, 30 attorneys general responded in support of the FCC's proposal to allow voice service providers to block several types of obviously spoofed robocalls—such as those originating from unassigned telephone numbers or impossible telephone number combinations.⁵ 35 attorneys general submitted similar comments to the FCC in October 2018.⁶

We have known for years that technological solutions are part of the answer. Since 2015, though, it has been up to consumers to find, purchase, or otherwise adopt call-blocking technology. They had to download “apps” for their smartphones or enroll in a service provided by their carrier; and yet the problem continued to grow. We *must* do more. And more can be done with caller ID authentication and the STIR/SHAKEN standards.

In the last three years, industry participants have made significant progress towards development and implementation of the call authentication framework known as STIR/SHAKEN. But even the best solutions won't help consumers if industry participants and regulators fail to collaborate on implementation. This means widespread adoption of STIR/SHAKEN—so that as many consumers benefit from caller ID authentication as possible—and appropriate consumer education—so that consumers can still meaningfully interpret caller ID. It also means industry-wide cooperation on traceback efforts, so that law enforcement can more easily identify the perpetrators of these illegal, mass-calling campaigns.

For these reasons, on March 6, 2018, Attorneys General from all 50 states, the District of Columbia, and 3 U.S. territories submitted a letter to Chairman Wicker expressing their support for the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act—also known as the TRACED Act. We believe this legislation effectively addresses many of the concerns raised by Federal regulators, service providers, private businesses, consumer advocacy groups, and other interested parties to combat illegal robocalls and spoofing. We are pleased to see that the TRACED Act requires implementation of STIR/SHAKEN, affirms the service provider's authority to block certain calls, and creates a safe harbor for the inadvertent blocking of legitimate calls.

I thank Senator Thune, Senator Markey, Senator Fischer, and the many co-sponsors of the TRACED Act for their support in this important fight, and I look forward to providing comments to the FCC if, and when, the times comes to implement its accompanying regulations. I look forward to answering your questions.

Senator THUNE. Thank you, Mr. Peterson.
Mr. Rupy.

**STATEMENT OF KEVIN RUPY, PARTNER, WILEY REIN,
ON BEHALF OF USTELECOM—THE BROADBAND ASSOCIATION**

Mr. RUPY. Chairman Thune, Ranking Member Schatz, Members of the Subcommittee, thank you for giving me the opportunity to appear before you today.

My name is Kevin Rupy, and I am a Partner in the Telecommunications Media Technology Practice at Wiley Rein, and I am here today on behalf of USTelecom—The Broadband Association.

USTelecom shares the Committee's concerns on illegal robocalls and is pleased to support the TRACED Act.

Since I last testified before the Senate in 2018, there have been three significant developments in this area and I would like to mention a fourth point.

³Letter from Thirty-Nine (39) State Attorneys General to Chairman Wheeler, (dated Sept. 9, 2014).

⁴FCC, CG Docket No. 02–278, Declaratory Ruling and Order, FCC 15–72 (June 18, 2015).

⁵FCC, Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17–59, Report and Order, FCC 17–151 (Nov. 17, 2017).

⁶See Advanced Methods to Target and Eliminate Unlawful Robocalls, Reply Comments of Thirty-Five (35) State Attorneys General, CG Docket No. 17–59 at 2–3 (filed Oct. 8, 2018).

First, since last year, industry has undertaken considerable efforts to deploy call authentication technologies, commonly referred to as SHAKEN/STIR, that will significantly diminish the ability of illegal robocallers to spoof caller ID information.

Companies are deploying these standards into their networks today and will continue to do so throughout 2019.

Second, consumers today have more tools than ever at their disposal to mitigate illegal or unwanted robocalls. Hundreds of such tools are available to consumers on their smart phones and a broad range of voice providers are integrating these tools into their networks.

Third, USTelecom's industry trace-back group efforts, which seek to identify illegal robocallers, had been significantly enhanced through recent automation. The time it now takes to trace back illegal robocalls has been reduced from weeks to days, sometimes even hours.

Fourth, while the Federal civil enforcement actions of the FCC and FTC are laudatory and effective, increased criminal enforcement against illegal robocallers is needed.

Let me briefly address each of these issues. First, the industry-led governance authority for the SHAKEN standard was established last year under ATIS, the standards body coordinating industry implementation of the SHAKEN protocol.

ATIS will identify the policy administrator in May and will oversee day-to-day operations of the SHAKEN standard. In short, industry is moving swiftly to implement this important call authentication technology.

Once implemented, the ability of illegal robocallers to spoof caller ID information will be significantly reduced, while consumer knowledge about the validity of incoming calls will increase.

As this process moves forward, broad sectors of industry are already deploying the SHAKEN standard into their networks. Several U.S. Telecom member companies have publicly advised the FCC of these deployment efforts with most targeting deployments in their IP networks as soon as the end of 2019.

Testing of the new technology and products is well advanced. Just last month, Comcast and AT&T successfully verified authentication of calls between their networks and Verizon announced the first exchange of STIR/SHAKEN-enabled calls to and from wireless handsets.

Second, consumers today can access more tools than ever to protect them from illegal robocalls. Between October 2016 and March 2018, the number of smart phone applications available increased from 85 to 550.

Equally important, more voice providers are integrating these tools into their networks. For example, AT&T provides the Call Protect Service that allows its customers with certain handsets to block suspected fraudulent calls.

In March of this year, Verizon rolled out new spam alerting and call blocking tools to wireless customers whose smart phones support these features.

Carriers are also deploying various tools across their TDM and IP wireline networks, such as anonymous call rejection and no so-

licitation, and several have worked with or are currently working with Nomorobo's blocking service.

Third, late last year, USTelecom's 26-member industry Traceback Group transitioned its manual process to one that is largely automated. The FCC recently acknowledged that USTelecom's manual process had reduced the time necessary for the agency to conduct its own investigations from months to weeks and the automated process is expected to produce even greater efficiencies.

Finally, while current Federal enforcement efforts are laudatory, they are mostly limited to civil enforcement. There is an acute need for aggressive criminal enforcement against illegal robocallers at Federal and state levels.

Criminal syndicates engaged in illegal robocalling activity should be targeted and brought to justice through aggressive criminal enforcement efforts. We applaud the TRACED Act's facilitation of these efforts.

In closing, let me again thank the Committee for holding this timely hearing. USTelecom shares your concerns with the scourge of illegal robocalls and we look forward to our continued work together to address this challenge.

[The prepared statement of Mr. Rupy follows:]

PREPARED STATEMENT OF KEVIN RUPY, ON BEHALF OF
USTELECOM—THE BROADBAND ASSOCIATION

Chairman Thune, Ranking Member Schatz, Members of the Subcommittee, thank you for giving me the opportunity to appear before you today.

My name is Kevin Rupy, and I am a Partner in the Telecommunications, Media, and Technology Practice at Wiley Rein LLP, and I am here today on behalf of USTelecom—The Broadband Association. USTelecom shares the Committee's concerns on illegal robocalls, and is pleased to support the TRACED Act.

Since I last testified before the Senate in 2018, there have been three substantial developments in the area of illegal robocalls, and I will also emphasize a fourth point.

- First, since last year, industry has undertaken considerable efforts to deploy call authentication technologies, commonly referred to as SHAKEN/STIR, that will substantially diminish the ability of illegal robocallers to spoof caller-ID information. Companies are deploying these standards into their IP networks today and will continue to do so throughout 2019.
- Second, consumers today have more tools than ever at their disposal to mitigate illegal or unwanted robocalls. Hundreds of such tools are available to consumers on their smartphones and a broad range of voice providers are increasingly integrating these tools into their networks.
- Third, USTelecom's Industry Traceback Group ("ITB Group") efforts, which seek to identify illegal robocallers, have been significantly enhanced through recent automation of the traceback process. The time it now takes to trace back illegal robocalls has been reduced from weeks to days—sometimes even hours.
- Fourth, while the Federal civil enforcement actions of the Federal Communications Commission (FCC) and Federal Trade Commission (FTC) are laudatory and effective, increased criminal enforcement against illegal robocallers is needed.

Industry Has Demonstrated a Strong Commitment to the Deployment of SHAKEN/STIR

First, the industry-led Governance Authority for the SHAKEN standard was established last year under The Alliance for Telecommunications Industry Solutions (ATIS), the standards body coordinating industry implementation of the SHAKEN protocol. ATIS will identify the Policy Administrator in May, that will oversee the day-to-day operations of the SHAKEN standard. In short, industry is swiftly moving to implement this important call authentication technology. Once implemented, the

ability of illegal robocallers to spoof caller-ID information will be significantly reduced, while consumer knowledge about the validity of incoming calls will increase.

Central to this effort is the development of the separate SHAKEN and STIR standards and best practice implementations. While deployment of the SHAKEN and STIR standards is not a panacea to the robocall problem, these standards should improve the reliability of the Nation's communications system by better identifying legitimate traffic. The deployment of the SHAKEN standard will also facilitate the ability of stakeholders (such as USTelecom's ITB Group) to identify illegal robocalls and the sources of untrustworthy communications.

There is strong industry commitment to the deployment of the SHAKEN and STIR standards. Numerous voice providers—representing the wireless, wireline and cable industries—have committed to deploying the SHAKEN and STIR standards within their respective networks. These include commitments from several companies with nationwide wireless coverage, as well as several large facilities based voice providers.¹ While there are some differences in the specific timelines to deployment of the SHAKEN and STIR standards, and deployment depends on the timely and practical availability of vendor network upgrades and applications, the commitments generally reflect deployments starting in 2018, with most targeting deployments in their IP networks as soon as the end of 2019.

In addition, the Call Authentication Trust Anchor Working Group (CATA WG) of the North American Numbering Council (NANC) completed its work last year to investigate a variety of issues associated with the SHAKEN/STIR system.² Testing of the new technology and products is well advanced. Just last month, Comcast and AT&T successfully verified authentication of calls between their separate networks, and Verizon announced the first exchange of STIR/SHAKEN-enabled calls to and from wireless customers.

After issuing its report to the FCC, the NANC CATA WG also selected a Governance Authority to establish the policies for the SHAKEN certificate management framework. The Governance Authority—ATIS—has moved forward with its work. The Board of Directors for the Governance Authority was selected last year, and includes representatives from a broad range of industry constituencies, including large and small voice providers, as well as a diversity of network providers. The diversity and commitment of the Governance Authority Board of Directors will help to facilitate a controlled and productive deployment of the SHAKEN standard.

An Increasing Number of Robocall Mitigation Tools are Available to Consumers Across Multiple Voice Platforms, Including TDM

Today, a broad range of voice providers, independent application developers and a growing number of diverse companies are offering services that can help Americans reduce unknown and potentially fraudulent calls. While these tools are not a panacea to the robocall problem, they are an important component that empowers consumers with the increased ability to better identify and/or block illegal or unwanted robocalls. Of particular note, an increasing number of robocall mitigation tools are being deployed by facilities-based providers themselves.

For example, AT&T has launched its 'Call Protect' service that allows customers with iPhones and HD Voice enabled Android handsets to automatically block suspected fraudulent calls. AT&T also offers AT&T Digital Call Protect for IP wireline phones.³ When the app is installed and set up, AT&T will automatically block fraudulent calls, warn of suspected spam calls, and allow consumers to block unwanted calls from a specific number for free.

In addition, last year, Verizon launched its Spam Alerts service which provides its wireline customers who have Caller ID—whether they are on copper or fiber—with enhanced warnings about calls that meet Verizon's spam criteria by showing the term "SPAM?" before a caller's name on the Caller ID display. Verizon's Spam Alerts feature utilizes TNS's Call Guardian and Neustar's Robocall Mitigation solution to proactively identify illegal robocalls and other fraudulent caller activity with more accuracy. By using existing Caller-ID technology, the service empowers consumers to better decide if they should answer a particular call. Verizon has also rolled out spam alerting and call blocking tools to wireless customers whose smartphones support these features.

¹ See e.g., FCC website, *Combating Spoofed Robocalls with Caller ID Authentication*, (available at: <https://www.fcc.gov/call-authentication>) (visited April 9, 2019).

² See, Report on Selection of Governance Authority and Timely Deployment of SHAKEN/STIR NANC Call Authentication Trust Anchor Working Group (available at: http://nanc-chair.org/docs/mtg_docs/May_18_Call_Authentication_Trust_Anchor_NANC_Final_Report.pdf) (visited April 8, 2019).

³ See, AT&T website, AT&T Mobile Security & Call Protect (available at: <https://www.att.com/features/security-apps.html>) (visited April 8, 2019).

Carriers are also deploying a variety of additional tools across their TDM and IP networks, including “anonymous call rejection” services that block callers who intentionally mask their phone numbers and “no solicitation” services that make unidentified callers go through a screening step before ringing. Numerous service providers have worked with or are currently working with Nomorobo to facilitate their customers’ ability to use that third-party blocking service, such as Verizon’s “one click” solution that simplifies customers’ ability to sign up for the service. In addition, the company Metaswitch also provides a robocall blocking service that supports all voice infrastructures and switches, from legacy Class 5 TDM to Metaswitch’s pure VoIP systems.⁴

In the wireless arena, the number of scoring and labelling analytics tools for consumers has exploded. In 2016 there were approximately 85 call-blocking applications available across all platforms, including several offered by carriers to their customers at no charge. By October, 2018, there were over 550 applications available, a 495 percent increase in call blocking, labeling, and identifying applications to fight malicious robocalls. The diversity in tools across multiple platforms demonstrates industry’s commitment to empower consumers, regardless of the type of network utilized by their chosen voice service provider.

Industry Traceback Efforts are Crucial to Combatting the Scourge of Illegal Robocalls

An equally important tool for reducing illegal robocalls is a robust traceback process with vigorous and consistent enforcement action. Since 2016, USTelecom has led the 26-member ITB Group whose members are committed to identifying the source of illegal robocalls, and working with law enforcement to bring these illegal perpetrators to justice. The 2017 Strike Force Report contains a detailed overview of the Traceback Group, and its general structure and operations.⁵

There are currently twenty-six members of the ITB Group, which includes traditional wireline phone companies, wholesale carriers, wireless providers, and cable companies. The membership also includes foreign carriers (*e.g.*, Bell Canada), and non-traditional voice providers (*e.g.*, Google and YMax).

Since late 2017, USTelecom has been making enforcement referrals to the FCC and the FTC. This cooperation between industry and government can help to administratively streamline the enforcement efforts of both the FCC and the FTC. The Communications Act permits voice providers to share customer proprietary network information (CPNI) in order to protect their customers and/or networks, enabling USTelecom’s ITB Group to quickly and efficiently identify the path of calls under investigation.⁶

This in turn, means that neither the FCC nor the FTC must go through the time-consuming process of issuing subpoenas to each and every provider in the call path—instead, they can focus such efforts only on those upstream providers that have declined to cooperate with the efforts of the Traceback Group. Indeed, just last year, the FCC acknowledged that USTelecom’s manual traceback process had reduced the time necessary for the agency to conduct its own traceback investigations from “months to weeks.”⁷

The most significant development regarding USTelecom’s ITB Group is the last year’s transition of USTelecom’s its manual traceback process to one that is largely automated. The automated process is expected to produce even greater efficiencies for both ITB Group tracebacks, as well as subsequent investigations by the FCC and the FTC.

While numerous providers have joined USTelecom’s ITB Group, and many others cooperate in good faith, too many upstream carriers refuse to cooperate. This not only prevents the ITB Group from identifying the true origin of these malicious calling events, but it makes subsequent law enforcement investigations more time con-

⁴ See, Metaswitch website, Robocall Blocking Service, (available at: <https://www.metaswitch.com/solutions/fixed-line-solutions/robocall-blocking-service>) (visited April 8, 2019).

⁵ See, Ex Parte Notice, from USTelecom, CTIA, ATIS, and ACT—The App Association, CG Docket No. 17–59, pp. 19–23 (submitted April 28, 2017) (available at: <https://ecfsapi.fcc.gov/file/10428413802365/Ex%20Parte-Strike-Force-Report-2017-04-28-FINAL.pdf>) (visited Sept. 24, 2018).

⁶ Section 222(d)(2) of the Communications Act permits telecommunications carriers to share, disclose and/or permit access to, Customer Proprietary Network Information in order to “protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.” See, 47 U.S.C. § 222(d)(2).

⁷ See, Letter from Rosemary Harold, Chief, Enforcement Bureau, and Eric Burger, Chief Technology Office, to Jonathan Spalter, President and CEO, USTelecom, p. 1, November 6, 2018 (available at: <https://docs.fcc.gov/public/attachments/DOC-354942A2.pdf>) (visited April 8, 2019).

suming. Given the crucial role of traceback in mitigating illegal robocalls, Congress and Federal enforcement agencies should strongly encourage voice providers to participate in traceback efforts.

Criminal Enforcement of Illegal Robocallers is Needed

Finally, while current Federal enforcement efforts are laudatory, they are mostly limited to civil enforcement. There is an acute need for aggressive criminal enforcement against illegal robocallers at Federal and state levels. Criminal syndicates engaged in illegal robocalling activity should be identified, targeted and brought to justice through criminal enforcement efforts. We applaud the TRACED Act's facilitation of these criminal enforcement efforts.

USTelecom applauds government efforts in the robocall fight, particularly the ongoing civil enforcement actions by the FCC and FTC. For example, the FCC last year, approved a \$120 million fine against one illegal robocaller responsible for generating billions of calls. The FTC also continues to engage in a series of complementary enforcement actions that target the worst of the worst bad actors in this space.

These civil enforcement actions brought by both agencies send a strong and powerful message to illegal robocallers that they will be located and brought to justice. USTelecom and its industry partners stand ready to further assist in these efforts to bring these bad actors to justice. Indeed, the ultimate goal of USTelecom's ITB Group is to identify the source of the worst of these illegal calls, and further enable further enforcement actions by Federal agencies.

While current Federal enforcement efforts are laudatory, they are mostly limited to civil enforcement. As a result, bad actors currently engaged in criminal robocall activities are—at most—subject only to civil forfeitures. USTelecom believes there is an acute need for coordinated, targeted and aggressive criminal enforcement of illegal robocallers at the Federal level and in conjunction with state attorneys general. Given the felonious nature of their activities, criminal syndicates engaged in illegal robocalling activity should be identified, targeted and brought to justice through criminal enforcement efforts.

To further underscore the need for criminal enforcement of illegal robocallers, the FTC announced this month that it reached a settlement with four separate operations, two of which allegedly facilitated “billions of illegal robocalls to consumers nationwide.”⁸ Of particular note in the FTC's announcement is the acknowledgment that two of the individuals named in the complaint are “recidivist robocallers,” who were each targeted in FTC lawsuits brought in 2017 and 2018. In fact, the FTC noted that certain of these recidivist robocallers were “permanently banned from making robocalls, or assisting others in doing so.”⁹

It is clear that more than civil enforcement is necessary to address illegal robocalling. We believe, in particular, that U.S. Attorneys' offices across the country should prioritize enforcement where Federal statutes, such as the Truth in Caller ID Act, are implicated, and should work closely with the FCC and FTC and international partners in enforcement cases, particularly when the calls originate outside of the United States.

Another possible vehicle could be the Task Force on Market Integrity and Consumer Fraud, comprised of a number of divisions of the Department of Justice (DOJ), including the FBI and various United States Attorney's Offices as designated by the Attorney General.¹⁰ The focus of the Task Force is to investigate and prosecute consumer and corporate fraud that targets the public and the government, with a particular emphasis on the elderly, service members and veterans. Given its focus on fraud directed towards consumers, as well as the inclusion of criminal enforcement agencies, the Task Force could be an ideal vehicle for pursuing criminal enforcement against illegal robocallers. The TRACED Act's establishment of an interagency working group under the Attorney General, will also further enhance Federal and state criminal law enforcement efforts against illegal robocallers.

While a holistic approach is essential to broadly address the issue of robocalls, robust enforcement efforts targeting illegal robocallers are most effective since they address the activity at the source. For example, consumer-centric tools may stop a series of calls from reaching tens of thousands consumers, whereas root-cause removal stops millions of calls from ever being dialed.

⁸ See, FTC Press Release, *FTC Crackdown Stops Operations Responsible for Billions of Illegal Robocalls*, March 26, 2019 (available at: <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-crackdown-stops-operations-responsible-billions-illegal>) (visited April 8, 2019).

⁹ *Id.*

¹⁰ See, White House Executive Order, *Executive Order Regarding the Establishment of the Task Force on Market Integrity and Consumer Fraud*, July 11, 2018 (available at: <https://www.whitehouse.gov/presidential-actions/executive-order-regarding-establishment-task-force-market-integrity-consumer-fraud/>) (visited July 20, 2018).

Senator THUNE. Thank you, Mr. Rupy.
Ms. Saunders.

**STATEMENT OF MARGOT FREEMAN SAUNDERS, COUNSEL,
NATIONAL CONSUMER LAW CENTER**

Ms. SAUNDERS. Chairman Thune, Senator Schatz, Members of the Subcommittee, I appreciate the opportunity today to testify on the importance of maintaining the integrity of the Telephone Consumer Protection Act as a primary tool to address unwanted robocalls.

My testimony is on behalf of the low-income clients of the National Consumer Law Center and five other national consumer organizations.

We very much appreciate Chairman Thune and Senator Markey's leadership in this area by sponsoring the TRACED Act. We want to talk about some of the other things that need to be done.

Last month, Americans received 5.2 billion robocalls, a phenomenal 370 percent increase since 2015. The data illustrates that the majority of robocalls are not overt scams. They are calls made by American corporations or on behalf of American corporations selling products and collecting debts. These callers claim to be the victims of a TCPA crisis but it's a crisis of their own making.

So-called legitimate businesses, often using lead generators who make the calls, are responsible for almost a billion telemarketing robocalls just last month to sell car insurance, health insurance, car warranties, home security systems, resort vacations, and more.

If the rate of telemarketing non-scam calls continues at the current pace, in 2019, there will be over 11 billion non-scam telemarketing robocalls in the United States.

In addition to telemarketers, major American corporations make an enormous number of robocalls to collect debts. Many debt collection calls are made to people who are behind in their payments but the calls are made dozens of times a week in an attempt to harass people into paying. Other robocalls are made to people who have nothing to do with the debts. Examples of these harassing debt collection calls are in my testimony.

A significant reason for the escalation of robocalls is that many of the offending callers anticipate a caller-friendly response from the FCC from their many requests to the FCC to loosen restrictions on robocalls. This is evidenced by the spike in calls that occurred right after last year's decision by the D.C. Circuit Court in *ACA International v. FCC* illustrated on Page 5 of my testimony. That decision set aside a 2015 Order on the question of what calling systems are included in the TCPA's definition for an automated dialer.

The calling industry's response to this decision is perfectly illustrated by the request by the U.S. Chamber, joined by 16 major national industries, requesting the FCC to loosen restrictions on robocalls.

The TCPA is straightforward. It does not prohibit robocalls. It simply requires expressed consent before calls are made to cell phones with an automated dialer or a pre-recorded voice or before telemarketing calls are made to residences.

The law is not out of date, as some claim. The problem is that the callers want to make robocalls without worrying about having

this consent and they do not want to stop calling consumers when the consumers say stop.

If their requests are granted, the number of automated calls will skyrocket and there will be no protections against automated texts.

Finally, the rules to stop unwanted robocalls must remain privately enforceable. Individual consumers harmed by invasive calls must be able to obtain redress for that harm and private enforcement through class actions is essential to deter violations.

FCC enforcement unfortunately does not accomplish this goal. *The Wall Street Journal* reported a few weeks ago that the FCC had collected only 6,700 in fines against violators of the TCPA.

I'd be happy to answer any questions. Thank you.

[The prepared statement of Ms. Saunders follows:]

PREPARED STATEMENT OF MARGOT FREEMAN SAUNDERS, SENIOR COUNSEL,
NATIONAL CONSUMER LAW CENTER

Chairman Thune, Senator Schatz, and Members of the Committee, I appreciate the opportunity to testify today on the importance of maintaining the integrity of the Telephone Consumer Protection Act (TCPA) for consumers. I provide my testimony here today on behalf of the low-income clients of the *National Consumer Law Center (NCLC)*, and on behalf of *Consumer Action*, *Consumer Federation of America*, *National Association of Consumer Advocates*, *Public Knowledge*, and *U.S.PIRG*.

I. Introduction

Americans were subjected to 5.2 billion robocalls last month—an increase by a phenomenal 370 percent just since December 2015.¹ This explosion of robocalls invades our privacy, distracts us, disrupts our lives, costs us money, and undermines the utility of the American telephony system.

The explosion of robocalls is not just a problem of calls that are overt scams, such as calls made by criminals to steal identities or defraud people into making payments to avoid spurious threats. Major American corporations, many of which are household names, are a large part of the cause of the proliferation of robocalls that plague Americans every day. These corporations are the defendants in actions in the Federal courts in most every state, and more tellingly, they are generally the leaders in the effort currently waging in the halls of the Federal Communications Commission (FCC) to weaken critical interpretations of the Telephone Consumer Protection Act (TCPA).² These callers are claiming to be the victims of a TCPA crisis—but it is a crisis of their own creation. The primary purpose of this testimony is to illustrate this, and ask this Congress to protect consumers, not robocallers.

The TCPA is straightforward and clear. It does not prohibit all robocalls. The law and the TCPA regulations that implement it simply require two main things with respect to robocalls and robotexts. First, a call or text can be made to a cell phone using an automatic telephone dialing system (ATDS) or a prerecorded voice only with the prior express consent of the person called, and the consent must be in writing if it is a telemarketing call. Second, prior express written consent is also required for any prerecorded telemarketing call to a residential line. (There are exceptions for calls relating to an emergency or to collection of a debt owed to the United States.) The elegance of this construct is that it gives us—the people *being* called—control over our own phones.

The current problem is not with the TCPA. (It is not out-of-date as some claim.) The problem is that the callers want to make the robocalls without worrying about having that consent. And they do *not* want to stop calling when consumers say “stop.”

In this testimony I will first address the fact that it is major American corporations that are responsible for most of the robocalls we all deplore, and discuss why the number of calls is escalating so alarmingly. I will then discuss several particular problems in enforcing the TCPA, with recommendations for what Congress and the Federal Communications Commission (FCC) should do to resolve them.

¹See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed Apr. 4, 2019).

²47 U.S.C. § 227.

II. Major American Corporations Are Responsible for the Majority of Robocalls

The majority of robocalls are made by, or at the behest of, *major American corporations*. Large, respected national corporations with whom many of us do business every day are responsible for hundreds of millions of telemarketing robocalls every month. The creditors with whom we all do business regularly make an equivalent number of unwanted robocalls to collect debts. *The majority of robocalls made every day to our home phones and our cell phones are not overt scam calls, but calls made by so-called “legitimate businesses.”*³

Major American corporations make directly—or are responsible for—a vast number of intrusive, annoying, repeated telemarketing calls to our landlines and cell phones—selling car insurance,⁴ health insurance,⁵ car warranties,⁶ home security systems,⁷ resort vacations,⁸ and more. Some of these calls push products and services that are shoddy, overpriced, or of dubious value, and some may push real bargains, but all of these calls annoy us, interrupt us, and invade our privacy. *If the rate of telemarketing calls continues at the current pace, in 2019 there will be over \$11.2 billion telemarketing robocalls made in the United States.*

There are dozens of cases against corporate defendants seeking redress for tens of millions of unwanted and illegal telemarketing robocalls. Just a few of these cases holding American corporations responsible for making hundreds of millions of telemarketing calls include:

- *Insurance: Smith v. State Farm Mut. Auto. Ins. Co.*⁹ In this case, the court held State Farm liable for the TCPA violations of a lead-generator marketing company it had used to market its insurance products. Calls were made to over 80,000 consumers.
- *Home Security Systems: Mey v. Monitronics Int’l, Inc.*¹⁰ The named-plaintiff had received over 19 calls from a broker calling to sell home security services, even though she had listed her telephone number on the national Do Not Call Registry. These telemarketing calls were made by lead generators on behalf of a Monitronic’s dealer. Calls were made to more than 7.7 million phone numbers. Monitronics claimed that it was not responsible for these calls made by others to sell its services.
- *Cruises: McCurley v. Royal Seas Cruises, Inc.*¹¹ After the cruise line claimed it was not responsible for the calls made by lead generators, who referred interested consumers to Royal Seas after telemarketing calls, the court allowed the case to proceed as a class action challenging the legality of 634 million calls¹² to the cell phones of 2.1 class members¹³ in violation of the TCPA.
- *Bank: Ott v. Mortgage Investors Corp. of Ohio, Inc.*¹⁴ A mortgage lender robocalled over 3.5 million people to push them into refinancing their mortgages with loans guaranteed by the U.S. Department of Veterans Affairs.
- *Film Studio: Golan v. Veritas Entertainment, L.L.C.*¹⁵ A film studio made over 3 million unsolicited calls as part of a six day telemarketing campaign to promote the film “Last Ounce of Courage.”

³ Averaging the monthly totals for the different types of calls on YouMail’s Robocall Index indicates that according to their analysis, 37 percent of robocalls are scams. The rest of the calls are 23 percent debt collection calls (including payment reminders), 18 percent telemarketing, and 22 percent alerts and reminders.

⁴ See *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765 (N.D. Ill. 2014).

⁵ See *Sullivan v. All Web Leads, Inc.*, 2017 WL 2378079 (N.D. Ill. June 1, 2017). See also *Northrup v. Innovative Health Ins. Partners, L.L.C.*, 329 F.R.D. 443 (M.D. Fla. 2019) (text messages).

⁶ See *Mey v. Enterprise Fin. Group*, Case No. 2:15-cv-00463 (M.D. Fla. filed Aug. 3, 2015).

⁷ See *In re Monitronics Int’l Inc.*, Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Feb. 28, 2014). See also *Braver v. Northstar Alarm Servs., L.L.C.*, 329 F.R.D. 320 (W.D. Okla. 2018) (regarding 75 million prerecorded voice calls to sell home security systems).

⁸ See *Glasser v. Hilton Grand Vacations Co., L.L.C.*, 341 F. Supp. 3d 1305 (M.D. Fla. 2018), appeal to 11th Circuit pending.

⁹ 30 F.Supp.3d 765 (N.D.Ill.2014).

¹⁰ 959 F. Supp. 2d 927 (N.D. W. Va. 2013). See also *In re Monitronics Int’l, Inc.*, Telephone Consumer Prot. Act. Litig., Case No. 1:13-md-02493 (N.D. W. Va. filed Aug. 31, 2017) (settlement agreement).

¹¹ 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019).

¹² *Id.* at *9.

¹³ *Id.* at *10.

¹⁴ 65 F. Supp. 3d 1046 (D. Or. 2014).

¹⁵ 2017 WL 2861671 (E.D. Mo. July 5, 2017).

- *National Cell Provider: Hageman v. AT&T Mobility L.L.C.*¹⁶ A large telemarketing campaign conducted by AT&T that pushed its wireless service produced a class action settlement. Many of these calls were repeat calls to the same consumers: the plaintiff received over 53 automated, prerecorded calls on his cell phone in less than two years.
- *Business Services Provider: Thomas v. Dun & Bradstreet Credibility Corp.*¹⁷ Repeated telemarketing calls, even after requests to stop, to advertise business services to over 1 million individuals.

In addition to telemarketers, major American corporations make an enormous number of robocalls to *collect debts*. Many of these callers repeatedly and flagrantly violate the consumer protections of the TCPA, simply paying off consumers when they are sued, and then continuing their patterns of calling. Many debt collection calls are made to people who owe money but are behind on their payments, but many others are made to people who have nothing to do with the debts.

Below are just a few examples of problematic debt collector robocallers. These cases all involve hundreds—if not thousands—of calls, and all involve multiple calls after repeated requests from the consumer to stop calling.

1. *Robertson v. Navient Solutions*.¹⁸ Shortly after Ms. Robertson acquired a Certified Nursing Assistant certificate, which she had funded with student loans, she experienced health problems, and also had to care for her dying father. She was unable to work, and applied for disability benefits. She received a forbearance on her Federal student loans, but not for her private student loans. Ms. Robertson made payments when she was able. However, payments did not stop the calls. *In total, Navient called Ms. Robertson a total of 667 times, and called 522 times after she told them to stop calling.* Navient would call back the same day even when Ms. Robertson told the collection agent that she would not have any money to pay until the following month.
2. *Gold v. Ocwen Loan Servicing, L.L.C.*¹⁹ The plaintiff consented to being contacted about his mortgage debt, and answered several collection calls, but then asked for the calls to stop. However, the servicer *called his cell phone at least 1,281 times between April 2, 2011 and March 27, 2014, despite repeated requests to stop.*
3. *Montegna v. Ocwen Loan Servicing, L.L.C.*²⁰ The servicer called the plaintiff on his cell phone at least 234 times, even after he requested that the calls stop.
4. *Todd v. Citibank*.²¹ Some time in January 2016, the bank began calling the plaintiff's cell phone. The 350 calls were *often made twice a day*, even after repeated requests to stop calling.²²
5. *Karl Critchlow v. Sterling Jewelers Inc.* (aka Jared).²³ The complaint alleges that Jared robocalled Mr. Critchlow more than 300 times, several times a day and on back-to-back days, even after he begged for the calls to stop, saying he simply did not have the money to pay the debt. The case was settled with a confidentiality agreement.

There are hundreds of similar cases filed in courts around the Nation every month. Most of these are settled, and in return for the settlement consumers are required to sign *confidentiality clauses*, which prohibit either them or their lawyers from disclosing the details of the settlements. These confidentiality settlements prevent reviewing courts from evaluating the repeated and persistent nature of the callers' behavior, and shields them from liability for systematic practices that violate the TCPA.

III. Why Are the Calls Increasing?

A significant reason for the escalation in robocalls is that many callers are anticipating a caller-friendly response to the many requests they have submitted to the FCC to *loosen* restrictions on robocalls. This is evidenced by the spike in calls that occurred right after last year's decision in March 2018 by the D.C. Circuit Court

¹⁶2015 WL 9855925 (D. Mont. Feb. 11, 2015).

¹⁷Case No. 2:15-cv-03194 (C.D. Cal. filed Apr. 28, 2015).

¹⁸*Robertson v. Navient Solutions, Inc.*, Case No.: 8:17-cv-01077-RAL-MAP (M.D. Fla. filed May 8, 2017).

¹⁹2017 WL 6342575 (E.D. Mich. Dec. 12, 2017).

²⁰2017 WL 4680168 (S.D. Cal. Oct. 18, 2017).

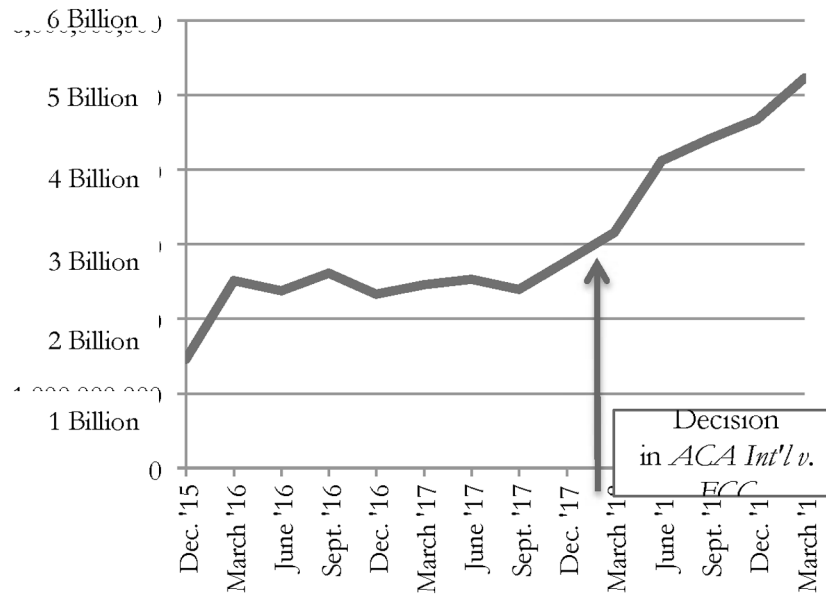
²¹2017 WL 1502796 (D.N.J. Apr. 26, 2017).

²²*Id.* at *8.

²³Case No. 8:18-cv-00096 (M.D. Fla. filed Jan. 12, 2018).

in *ACA International v. F.C.C.*²⁴ That decision set aside a 2015 FCC order on the question of what calling technology is included in the definition of an automatic telephone dialing system (ATDS),²⁵ and raised the specter that the term might be interpreted not to cover the autodialing systems that are currently used to deluge cell phones with unwanted calls.

Increase in Robocalls December 2015 through March 2019



The calling industry's response to this decision is perfectly illustrated by the request of the U.S. Chamber Institute for Legal Reform (U.S. Chamber),²⁶ joined by sixteen major national industries,²⁷ to the FCC to *loosen* restrictions on robocalls. *It is essential to understand, that if the request of the U.S. Chamber were to be granted, the scourge of robocalls will skyrocket.*

Additionally, losing defendants in judicial actions typically seek redress from the FCC by asking for retroactive waivers for the liability they face after courts have found that they have made millions of robocalls without consent. And there are dozens of petitions currently pending at the FCC asking for special interpretations or exemptions, which seek to allow industries to ignore the basic rule of the TCPA that express consent must be provided before automated calls can be made to our cell phones. We ask you to encourage the FCC to hold the line and enforce the TCPA. Allowing waivers and exemptions undermines compliance, *and leads to increased unwanted robocalls.*

²⁴ 885 F.3d 687 (D.C. Cir. 2018)

²⁵ 47 U.S.C. § 227(a)(1).

²⁶ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, U.S. Chamber Institute for Legal Reform, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018), available at <https://ecfsapi.fcc.gov/file/105112489220171/18050803-5.pdf>.

²⁷ These industries include: ACA International, American Association of Healthcare Administrative Management, American Bankers Association, American Financial Services Association, Consumer Bankers Association, Consumer Mortgage Coalition, Credit Union National Association, Edison Electric Institute, Electronic Transactions Association, Financial Services Roundtable, Insights Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, RestaurantLaw Center, and Student Loan Servicing Alliance.

IV. What Should Be Done to Rein in Robocalls?

To rein in robocalls, five steps are necessary:

1. We need to be able to identify who the caller is when calls come in to our phones.
2. The TCPA's broad scope must be upheld so that it applies to the unwanted automated calls Americans receive.
3. The rules must give us the ability to limit and control the calls to our phones.
4. Sellers must not be allowed to hide behind the third parties they hire.
5. The rules must be enforceable in a way that provides a) individuals harmed with the ability to obtain redress for their harms, and b) incentives to the callers to comply with the law.

A. Identifying Who Is Calling

To decide whether to answer the phone one must know who is calling. This requires that both the name displayed—if a name is displayed—and the phone number displayed be accurate.

There is a new technology, which the telecom industry has been developing, known as SHAKEN/STIR, for better verifying the accuracy of caller ID information.²⁸ And the TRACED Act,²⁹ which your Committee approved last week, would expedite the implementation of this technology. NCLC joined with other consumer groups in strongly endorsing this legislation.

Even though this legislation takes an important and welcome step, it is important for us all to realize that the work will not be over, even as to rooting out spoofed calls. In its current form, as I understand it, SHAKEN/STIR would capture only phone numbers that can be reliably identified as not belonging to the caller. It will thus not catch situations in which a robocaller purchases actual numbers, perhaps in the thousands, from a legal source, and then uses those numbers to make calls that mask the robocaller's real identity. Nor is it apparent how it would, or could, capture calls originating from carriers overseas that have not implemented the technology.

Ultimately, if we can't actually identify who the real caller is, we don't have good information about whether to answer the phone.

The TCPA contains this provision:

(c) It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information *with the intent to defraud, cause harm, or wrongfully obtain anything of value*, unless such transmission is exempted pursuant to paragraph (3)(B).³⁰

This provision makes caller ID spoofing illegal *only* if the spoofing is done with wrongful intent. This is a very difficult standard to prove. This provision does not prevent telemarketers and debt collectors from spoofing phone numbers.

Recommendations:

- 1) Congress should pass the TRACED Act, S. 151;
- 2) The TCPA should be amended specifically to prohibit the transmission of misleading or inaccurate caller ID information, except in limited circumstances necessary for law enforcement or the protection of the callers (but caller ID suppression should still be permissible); and
- 3) Telephone service providers should be required to prevent the connection of calls (or texts) for which the caller-ID is not attached to a known customer, whose name and address matches the originating call provider's information for that number.

²⁸ See Press Release, Federal Communications Commission, Chairman Pai Calls on Industry to Adopt Anti-Spoofing Protocols to Help Consumers Combat Scam Robocalls (Nov. 5, 2018), available at <https://docs.fcc.gov/public/attachments/DOC-354933A1.pdf>.

²⁹ This bill, sponsored by U.S. Sens. John Thune (R-S.D.) and Ed Markey (D-Mass.), is the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, S. 151.

³⁰ 42 U.S.C. § 227(e)(1) (emphasis added).

B. The TCPA Must Be Interpreted Broadly to Apply to the Calling Systems Used Today

The TCPA is a remedial statute that must be liberally interpreted to further its purpose of protecting consumers' privacy and stopping unwanted, intrusive calls.³¹ Given this mandate, it would be a grave error to interpret the statute's definition of "automatic telephone dialing system"³² (ATDS or "autodialer") narrowly, resulting in effective nullification of the prohibition against autodialed calls to cell phones without the called party's consent. Yet that is exactly what much of corporate America is applying heavy pressure on the FCC to do.

The TCPA defines an ATDS as equipment that "has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."³³ In our view, and the view of a number of courts,³⁴ this definition encompasses both systems that store numbers and dial them automatically, and systems that generate numbers and dial them automatically, and only the latter must use a random or sequential number generator. Other courts, however, take the position that a system must use "a random or sequential number generator" to qualify as a covered ATDS under the TCPA.³⁵

The issue is of great importance, because robodialing and robotexting technology are what enables so many billions of calls to be made every year. Yet many of the calling systems in use today do not call numbers randomly. Instead, they are "predictive dialers" that generate call lists from a database of numbers, and then robodial or robotext those numbers. For example, a telemarketer may purchase a list of consumers who have proven to be easy marks in the past; a debt collector will call numbers believed to belong to debtors; or a seller may buy a list of consumers who are believed to be interested in a certain type of product. If the definition of ATDS were interpreted so narrowly that it did not apply to dialing systems that automatically dial from lists—those systems that are in use today—there would be no way to stop this onslaught.

A Ninth Circuit decision, *Marks v. Crunch San Diego, L.L.C.*,³⁶ is the leading decision for an interpretation of ATDS that encompasses the dialers used today. After a meticulous analysis of the statutory language, the Ninth Circuit determined that an ATDS includes systems that simply store and automatically dial numbers.³⁷

Robocallers have claimed that the *Marks* decision cannot be correct because its interpretation of the ATDS definition could sweep in all smartphones, triggering one of the concerns that led the 1D.C. Circuit, in *ACA International v. FCC*, to set aside the FCC's interpretation of the definition. However, this is not the case.³⁸

³¹ See, e.g., *Parchman v. SLM Corp.*, 896 F.3d 728, 738–739 (6th Cir. 2018); *Daubert v. NRA Grp., L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–48 (9th Cir. 2017).

³² Senators Markey, Menendez, Gillibrand, Warren, Wyden, and Cortez Masto urged the FCC to issue "a comprehensive definition of the term autodialer. . . ." (June 26, 2018) available at <https://www.markey.senate.gov/imo/media/doc/autodialer-percent20letter.pdf>.

³³ 47 U.S.C. § 227(a)(1).

³⁴ *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041 (9th Cir. 2018). *Accord* *Evans v. Pa. Higher Educ. Assistance Agency*, 2018 WL 6262637 (N.D. Ga. Oct. 11, 2018). See also *Getz v. DirecTV, L.L.C.*, F. Supp. 3d , 2019 WL 850254 (S.D. Fla. Feb. 20, 2019); *Adams v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 6488062 (S.D. Fla. Oct. 29, 2018); *Davis v. Diversified Consultants Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014); *Echevarria v. Diversified Consultants, Inc.*, 2014 WL 929275 (S.D.N.Y. Feb. 28, 2014), *adopted by* 2014 WL 12783200 (S.D.N.Y. Apr. 22, 2014).

³⁵ See, e.g., *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927 (N.D. Ill. 2018). *Accord* *Thompson-Harbach v. USAA Fed. Sav. Bank*, 2019 WL 148711 (N.D. Iowa Jan. 9, 2019). See also *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159 (N.D. Ill. Nov. 29, 2018); *Gary v. Trueblue, Inc.*, 346 F. Supp. 3d 1040 (E.D. Mich. 2018).

³⁶ 904 F.3d 1041 (9th Cir. 2018).

³⁷ *Id.* 904 F.3d at 1051. Among other rationales, the court pointed out that the TCPA does not prohibit all calls made with an ATDS: it allows ATDS calls to be made when a party has consented to receive them. If the definition included only systems that dial telephone numbers produced randomly or sequentially from thin air, rather than dial from a stored database of inputted numbers, the prohibition of autodialed calls to consumers who had not consented to receive them would be meaningless. Autodialed calls would always reach parties who had not consented, because the calls would go to numbers that had been generated from thin air. Callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever. Only if the prohibition encompasses calls made to a stored list of numbers, for which the caller will know whether it has obtained consent, does the prohibition make sense. As the Ninth Circuit stated, "[t]o take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." *Id.*

³⁸ NCLC has filed numerous comments with the FCC on the proper interpretation of autodialer under the TCPA, as well as the more specific question raised by the various cases,

Smartphones—just like all computers—may have the *potential* capacity to be part of a system that could be an ATDS. But Chairman Pai has taken the position that it is present capacity, not potential capacity, that must be shown, and smartphones are not manufactured with any inherent features that make them ATDSs. Unlike predictive dialers, they cannot make simultaneous calls to a batch of numbers automatically from a stored list, nor do they dial numbers while no human being is on the line, which creates the problem of “dead air” and abandoned calls inherent to predictive dialers.³⁹ Calls are made from a smartphone only when the caller who is going to speak to the called party scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number to be called). That capability does not make the smartphone an ATDS. As Chairman Pai has noted, the Commission has already explicitly held that “speed dialing” does not fall within the definition of an ATDS.⁴⁰

The Third Circuit’s decision in *Dominguez v. Yahoo, Inc.*⁴¹ is another example of an interpretation that could undermine the scope of the TCPA. In that case, Yahoo’s completely automated text messaging system sent 27,809 unwanted text messages to a consumer.⁴² The previous owner of the number had subscribed to an e-mail-notification service offered by Yahoo, which sent a text message to the former owner’s phone number every time an e-mail was sent to the former owner’s linked Yahoo e-mail account. The consumer tried to halt the messages by replying “stop” and “help” to some texts. When he asked Yahoo’s customer service for help, he was told that the company could not stop the messages, and that, as far as Yahoo was concerned, the number would always belong to the previous owner. The consumer then sought help from the FCC. In a three-way call with the consumer and Yahoo, the FCC tried to convince Yahoo to stop the messages, but was similarly unsuccessful. After receiving 27,809 text messages from a machine over seventeen months, the consumer brought suit under the TCPA. Only after the case was filed did the messages finally stop.⁴³ Alarmingly, the Third Circuit ruled that the system was not an ATDS because the consumer did not prove that it had the present capacity to generate random or sequential numbers. This ruling, if accepted by other courts or the FCC, would leave every cell phone in America vulnerable to the same deluge of unstoppable text messages.

Perhaps the most brazen attempt to evade the TCPA’s protections against autodialed calls to cell phones is clicker agent calling systems. These systems are entirely automated, but insert a human “clicker agent” into the process. These human clicking agents do not participate in the calls, and simply have the job of repeatedly clicking a single computer button, which sends telephone numbers on an already-created list to an automated dialer in another locale. The seller then claims that the insertion of this human as an automaton means that the calls are

and the issue of whether smart phones are covered if the *Marks* decision prevails. See, e.g., Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision*, CG Dockets 02–278 and 18–152 (June 13, 2018) available at <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf>; Comments of National Consumer Law Center on the *Marks* decision (October 17, 2018) available at <https://ecfsapi.fcc.gov/file/1018245262122/NCLC%20Comments%20on%20Marks%20Decision.pdf>; *Ex Parte* on Smart Phones, (November 13, 2018) available at <https://ecfsapi.fcc.gov/file/11142097310498/ex%20parte%20on%20smartphones%20-%202011-13-18.pdf>.

³⁹ See *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 110, 114 (11th Cir. 2014).

⁴⁰ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8074 (F.C.C. July 2015) (Dissenting Statement of Commissioner Ajit Pai). See also *In Re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8776 (F.C.C. Oct. 16, 1992).

⁴¹ 894 F.3d 116 (3d Cir. 2018). Two other cases of uncontrolled technology resulting in a deluge of unwanted robocalls or texts are *Pagan v. Redwood Capital Group and Schuster v. Uber Technologies, Inc.* In *Gonzalez-Pagan v. Redwood Capital Group*, a local developer called Mr. Gonzalez-Pagan approximately 5,000 times for years, often making more than 50 calls a day on back-to-back days; even though Mr. Gonzalez-Pagan owed nothing to the developer and had no idea how it put his cell number in its robodialing campaign. The calls continued even after Mr. Gonzalez-Pagan drove to the defendant’s apartment complex and begged for the calls to stop. Over 500 calls were made even after the lawsuit was filed in Federal court. In *Schuster v. Uber Technologies, Inc.*, Mr. Schuster sued Uber for sending 1,050 text messages without consent and despite repeated requests to cease.

⁴² *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. at 121 (“Ultimately, Dominguez cannot point to any evidence that creates a genuine dispute of fact as to whether the E-mail SMS Service had the present capacity to function as an autodialer by *generating random or sequential telephone numbers* and dialing those numbers.” (emphasis added)).

⁴³ *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. at 370–71.

not governed by the TCPA, so they can be made without consent and the called party has no way to stop them.

If this position were accepted, the result for our ability to control unwanted calls to our cell phones would be profound. For example, a single seller, Hilton Grand Vacations Co., used a clicker agent system to make *56 million calls* to cell phones to sell vacation packages, and then claimed that the TCPA did not require consent.⁴⁴ And that is just one company. Allowing clicker agent calls to evade the TCPA would amount to an invitation to every telemarketer—both those pushing overt scams and those making less shady but equally intrusive calls—to make millions of calls without consent. Clicker agent systems not only result in mass unwanted automated calls to cell phones, but also produce the same problems of dropped calls and delays after answering the phone that calls made by all autodialers produce.⁴⁵

Consumer groups have asked the FCC to rule on these evasion efforts and clarify that systems which use human clicker agents to process phone numbers that are then automatically dialed are covered by the TCPA. However, the FCC has not yet issued a response.

Recommendation:

Congress should make clear to the FCC that the TCPA's definition of ATDS is intended to encompass the automated dialing systems in use today, and to reject the evasions that callers are attempting to devise.

C. The Rules Must Give Us Control Over Calls

The TCPA was written explicitly to protect Americans from the “scourge of robocalls” by giving consumers control over whether they receive robocalls. Congress did so by giving consumers the right to choose whether to consent—and implicitly to withhold or revoke that consent—to automated calls.

The calling industry has asked the FCC to issue a ruling that consent provided as part of a contract cannot be unilaterally revoked by the consumer.⁴⁶ Such a ruling would effectively eradicate the TCPA’s requirement for express consent for automated calls.

The D.C. Circuit’s decision in *ACA International* confirms the FCC’s conclusion in its 2015 Order⁴⁷ that consumers have the right to revoke consent.⁴⁸ However, the *ACA International* court did not take a position on whether the FCC had authority to determine that revocation of contractually provided consent might be limited by contract, because the issue was not before the court.⁴⁹

Most of the automated calls about which consumers complain are either telemarketing calls or debt collection calls.⁵⁰ For calls made by debt collectors, the FCC has explicitly allowed consent to be presumed whenever consent was provided in the original credit contract with the creditor or the seller. Those contracts are adhesion contracts, in which consumers have no bargaining power and no ability to change the terms. So it is already a stretch for the FCC to have said that consent for debt collection calls—which is required by statute to be *express*—can be *implied* when a consumer gives her telephone number to open a charge account in a store. Providing a telephone number when applying for credit hardly constitutes express consent to be contacted months or years later by a debt collector.⁵¹ Courts have stretched the notion of express consent even farther by holding that consent can be transferred

⁴⁴ *Glasser v. Hilton Grand Vacations Co., L.L.C.*, 341 F. Supp. 3d 1305 (M.D. Fla. 2018), *appeal to 11th Circuit pending*.

⁴⁵ According to the record in the case, Hilton’s documents included an illustration of the two systems side by side. Doc. 104–7, at 2. The two systems appear to be identical *except for* the addition of the superfluous clicker agent for the TCPA-covered calls.

⁴⁶ See, e.g., Comments of U.S. Chamber Institute for Legal Reform, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02–278 and 18–152, at 21, 27 (filed June 13, 2018), available at <https://ecfsapi.fcc.gov/file/1061348977655/ILR-U.S.%20Chamber%20TCPA%20Public%20Notice%20Comments.pdf>.

⁴⁷ See 2015 Order at 7993.

⁴⁸ *ACA International v. F.C.C.*, 885 F.3d 687, 709 (D.C. Cir. 2018).

⁴⁹ *Id.* at 710 (D.C. Cir. 2018) (emphasis added; citation omitted).

⁵⁰ See section II, *supra*, for more discussion about unwanted and unstopable debt collection calls.

⁵¹ “[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92–90, Report and Order, 7 F.C.C. Red. 8752, 8769 ¶31 (Oct. 16, 1992).

from the original creditor to a debt buyer, and then from the debt buyer to a collector it hires.⁵²

It would be a true overextension for the FCC to take the next step down the road to unlimited automated calls and hold that, once a consumer has provided her phone number in a contract, she could never stop a debt collector's automated calls by withdrawing that consent. One Second Circuit decision, *Reyes v. Lincoln Automotive Financial Services*,⁵³ erroneously holds that the consumer's consent is irrevocable when it is part of a binding contract. However, that decision fails to give appropriate weight to the FCC's 2015 Order ruling that, "[w]here the consumer gives prior express consent, the consumer may also revoke that consent."⁵⁴ The *Reyes* decision also mistakenly holds that no other circuit had addressed the question, when in fact several other circuit court decisions had upheld the consumer's right to revoke consent that had been given in a contractual context.⁵⁵

If revocation is not permitted, robocalls will be even more abusive and unstoppable. Debt collection callers comprise *nineteen of the top twenty robocallers* in the United States.⁵⁶ As detailed above, debt collection calls are among those calls that are routinely complained about and the subject of litigation. Often, debt collectors and creditors collecting their own debts are now routinely refusing to stop calling, despite pleas from consumers, and are instead arguing that the Second Circuit's *Reyes* decision applies to them and that consent cannot be revoked. We can only imagine the nightmarish scenario that will impact tens of millions of people across the U.S. if the FCC rules that consent granted by contract cannot be revoked.

Recommendation:

1) Congress should a) re-emphasize to the FCC what the TCPA already says, that it is intended to ensure that consumers who have consented to receive robocalls as part of a contract can revoke their consent in any reasonable manner regardless of the context in which consent was provided.

2) If the FCC fails to issue the correct interpretation of the TCPA, Congress should pass H.R. 946 (the Stopping Bad Robocalls Act), sponsored by Congressman Pallone and others in the House, which mandates the appropriate interpretations of these critical issues.

D. Sellers Must Not Be Allowed to Hide Behind the Third Parties They Hire

Callers—particularly the “legitimate businesses” that can actually be traced and called to account for their violations—go to great lengths to devise ways to bombard us with calls without our consent yet evade liability. One strategy is to use “data brokers” to place the calls. On these calls from data brokers, once a consumer indicates an interest in the product being sold (“Press 2 now if you want to hear more about available health insurance in your area.”), the broker passes along the consumer's information to the company selling the product.

Another strategy is to hire others to make the calls and then claim that the callers were independent contractors for whom the seller is not responsible. The seller may put a clause in its contract with the independent contractor that purports to require it to comply with the TCPA, and then claim that it can't possibly be held liable since the independent contractor promised to obey the law.

This ploy was outlined—and strongly disapproved of—in the case of *Krakauer v. DishNetwork, L.L.C.*⁵⁷ After one prosecution by the Federal and state governments had found that Dish was responsible for hundreds of millions of calls,⁵⁸ the court adjudicating a civil enforcement action found that the independent contractors were agents of DishNetwork, and that DishNetwork was vicariously liable for the calls

⁵² See *Selby v. LVNV Funding, L.L.C.*, 2016 WL 6677928, at *8 (S.D. Cal. June 22, 2016).

⁵³ 861 F.3d 51, 58.

⁵⁴ 2015 Order at 7996. See *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 683 (D. Md. 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling).

⁵⁵ See *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265 (3d Cir. 2013) (consent provided in application for credit). See also *Schweitzer v. Community Bank*, 866 F.3d 1273 (11th Cir. 2017) (consent provided in credit card application can be revoked, and consumer can revoke consent in part); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–49 (9th Cir. 2017) (consent provided in gym membership application); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014) (consent provided in application for credit card, although the court allows that the *method* of revoking consent may be limited by the contract).

⁵⁶ See YouMail Robocall Index, available at <https://robocallindex.com/> (last accessed April 9, 2019). To verify the sources of the calls, we listened to provided-voice-mail recordings and called the numbers listed to see who answered.

⁵⁷ 311 F.R.D. 384 (N.D.N.C. 2015).

⁵⁸ *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942 (C.D. Ill. 2014).

made by the independent contractors to sell Dish products.⁵⁹ Yet it is still commonly raised by sellers in case after case as a means of avoiding liability for the illegal calls made on their behalf.

Recommendation:

Congress should urge the FCC to strengthen its rulings about the liability of sellers who benefit from robocalls made by others (such as data brokers and independent brokers), making it even clearer that these sellers are responsible for the TCPA compliance of those callers.

E. The Rules Must Continue To Be Enforceable, with Strong Remedies that Provide a Deterrent for Serial Violators

Rules to stop robocalls need to be privately enforceable for two reasons. First, individual consumers harmed by the invasion of privacy caused by the multitude of calls they receive need to be able to obtain redress for that harm. And, second, private enforcement is essential as a way of deterring violations. Unfortunately, FCC enforcement does not accomplish this goal. According to a recent article in the Wall Street Journal, the FCC has collected only \$6,790 in fines against violators of the TCPA.⁶⁰

The TCPA provides this redress by authorizing “an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, which is greater. . . .”⁶¹ Moreover, when the court finds “that the defendant willfully or knowingly violated this subsection. . . .”, the court may increase the amount of the award to an amount equal to not more than 3 times” the \$500.⁶² However, there is no authorization in the law for the recovery of attorney’s fees or of the costs of the action to be awarded, as is provided in other Federal consumer protection statutes.⁶³

Individual actions are essential for providing redress to individual consumers, but because of confidentiality clauses they provide little deterrent effect on the callers. These callers simply pay up and repeat the pattern with other victims. Obviously, routinely violating the law and paying individual consumers damages is more financially beneficial than complying with the law—else these callers would not keep repeating the pattern, as they are now doing.

A classic example is callers who keep making illegal calls to new consumers *even after being sued in case after case*. Tampa attorney Billy Howard,⁶⁴ who represents consumers throughout Florida, has litigated hundreds of cases on behalf of consumers against creditors who are robocalling them with similar facts: hundreds of unconsented-to robocalls to collect debts. He has litigated repeat TCPA claims involving dozens or hundreds of unconsented-to robocalls to consumers with the same callers:

- 10 cases against Synchrony Bank in the past two years.
- 18 cases against Navient Solutions in the past three years.
- 24 cases against Credit One Financial/Credit One Bank in the past three years.
- 8 cases against Commenity LLC in the past three years.

This pattern of repeated calls leading to repeated cases shows that existing remedies are not enough to deter callers from continuing to make illegal calls.

Typically, consumers bring individual TCPA suits only after hundreds, or even thousands, of illegal calls interfere with work, interrupt family time, or infringe upon the consumer’s solitude. Repeat violators of this forty-year-old law cry foul when forced to answer for their transgressions. *Lost in the rhetoric is the fact that many of the same corporations are violating the same law while ignoring the same pleas for the calls to stop. It seems that corporations have made the business decision that ignoring the TCPA is more profitable than compliance.* Even more troubling, the consumers who experienced these violations of Federal law are then sworn to

⁵⁹ See *Krakauer v. Dish Network L.L.C.*, 2017 WL 2242952, at *3 (M.D.N.C. May 22, 2017 (“The OE Retailers collectively generated hundreds of millions of dollars a year in revenue for Dish.”)).

⁶⁰ Sarah Krouse, *The FCC Has Fined Robocallers \$208 Million. It’s Collected \$6,790*, The Wall Street Journal, Mar. 28, 2019, available at <https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803>. The article cites as a source for the analysis “records obtained by The Wall Street Journal through a Freedom of Information Act request.”

⁶¹ 47 U.S.C. § 227(b)(3).

⁶² *Id.*

⁶³ See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(3); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3); Equal Credit Opportunity Act 15 U.S.C. § 1691e(d).

⁶⁴ <https://www.theconsumerprotectionfirm.com/billy-howard>

secrecy through confidentiality clauses and subject to liquidated damages of potentially thousands of dollars if they share their story.

Wrong number calls are a particularly maddening example of why a stronger deterrent is necessary. Many debt collection calls are made to people who never owed money to the callers, yet the callers have their number and just keep calling, ignoring pleas to stop. Litigation around reassigned number calls is caused by *repeated and unstoppable calls* to the wrong number, not just one or two mistaken calls. Consumers beg callers to stop the calls, and it is only when they don't that consumers seek legal advice to stop the calls and obtain legal redress. Some recent examples—from many similar cases—include:

1. *Lebo v. Navient*.⁶⁵ Zachary Lebo received 100 calls over two months from Navient for a “Justine Sulia,” sometimes as many as five calls a day. He had never given permission for Navient to call him and revoked permission over the phone, yet the calls continued.
2. *Waite v. Diversified Consultants*.⁶⁶ Patricia Waite and her daughter Heather received about 166 calls from Diversified Consultants for “Marcy Rodriguez,” whom neither of them knew. Diversified continued calling multiple times a day despite being told that it had a wrong number.
3. *Goins v. Palmer Recovery Attorneys*.⁶⁷ Amber Goins received frequent calls from Palmer Recovery Attorneys seeking to collect from “Kenya Johnson.” Ms. Goins told Palmer several times that she was not Kenya Johnson, and Palmer repeatedly said that it would remove her number from its calling list; however, the calls continued.
4. *Davis v. Diversified Consultants, Inc.*⁶⁸ Jamie Davis received up to three calls a day from Diversified Consultants seeking to collect on a debt owed by “Rosemary.” The calls continued even after Mr. Davis told Diversified that he did not know Rosemary, and the callers said they would remove his phone number.
5. *Moseby v. Navient Solutions, Inc.*⁶⁹ Terrance Moseby received dozens of calls from Navient for a “Joshua Morris” or “Andrea.” Mr. Moseby has never had any relationship with Navient or either of these people. He told Navient that it had the wrong number but the calls continued.

To protect consumers, it is imperative that the pressure be maintained on callers to ensure that they are calling the correct number: the number that belongs to the consumer from whom they have consent to call. Mistakes do happen. But these lawsuits are not about a single mistake. These lawsuits are about callers who persist in calling numbers after they have been told repeatedly that the number does not belong to the person who provided consent. These cases are brought against callers who clearly did not have enough of a financial incentive to make sure that they stopped calling—and harassing—consumers with whom they had no relationship, who had not provided consent, and who begged the callers to stop the calls.

The calling industry complains incessantly about the “nuisance class actions” brought by plaintiffs’ attorneys, and uses the stories as a basis for requesting a variety of changes in interpretations of TCPA terms. However, class actions drive compliance with the law and the FCC’s rules.

Because class actions cost the calling industry money when they have failed to follow the simple requirements for obtaining consent before they make robocalls, callers are more likely to change their behavior to avoid being held liable in a class action case. As the Federal district court judge noted in a telemarketing case against Dish Network involving tens of millions of calls:

[T]he legislative intent behind the TCPA supports the view that class action is the superior method of litigation. “[I]f the goal of the TCPA is to remove a ‘scourge’ from our society, it is unlikely that ‘individual suits would deter large commercial entities as effectively as aggregated class actions and that individuals would be as motivated . . . to sue in the absence of the class action vehicle.’”⁷⁰

Indeed, in another opinion related to this case, the court recited the failure of the defendant to comply with its promise to government enforcers, explaining its rationale for awarding treble damages for the defendant’s willful violations of the TCPA:

⁶⁵ Case No. 2:17-cv-00154 (D. Wyo. filed Sept. 15, 2017).

⁶⁶ Case No. 5:13-cv-00491 (M.D. Fla. filed Oct. 7, 2013).

⁶⁷ Case No. 6:17-cv-00654 (M.D. Fla. filed Apr. 11, 2017).

⁶⁸ Case No. 1:13-cv-10875 (D. Mass. filed Apr. 12, 2013).

⁶⁹ E.D. Ark. 4:16-cv-00654.

⁷⁰ *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 400 (M.D.N.C. 2015) (emphasis added).

The Court concludes that treble damages are appropriate here because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations. The evidence shows that Dish's TCPA compliance policy was decidedly two-faced. Its contract allowed it to monitor TCPA compliance, and it told forty-six state attorneys general that it would monitor and enforce marketer compliance, but in reality it never did anything more than attempt to find out what marketer had made a complained-about call. It never investigated whether a marketer actually violated the TCPA and it never followed up to see if marketers complied with general directions concerning TCPA compliance and or with specific do-not-call instructions about individual persons. Dish characterized people who pursued TCPA lawsuits not as canaries in the coal mine, but as "harvester" plaintiffs who were illegitimately seeking money from the company. The Compliance Agreement did not cause Dish to take the TCPA seriously, so significant damages are appropriate to emphasize the seriousness of such statutory violations and to deter Dish in the future.

This case does not involve an inadvertent or occasional violation. It involves a sustained and ingrained practice of violating the law.

Dish did not take seriously the promises it made to forty-six state attorneys general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make many thousands of calls on its behalf that violated the TCPA. Trebled damages are therefore appropriate.⁷¹

Most of the litigation under the TCPA relates to calls to cell phones because violations trigger damages after the first call. However, these cases are costly and complex to litigate, requiring experts to opine on technical issues such as whether the caller used an ATDS, or to assist in determining the number of covered calls, as well as issues of consent. Calls to landlines are much less protected and many have said that the unrestricted number of robocalls to landlines is one of the reasons for the decrease in the use of residential landlines. Private litigation should be encouraged and facilitated by the laws governing robocalls.

Recommendation:

Make it easier for victims of unwanted robocalls to bring actions against callers who violate the TCPA, by allowing courts to award plaintiffs attorney's fees and costs of bringing the action.

Thank you for considering the views of consumers. I am happy to answer any questions.

Senator THUNE. Thank you, Ms. Saunders.

As I said earlier, I'm committed to protecting consumers from fraudulent and scam calls and that's why I, along with Senator Markey, authored the TRACED Act to go after individuals who intentionally violate the law and prey on vulnerable populations.

It is unfortunate that illegal robocalls have now increased to the point where people hardly want to pick up their phones at all. Consumers can also be harmed if they do not receive important time-sensitive calls that financial institutions, health care companies, and automakers make to their customers.

Attorney General Peterson, do you think that you have the necessary tools to meet the challenge of tackling illegal robocallers so that consumers feel it's safe to answer their phones again?

Mr. PETERSON. No, Senator. I think one of the reasons I think the TRACED Act is going to be really advantageous to attorneys general is because technology is a big part of the answer and I think with the STIR/SHAKEN guidelines that will really help us—I think that's one of the more important elements that we see there to stay in front of the technology, if possible.

The other part is the interagency cooperation will be important because I think as states, we find more strength in working with

⁷¹Krakauer v. Dish Network L.L.C., No. 1:14-CV-333, 2017 WL 2242952, at *12–13 (M.D.N.C. May 22, 2017) (internal citations omitted.).

the FCC or the FTC on some of these efforts. We've had a history of that and I think the fact that in the bill it notes that the attorney general should work with state attorneys general is an important element for us because this thing is always advancing. It's taking turns and I think working together we will be strengthened in enforcement.

Senator THUNE. Let me direct this to you, Attorney General Peterson, also Mr. Rupy.

In the past, when I've asked enforcement and industry officials whether the Do Not Call Registry is broken, the response has made clear that it is most effective for folks who are making a good faith effort to comply with the law.

The reality is that there are too many individuals, like Adrian Abramovich, who had no regard for the laws on the books, which is why I believe a credible threat of prosecution is necessary for illegal robocalls.

Do you agree that threat of criminal prosecution is a necessary deterrent?

Mr. RUPY. Mr. Chairman, thank you for that question, and it's an excellent question, and I wholeheartedly agree with that view, and I think I applaud the TRACED Act for what it does in establishing that interagency working group to facilitate that type of criminal enforcement.

I think one of the things that is not lost on me is that when you look at Mr. Abramovich, he was a recidivist robocaller. So he was sued by AT&T in 2007. The FCC acted aggressively against him in 2017, 2018.

The FTC just last week announced a series of settlements with several individuals: Andy Salisbury, Aaron Michael Jones, James Christiano, and the most disheartening aspect of that announcement was that the FTC referred to them as recidivist robocallers. They're doing this again and again and again.

I think individuals like that definitely need to be targeted through criminal enforcement. The best way to prevent illegal robocalls is to stop them from ever being made and the best way to ensure that is put the people that are making them behind bars.

Mr. PETERSON. I think, Senator Thune, you mentioned in your opening about the cost of doing business, and I think that a lot of these violators probably perceive it that way, as if they're fine to move on.

I think when you bring up criminal penalties that's when you get their attention. So that's why I support that.

Senator THUNE. OK. Thanks.

Mr. Rupy, in your testimony, you mentioned industry's commitment to deploying the Call Authentication Framework known as STIR/SHAKEN. It has been discussed quite a bit here this morning already, but the bipartisan TRACED Act will help guide industry on the implementation of this much-needed call framework.

Can you speak to how implementation of this framework will help consumers not receive spoofed calls? It's going to describe that.

Mr. RUPY. Thank you, Mr. Chairman.

Absolutely. So basically the way I like to explain the SHAKEN/STIR standard is as follows. It's obviously a very technologically

complex standard and issue, but I think the best way to understand it is that it's effectively the equivalent of a Notary Public.

When you go to a Notary Public with a document, they don't look at the document. They look at your driver's license and the signature you put on the line. So the STIR/SHAKEN protocols and standards will do two things.

Number 1, they will authenticate the number that is originating that call. In other words, verifying that that is indeed the number calling. Number 2, it will enhance trace-back efforts. So when we trace back the call, we may go through five-six-seven different providers to get to the point of origination.

Because that call origination will be authenticated at the front end, we can hop right to that point to get to them and that helps consumers in a couple of ways. Number 1, it makes enforcement actions, whether civil or criminal, easier to pursue because we can find these people faster and U.S. Telecom, through its Traceback Group, is doing that, but then, Number 2, the standard will help inform a lot of the analytics that's taking place in the network and on the consumer's end in the various, you know, hundreds of apps and services that are out there.

So that will better inform their analytics in terms of how to handle that call and just to be clear, especially early on, the lack of authentication on a call as the standard is being deployed is not necessarily going to be an indicator of whether that call is good or bad.

But as implementation progresses, it will greatly enhance the analytics side for consumers.

Senator THUNE. Thank you.

Senator Schatz.

Senator SCHATZ. Thank you.

Let me start with Ms. Saunders. *The Wall Street Journal* recently reported that the FCC has fined robocallers \$208 million but collected about \$7,000. So, in addition to the sort of cost of doing business question, the cost is actually close to zero, and I'm wondering how we can do better to improve the recovery rate.

Ms. SAUNDERS. Well, the recovery rate by the government is poor but the recovery rate in private class actions is significant and so as unpopular as they are, it is the class actions that are driving compliance and that's why the major industries are pushing the FCC to change the rules so that these class actions won't be available.

But I would like to take a step back and look at what is driving all those robocalls that has been the subject of discussion today.

Who's paying those robocallers? How are they making money? They're being paid—those robocallers are lead generators. They're making the calls illegally. When they get someone on the phone who's interested in purchasing home security or car insurance or life insurance contract, that's a live lead, they then refer that lead to a real American company, State Farm, Royal—

Senator SCHATZ. And it sort of launders the illegal activity and incentivizes it, but at some point it gets handed over to a legit business.

Ms. SAUNDERS. That's exactly right and those legitimate businesses are paying for those calls and then when they're sued—ex-

cuse me—are paying for the leads and then when they’re sued for making illegal telemarketing robocalls without prior expressed consent, they say we didn’t know anything about the illegality. Our contract with this lead generator or this independent contractor requires them to comply with the law. We’re not responsible.

Senator SCHATZ. I got it. OK. So it seems to me there’s the problem of the recovery rate, there’s the problem of the sort of upstream, whatever you want to call it, upstream or downstream companies that are benefiting from this, and plausible deniability through the contract itself, and then there’s this question of the criminal penalties, and I’d like to lead into the attorney general with a question about how we can enhance AGs’ authorities here.

Why don’t you just offer us your thoughts on what AGs can be empowered to do and how that would make a difference?

Mr. PETERSON. Typically, the AGs are empowered by our own state laws and, frankly, I think a lot of legislative bodies are challenged to stay in front of this type of technology. So I’m a proponent of the state solutions, but I also think the partnership with Federal authorities is important here.

I will say one of the challenges, whether it’s a civil penalty or criminal penalty, is the ability to get our hands around these people.

Senator SCHATZ. To find them?

Mr. PETERSON. Yes, to actually get them in a headlock, and that’s not easy to do and, in fact, we’re fortunate we have one case where we have a partial player in a headlock, but that’s always going to be the challenge and so I think having in our toolbox the ability to enforce criminal penalties will help, but I don’t think it’s the silver bullet.

Senator SCHATZ. So the other thing I think offers an opportunity for consumers is, first of all, education because I think there will be some number of robocalls happening, even if we do all the right policies, and so it seems to me that likely the most vulnerable among our constituents are still endanger of being not just spoofed and spammed but really scammed and ripped off, and so we have to kind of work on the consumer education side and then apps are going to provide some utility to people, but I kind of worry about having two tiers of phone users, those that are educated, know how to use an app to block all the nonsense, and those who don’t.

And so, Mr. Rupy, I’m wondering whether you can address that question, and just one more sort of nuance to this, which is that there are now apps that you have to pay for to block robocalls, which I suppose is better than nothing, but it seems to me that this is ought to be like a seatbelt. This ought to be, both in sort of tech terms and in sort of public policy terms, like a utility.

We just don’t allow robocalls. You don’t have to pay to block them and you don’t have to forfeit your privacy to some telecommunications or tech company in order to have that utility. You just ought to be free of these things. So can you comment on that?

Mr. RUPY. Thank you, Senator.

Those are both great questions. So let me tackle the first of your questions, and I would respond to that by saying U.S. Telecom has long believed and I certainly believe that there’s no single silver bullet to the robocall problem. OK. There has to be a holistic com-

prehensive approach that includes tools, that includes enforcement, that includes technologies, like SHAKEN/STIR, but also education.

Education is a huge component and an important component and it's happening. You know, the example I give is that my 83-year-old mother up in New Jersey got the grandparents' scam and fortunately she has a son that talks to her relentlessly about robocalls. She didn't take the call. My in-laws had a friend down the street that was at the CVS buying the iTunes cards and a clerk stopped the sale.

Both those are examples of education and education can be powerful, but again no single thing in and of itself is going to solve this problem.

Senator SCHATZ. Thank you.

Senator THUNE. Thank you, Senator Schatz, and good point there.

The people probably most likely to get preyed on are the least technologically savvy and so a lot of the consumer awareness things that we're talking about in many cases probably aren't going to get to some of the populations that are most likely to be subject to scams.

Senator Blackburn.

**STATEMENT OF HON. MARSHA BLACKBURN,
U.S. SENATOR FROM TENNESSEE**

Senator BLACKBURN. Thank you, Mr. Chairman, and I appreciate that we're having this hearing today.

As you can see, this is an area where there is bipartisan agreement, and I think we all have our stories of family members that have received these calls and are just aggravated when they receive this number of calls.

I want to, Mr. Rupy, ask you quickly. Looking at the cost of this and with SHAKEN/STIR and the implementation, what is your concern that equipment vendors may escalate their price as you look at a date certain implementation?

Mr. RUPY. Absolutely. Thank you for that question, Senator.

Just two quick points on that. Number 1, industry is heavily committed to deploying this standard. They're doing it. They're going to make it happen. They're committed to it.

To the point on vendors, I do know that that is certainly an issue that some companies may be facing, particularly for smaller rural companies. There are a limited number of vendors that are out there. We are certainly hopeful that they can provide the equipment in a timely and reasonable manner, but, you know, that's certainly one factor that may be out there, but, nevertheless, industry is definitely strongly committed.

Senator BLACKBURN. So is it fair to say you all are watching that to make certain that we do not end up with some of those being taken advantage of?

Mr. RUPY. Absolutely, Senator. I think that's something that all of us, you know,—

Senator BLACKBURN. OK.

Mr. RUPY.—want to keep an interest in.

Senator BLACKBURN. Let me ask you this, and this is to each of you there. In Tennessee, we have some companies that want to fol-

low up with individuals that have contracted for their service. It may be home improvement, it may be lawn care, it may be health care, and they're prohibited from doing follow-up with those customers that are under contract because of the robocall rules and they've gotten caught in this area.

So how do you suggest that we ensure that companies who have contracted with people for a service, whether it's something like lawn care or health care or repairmen, are not harmed during the implementation of the solution?

Mr. PETERSON. Ms. Saunders, you want to go first?

Mr. RUPY. I'll jump at that first, Senator. Look, I think that's a crucial point and from a technology perspective, at the end of the day, what we want to achieve, to Chairman Thune's point, we want to ensure that the bad illegal robocalls are stopped or blocked or mitigated and that legal legitimate calls will go through.

Mr. Chairman, as you acknowledged in your speech yesterday, SHAKEN is not going to be the silver bullet. It's not a panacea, but it can help authenticate legitimate calls so that legitimate businesses and individuals can make their legitimate calls while stopping the illegal robocalls.

Senator BLACKBURN. Anyone want to add anything further to that? Ms. Saunders?

Ms. SAUNDERS. I think there is some misunderstanding about what you call the robocall rules. The Telephone Consumer Protection Act does not prohibit all robocalls. It only requires automated calls to cell phones to be consented to first.

So those folks that are following up on inquiries, the inquiries—

Senator BLACKBURN. We have numerous companies that have had problems with that and so as we look at SHAKEN/STIR, what we want to do is make certain that they are not disadvantaged because there have been problems and that may come to us regularly on these.

My time is running out. I will just say to you, Mr. Peterson, the criminal penalties, I appreciate your comments about getting that actor in the headlock and feeling that criminal penalties.

I just want to make certain that I understand you are saying you think the criminal penalties as opposed to raising the cost or raising the fee on civil penalties is going to be more helpful?

Mr. PETERSON. That's correct.

Senator BLACKBURN. OK. Thank you.

Senator THUNE. Thank you, Senator Blackburn, and appreciate all of the wrestling analogies here today, too.

Next up is Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you all.

It's a very important topic and in my own state, robocalls doubled last year and you know what the national volumes are and I'm very pleased to be part of this bill and I want to thank the leaders of the bill.

Last week, I offered an amendment to the TRACED Act to direct the FCC to establish a robocalls task force. This idea was not actu-

ally mine, it was Commissioner Rosenworcel's, and I look forward to working with my colleagues on these issues. I'm hoping we can get something going at the FCC.

Do you think that the FCC could do more to combat illegal robocalls and establish a robocall task force? Do any of you want to comment on if you think that would be helpful? Yes, Mr. Rupy?

Mr. RUPY. Thank you for that question, Senator.

I certainly I think that's one of the things that the TRACED Act does by establishing this interagency working group, but I will also say that U.S. Telecom and its 26-member industry Traceback Group is already working very collaboratively with the Enforcement Bureaus of both the FCC and FTC. We would love to work with state AGs.

Industry wants to help advance those enforcement actions and we applaud certainly the civil enforcement actions by both agencies. We think they're effective, and we share our trace-back information with the FCC's Enforcement Bureau, who has this high priority for them as well as for Chairman Pai at the agency.

Senator KLOBUCHAR. Ms. Saunders, do you want to comment about this idea of the task force?

Ms. SAUNDERS. I'm sure it will be very helpful.

Senator KLOBUCHAR. OK. Thank you.

Ms. Saunders, we know that seniors are more often targeted, vulnerable to these schemes, and do you think additional information about emerging fraud schemes would help prevent seniors from being financially exploited?

Mr. Rupy mentioned his own family, his own grandparents being subject to a scam, is that right?

Mr. RUPY. That's correct.

Senator KLOBUCHAR. Right. Where seniors believe they're given money and so this idea to me—my former job, I was a county attorney and we went around. We did a Senior Fraud Task Force all over the state and getting the information out, we found, to the local areas about what these actual scams were was helpful because then seniors could learn about them and anticipate them.

Do you want to comment on that?

Ms. SAUNDERS. Yes, Senator Klobuchar. I think that education is always a good thing and will be helpful.

I've been working in consumer protection on behalf of low-income people for my entire career, which is now over 40 years, and I have to say that in all of these scams that we have tried to address, Legal Services and private attorneys, working with attorneys general, the thing that almost always works the best is enforcement and whether it's public enforcement or private enforcement.

Education unfortunately will help only some people—

Senator KLOBUCHAR. Exactly.

Ms. SAUNDERS.—but will not help everybody.

Senator KLOBUCHAR. Mr. Peterson, I know that we've been using this figure that the FCC has ordered \$208.4 million for violators but only collected around \$6,000. Ms. Saunders mentioned this in her opening.

Given the minimal amount of money collected, can you discuss how we're going to improve this process to hold these scammers ac-

countable? It seems to me if they know that none of this money's really collected, they're just going to keep doing it.

Mr. PETERSON. Yes, Senator. I'm not qualified really to go into the depths of the collection process.

Senator KLOBUCHAR. OK.

Mr. PETERSON. I will just tell you as a reality, it's difficult for us because of the questions or the concerns we've discussed as far as being able to locate them and to actually ascertain their assets.

Senator KLOBUCHAR. And it would be easier if some of it was done on the Federal level is what you're saying?

Mr. PETERSON. That would help.

Senator KLOBUCHAR. Yes.

Mr. PETERSON. But on the education front, we actually travel all around the state of Nebraska and set up in senior centers to explain this. Kind of the sad thing about that is you can fully set out the scams. They'll go home the next day and they're lonely and the phone rings and we say look at caller ID, if you don't recognize it, then let them leave a message, but they give it a shot anyway.

Senator KLOBUCHAR. Yes.

Mr. PETERSON. So I think that will always be a challenge.

Senator KLOBUCHAR. Right. Anyone want to add about the collections and how we can improve that?

Ms. SAUNDERS. I think the problem is that the people that are being prosecuted are the lead generators and they don't have any money and the way to actually increase enforcement is to go after the people who are paying them for those leads, so the big corporations.

Senator KLOBUCHAR. So it takes more of sort of in-depth prosecutions and investigations?

Ms. SAUNDERS. That's right.

Senator KLOBUCHAR. Mr. Rupy?

Mr. RUPY. I would just add, Senator, that that's where I believe criminal enforcement is especially key. I mean, when you look at the fact that the individuals I cited at the FTC, a billion robocalls, illegal robocalls annually, Abramovich, I think it was 300–400 million in 3 months, so.

Senator KLOBUCHAR. Yes. Well, I don't know what the numbers are for the FTC personnel and Justice on this kind of thing. I do know just because of a somewhat related issue, antitrust, I was looking at those numbers and they have gone down from their height quite remarkably the number of employees working on these and meanwhile in that area just like this, you have more and more detailed sophisticated proposals, we'll call them, in that case mergers, but in this case schemes, and everyone knows that they're out-matched, so they just keep doing it. So it makes the problem even worse.

All right. Thank you.

Senator THUNE. Thank you, Senator Klobuchar.

Mr. Attorney General, I'll recognize your Senator from the great state of Nebraska, Senator Fischer.

**STATEMENT OF HON. DEB FISCHER,
U.S. SENATOR FROM NEBRASKA**

Senator FISCHER. Thank you, Mr. Chairman.

On behalf of the millions of Americans, it is critical that we effectively address the many concerns voiced by consumers, voice service providers, private businesses, state law enforcement, and Federal regulators.

We could not have this discussion today without the important voice of our state attorneys general and so I am pleased to welcome Nebraska Attorney General Doug Peterson to the subcommittee today.

AG Peterson is well versed on the TRACED Act. He led all 50 state attorneys general, in addition to the District of Columbia and three U.S. territories, in a letter to this Committee voicing support for the bill's provisions. So thank you, General Peterson, for being here today.

As we're looking at the issue before us and as you know very well, many of the recent robocall enforcement actions led by the FTC involved collaboration with state partners.

What attributes of collaboration between Federal agencies and state partners have been the most helpful in these enforcement sweeps?

Mr. PETERSON. Well, I think the scope of the remedies that the Federal authorities have are something that because you have a variety of different state laws in the area, having the Federal legislation to enforce is important and helpful.

That's why we think the interagency working group is also very important because in a variety of things, the combination of states working together with the FTC is a much stronger combination. It gives you better avenues and options as far as courts.

In fact, 43 states have come together on this specific topic to work closely with the FTC and that's why we're appreciative of the bill actually identifying the importance of meeting with the attorneys general.

I think specifically our enforcement is typically difficult if we're just limited within our own state authorities and that's why you see the multistate efforts and I think we're much stronger if we work together with the FTC and the FCC in doing this.

Also, even in the regulations and developing the regulations, the opportunity to have input of what we see, I guess, on the street, if you will.

Senator FISCHER. When you have that interagency working group, do you think a main benefit would be that it will really clarify communication, make that clear communication more effective across the country?

Mr. PETERSON. I do, because we have the same goal. The goal is very clear and to work together as two enforcement bodies I think makes it even stronger.

Senator FISCHER. And last year, the estimated number of illegal robocalls surged by more than 36 percent, and it reached nearly 48 billion illegal robocalls.

As we see advances in technology, it just costs pennies for these to take place and so a lot of bad actors profit from that enormous amount of calls that we're seeing.

General Peterson, can you highlight how requiring comprehensive implementation of STIR/SHAKEN, the standards that are in there, as the TRACED Act does, as well, how can we address the

root cause of the problem? You know, it is so irritating to have these calls 24 hours a day from numbers that you think must be a neighbor calling and they spoof you on it, so how can we address this?

Mr. PETERSON. Well, I think STIR/SHAKEN is one major step for that because it puts the industry in the position of using their technical expertise to be part of the solution.

I say up to this point in time, oftentimes the consumer was given the burden of responsibility to either download apps or do things of that nature and so those who were, you know, careful consumers would go through the steps, but particularly the elderly who are not very advanced in the technology, they always have to have their grandchildren do their phones and things of that nature.

The message we've always done in our consumer protection efforts in this area has always been utilize your caller ID, utilize your caller ID, and when they start getting fooled by spoofing, then that advice seems to have less effect and now with the STIR/SHAKEN programs being developed, I think we can feel a little bit more confident by giving that counsel that they know it's from an authentic source.

Senator FISCHER. I'm just very pleased to see a bipartisan approach here and consensus from every state and I certainly appreciate your leadership in this.

Thank you.

Mr. PETERSON. Thank you.

Senator FISCHER. Thank you, Mr. Chairman.

Senator THUNE. Thank you, Senator Fischer.

Who came up with the STIR/SHAKEN?

Mr. RUPY. A bunch of engineers.

[Laughter.]

Senator THUNE. And James Bond fans.

Senator Blumenthal is up next.

**STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. I think Senator Thune means who came up with the acronym, not the technology. Was it engineers?

Senator THUNE. STIR/SHAKEN.

Mr. RUPY. It was a bunch of engineers, yes.

Mr. PETERSON. The name is Bond, James Bond.

[Laughter.]

Senator BLUMENTHAL. Thank you all for being here.

I want to pick up on a point that Senator Schatz raised. There's an article that I saw today, I think it may have reported the fact that he cited, and I'm going to ask that it be entered into the record, if there's no objection.

Senator THUNE. Without objection.

[The article was entered into the record:]

THE FCC HAS FINED ROBOCALLERS \$208 MILLION. IT'S COLLECTED \$6,790.

U.S. telecom regulators impose penalties and seek to recoup ill-gotten gains from robocallers, but have struggled to collect



Large wireless carriers are currently working on a call-verification system that regulators and executives say will help consumers identify legitimate calls. PHOTO: ANDREU DALMAU/EPA/SHUTTERSTOCK

By Sarah Krouse—March 28, 2019 7:00 am ET

America's telecommunications watchdogs have levied hefty financial penalties against illegal robocallers and demanded that bad actors repay millions to their victims. But years later, little money has been collected.

Since 2015, the Federal Communications Commission has ordered violators of the Telephone Consumer Protection Act, a law governing telemarketing and robodialing, to pay \$208.4 million. That sum includes so-called forfeiture orders in cases involving robocalling, Do Not Call Registry and telephone solicitation violations.

So far, the government has collected \$6,790 of that amount, according to records obtained by The Wall Street Journal through a Freedom of Information Act request.

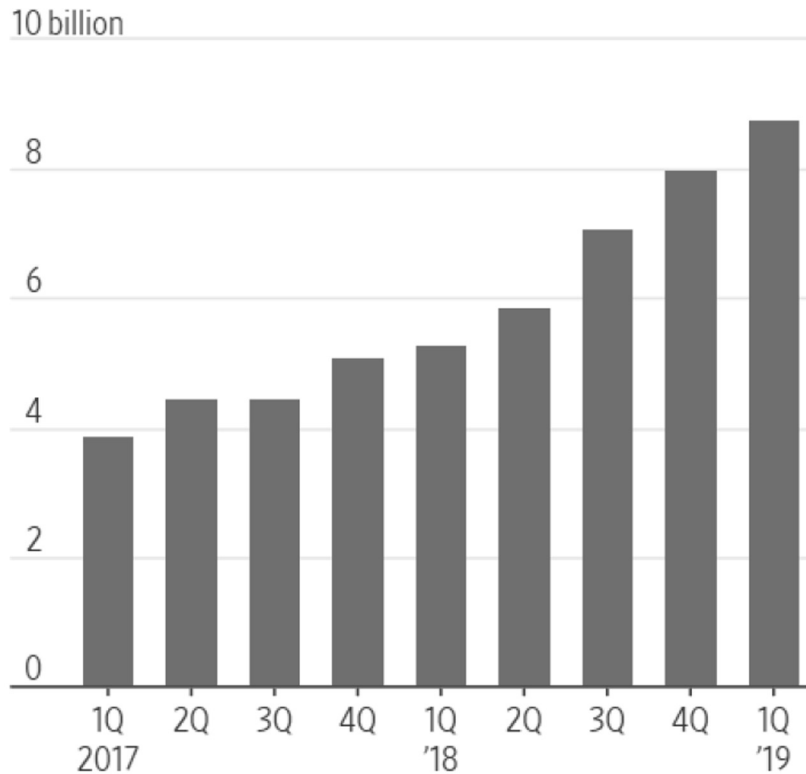
The total amount of money secured by the Federal Trade Commission through court judgments in cases involving civil penalties for robocalls or National Do Not Call Registry-related violations, plus the sum requested for consumer redress in fraud-related cases, is \$1.5 billion since 2004. It has collected \$121 million of that total, said Ian Barlow, coordinator of the agency's Do Not Call program, or about 8 percent. The agency operates the National Do Not Call Registry and regulates telemarketing.

"That number stands on its own. We're proud of it; we think our enforcement program is pretty strong," Mr. Barlow said.

An FCC spokesman said his agency lacks the authority to enforce the forfeiture orders it issues and has passed all unpaid penalties to the Justice Department, which has the power to collect the fines. Many of the spoofers and robocallers the agency tries to punish are individuals and small operations, he added, which means they are at times unable to pay the full penalties.

Don't Answer

Estimated number of robocalls in the U.S.



Note: Data for 1Q 2019 through 3/25

Source: Hiya

"Fines serve to penalize bad conduct and deter future misconduct," the FCC spokesman said. A spokeswoman for the Justice Department, which can settle or drop cases, declined to comment.

The dearth of financial penalties collected by the U.S. government for violations of telemarketing and auto-dialing rules shows the limits the sister regulators face in *putting a stop* to illegal robocalls. It also shows why the threat of large fines can fail to deter bad actors.

"It's great that we have these laws; it's great that we have public enforcement, but because there are so many calls and so many callers, the public enforcement is a joke," said Margot Saunders, senior counsel at consumer advocacy group National Consumer Law Center. "It doesn't even make a dent."

There were 26.3 billion *unwanted robocalls* made to U.S. mobile phones in 2018, by one measure from robocall-blocking app Hiya. Another company that offers such services, YouMail Inc., puts the number of unwanted and illegal robocalls made in the U.S. last year even higher, at nearly 48 billion.

AT&T Inc. and other large wireless carriers are currently working to implement a call-verification system by the end of the year that regulators and telecom industry executives say will help consumers identify legitimate calls. That system won't block calls, but will signal that the caller has the right to use a given number and that it hasn't been spoofed.

The FCC and FTC say there are challenges to collecting penalties for robocall-related wrongdoing. Small illegal operations can quickly close up shop and change their names, enforcement officials say. Some are based overseas, making it *difficult to identify or seize assets*.

Fines are "a deterrent on legitimate companies that have real assets in the U.S.," said Daniel Delnero, a senior attorney at Squire Patton Boggs in Atlanta that advises companies on consumer class-action suits related to the Telephone Consumer Protection Act.

For a spam caller or overseas operator, "that's really just pushing for Social Security numbers or bank account information—it's less of a deterrent, because they don't really have anything that could be collected anyway," Mr. Delnero said.

In many FTC cases involving civil penalties, the agency secures judgments for large fines and settles for a smaller sum, contingent upon the accused person or company being transparent about their assets, Mr. Barlow said. Congress requires the agency to consider an individual's ability to pay.

In the 2017 case of a "recidivist robocaller" that placed illegal robocalls for nearly a decade, for example, two defendants faced civil penalties of \$2.7 million in a California suit filed by the FTC. They were each ultimately ordered to pay \$225,000 or less, if their financial disclosures were complete and accurate.

Ajit Pai, Chairman of the FCC since January 2017, said in an interview on robocalls earlier this month that in the past, few financial penalties have been collected, but that he is working to change that. It is "important to *send a signal* to other would-be robocallers that you're not going to be able to get away with it," Mr. Pai said.

Still, none of the \$202 million demanded in what the FCC calls forfeiture orders against alleged rulebreakers during Mr. Pai's tenure has been collected.

The agency in May 2018, for example, fined a Florida-based company and its top executive \$120 million for making 100 million illegal robocalls during a three-month period in 2016. Agency records as of late December indicate that no funds had been collected.

Senator BLUMENTHAL. The headline is "The FCC has fined robocallers \$208 million. It's collected \$6,790."

Mr. RUPY, do you have an explanation for why that is?

Mr. RUPY. Thank you for that question, Senator.

So I think just two things real quick. Number 1, I think my understanding of how the FCC can collect those funds, they basically have to make the referral to DOJ and then, you know, DOJ basically has to enforce that.

Senator BLUMENTHAL. So DOJ is not enforcing the FTC orders?

Mr. RUPY. It's not that they're not enforcing—the orders are enforced by the FCC, but it's the collection of the funds that falls into the Department of Justice's.

Senator BLUMENTHAL. Well, that's what I mean. The orders are enforced. The FTC is the plaintiff, but you're saying DOJ is the one who goes to court—

Mr. RUPY. Correct.

Senator BLUMENTHAL.—and they're not going to court?

Mr. RUPY. Correct. But the other point I would raise, Senator, is that while there is that collection issue, I do believe, U.S. Telecom certainly believes that those enforcement actions do have a positive impact.

I mean just as an example, last year the Enforcement Bureau Chief sent letters to carriers that weren't supporting Traceback. USTelecom's Traceback Program, you know, saw an uptick in support of carriers after those letters went out. So I do think, you

know, we have to look at the positive effect that those types of enforcement actions have on industry.

Senator BLUMENTHAL. Well, they may have a positive impact but they'd have a lot more positive impact if the collections were made and I agree totally with Attorney General Peterson, having been an attorney general myself, that nothing speaks as loudly as prison time.

Mr. RUPY. Senator, I wholeheartedly agree there. I think that's the most effective.

Senator BLUMENTHAL. At the end of the day, what really matters for consumers is the ability to block these calls. That's the most effective tool and the technology exists to block these calls.

I've joined Commissioner Rosenworcel in calling on carriers to make robocall blocking tools available to their customers for free. Most of them now charge a fairly steep monthly bill for this blocking technology and I am introducing today a measure, it's called The Robocall Bill, that would require the carriers to provide this technology for free to every consumer, give them control.

Would you support that bill?

Mr. RUPY. Senator, I think one of the things that I would point to is there is tremendous deployment of these tools by a variety of carriers and some are free, some are not, but many carriers are deploying a variety of tools, both, you know, on the edge and in the networks and on the apps, and it's certainly my view that that diversity in tools and diversity in approaches to empowering consumers is the best approach.

Senator BLUMENTHAL. Why not just require that it be provided for free?

Mr. RUPY. I think, Number 1, Senator, I think that's—

Senator BLUMENTHAL. I don't understand the argument for diversity. I mean, you know, diversity is a great thing, but a lot of carriers are not providing it free of charge.

Mr. RUPY. I think many carriers are deploying tools that—

Senator BLUMENTHAL. Why not require it for free?

Mr. RUPY. Some are free, some—

Senator BLUMENTHAL. OK. So I don't mind if you don't want to answer the question, but I have limited time. So let me go on.

Ms. Saunders, what do you think? Shouldn't it be required for free?

Ms. SAUNDERS. Senator Blumenthal, you have already sponsored a lot of bills that I think have moved the ball forward and we really appreciate that.

I'm not sure, frankly, that I agree that it should be always provided for free. When a phone carrier is required to provide something someone has to pay for that, it's generally the ratepayers, not the stockholders. When the ratepayers pay for it, that causes the rates to go up, that affects the poorest ratepayers, the low-income homeowners who are paying for residential landline and often \$5 or \$10 a difference a month can make the difference between whether they can afford that landline or not.

So I fully support call blocking, but I'm not necessarily sure that requiring phone companies to provide them for free helps the people that you want to help the most, which are those that really can't afford to pay those fees, because it may mean that not only

do they not have call blocking but they don't have their phones. It's at least an issue that we are considering—that we represent those poor people, those low-income people who struggle to pay their landline bills.

Senator BLUMENTHAL. Is there a difference between the prepaid and other consumers?

Ms. SAUNDERS. I think there is a difference. Some of the lowest-income consumers have cell phones which are lifeline and those are often prepaid and some are on contracts. I'm not sure how that goes to call blocking.

Senator BLUMENTHAL. So you would agree with Mr. Rupy that the diversity is a good thing?

Ms. SAUNDERS. My point is, sir, is that, call blocking is an interim measure that needs to be implemented, but the ultimate measure is that we need to figure out how to stop the illegal calls and the Traceback is a very good step in that direction, but it won't complete the problem until we give consumers control over who gets to call their phone lines and that, I think, really lies with implementation of the Telephone Consumer Protection Act.

Senator BLUMENTHAL. Thank you. My time has expired. Thanks very much.

Senator THUNE. Thank you, Senator Blumenthal.
Senator Gardner.

**STATEMENT OF HON. CORY GARDNER,
U.S. SENATOR FROM COLORADO**

Senator GARDNER. Thank you to the witnesses for being here today and thank you to Chairman Thune for convening this very important hearing.

You know, the only thing that I can think that Coloradans might universally despise more than the Los Angeles or Oakland or Las Vegas Raiders or whoever they are robocalls and just like everyone else around this dais, my state is getting inundated with them.

According to YouMail's Robocall Index, Coloradans received 30.7 million robocalls in March 2017. That's more than 989,000 calls per day and more than 41,000 calls per hour. But that was 2 years ago.

In March of this year, YouMail estimates that Coloradans received a whopping 73.6 million robocalls. That's an approximately 140 percent increase in robocalls to Coloradans over the past 2 years. That's equivalent to 2.4 million calls per day, nearly 99,000 calls per hour, and just over 27 calls per second every single day in a state of five and a half million people.

But these are just averages. Many in Colorado have it far worse than the average. For example, I received a letter from a constituent in Loveland who e-mailed me at 11 a.m. 1 day to let me know that he had already received 11 robocalls that morning. A husband and wife in their 70s who live in Delta had sent me a letter telling me that calls start at 8:30 in the morning and last late into the evening with nearly nonstop recordings and robocalls about medical supplies and financial offers.

They're on the Do Not Call List but that doesn't stop the scammers and incessant calls. Enough is enough. We simply have to stop this.

Even my staffers' desk lines here in Washington, D.C., and I'm going to get this opened up are getting robocalls from spoofed internal Senate phone numbers. A phone call that looks like it came from the Senate is a scammer.

One of my staffers was actually connected to a scammer this week through a robocall at his desk line and the scammer tried to get him to divulge his personal credit card details to secure lower interest rates.

I'm going to play just a few seconds of that call and the scammer has figured out how to disable the phone, but I hope that people will take some time to listen to this call. If anybody's interested in hearing the transcript of this, they should because I was going to play about 7 seconds of it where they tried over and over to get and divulge the——

[Audio played.]

Senator GARDNER. Now I stopped it there because the next words have probably never been entered into the congressional record before——

[Laughter.]

Senator GARDNER.—and I don't want people to hear this listening live.

I hope that people will, if anybody's interested, hear this and what this person tried to do to access and did everything they could to access this.

Now if this was maybe my 95-year-old grandmother who got this phone call, she'd have been pretty intrigued by what this gentleman had to say and the dangers that it poses.

So this call ended with this. My staffer said the U.S. Government is aggressively pursuing criminal activities and the scammer replied to him, "Sure. If you can, if you can, I'll be waiting for you." It's on this call. Think of that. "I'll be waiting for you."

These criminals are taunting us because they think we won't act. They think we can't reach them. Congress has waited too long to take more aggressive action on robocalls and these scammers think that they're invincible.

That's why I was proud to cosponsor the TRACED Act, legislation designed to crack down on these kinds of calls and promote better coordination among Federal agencies.

I thank Senators Thune and Markey for their leadership on that effort and for this Committee passing the bill at our most recent markup.

Mr. Rupy, the Department of Justice announced last year that they had sentenced 24 defendants and a multimillion dollar international robocall scheme based in India. U.S. Attorney's Office for the District of Colorado provided significant support for that operation. I was pleased to see the aggressive action that DOJ took in this instance.

You indicated in your testimony that we still need to improve coordination between the FCC, FTC, and DOJ to pursue criminal charges against the worst robocall offenders. I'm going to ask you for the record what more we can do and, you know, what we have to have the complete support of U.S. Telecom membership in pursuing justice for every Coloradan and everyone else in this country.

We're going to get to that. I'm going to run out of time, but I just want to thank you and the Federal Government and private sector alike. We've got a lot to do when it comes to preventing robocalls and according to the FCC, approximately 60 percent of the complaints they get are regarding unwanted calls.

Coloradans are sick and tired of this. They're sick and tired of the interruptions, the constant scamming, the constant gaming, the nonstop ringing, and it needs to stop, and so Congress should pass the TRACED Act as soon as possible. The President should sign it into law and I stand ready to work with anyone who's willing to do just that and we'll follow up with you on the record.

Thank you.

Senator THUNE. Thank you, Senator Gardner. Appreciate that.

Next up is my partner on this, the Senator from Massachusetts, Senator Markey.

**STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS**

Senator MARKEY. Thank you, Mr. Chairman, so much, and nothing is more bipartisan than the scourge of robocalls.

This is something that unites everyone in America. We realize that something very bad has happened, that there is a sinister side of cyberspace, that really terrible things can happen as well as very good things, and when I was authoring the Telecommunications Consumer Protection Act back in 1991, we were in a relatively prosaic era, it turns out, in terms of robocalls and the goal then was to make sure that people, whether at home or in their mobile phones, consumers should not be subject to intrusive and unsolicited calls.

But this precious zone of privacy and control is under massive attack today because technology has evolved. Scammers can now easily robocall consumers en masse using technology as basic as a modern smart phone. That's all they need. They just need a smart phone and they're in business in sending tens of thousands of unwanted calls to people.

The fraudsters can easily spoof their numbers in which they conceal their actual identity and instead make it seem like the call is coming from someone in your neighborhood when it's coming from some place, as Senator Gardner is saying, unknown and more likely than not international, but it's been disguised as it's coming into people's homes.

In March, as the Chairman mentioned, consumers received an estimated 5.2 billion robocalls and more than 55 million came to my constituents in Massachusetts and the onslaught of robocalls has rattled consumers' confidence in their mobile devices, caller ID isn't trusted, important calls go unanswered, innocent Americans are defrauded, robocalls are a menace in our country, and just last week, this Committee sent a clear message to fraudulent robocallers your days are numbered.

The Committee unanimously passed the TRACED Act, bipartisan legislation that has received the unanimous support of this Committee and we thank you, Mr. Chairman, for your incredible work in putting together that coalition in stopping robocalls.

It requires a simple formula, authentication, blocking, and enforcement, and this bill does achieve all three, and it's received and we thank you, Mr. Attorney General, for your support, the attorneys general of 54 states and territories attorneys general, all of the Federal Communications Commissioners, all of the Federal Trade Commissioners, major industry associations, and leading consumer groups.

So let me go to you first, Ms. Saunders. Estimates suggest that this year almost half of all calls to mobile phones will be from spoofed numbers. Half of all calls to mobile phones in America in a year will be from spoofed numbers.

How will the TRACED Act address the pressing challenge to the authenticity of our telephone networks?

Ms. SAUNDERS. Senator Markey, thank you for the question and thank you for your leadership on this issue.

The TRACED Act will require that the phone companies originating the phone calls will validate that the caller ID matches the actual phone number from which the call is coming and that will bring us much farther along the road to ensuring that we can believe our caller IDs and we will know who is calling us.

Senator MARKEY. So there's an enforcement working group to identify better opportunities to better prosecute illegal robocalls.

So, Attorney General Peterson, what enforcement challenges do you face and how do you think the working group could help alleviate those challenges?

Mr. PETERSON. Well, I think that the working group among the attorneys general, this interagency working group is going to be very important. As I have already said, 43 state AGs have come together and want to coordinate with the Feds as to how best we can collectively use Federal law and state law, what are the best forums, what are the best investigative tools.

So the problem is so significant that in order to have any opportunity to be effective, I think there's got to be this combined effort. That's why we were very encouraged to see the specific language in the bill with regards to the interagency working groups.

Senator MARKEY. Can you once again just state what percent of all the complaints that come into your office are with regard to unwanted calls?

Mr. PETERSON. For us, it's over 60 percent, but I know every state's a little bit different, but the volume is what's so significant and probably in the last 2 years how that volume has just accelerated at a rate with the technology and the accessibility that we haven't seen before.

Senator MARKEY. So, Mr. Rupy, the TRACED Act establishes binding requirements for telephone providers to adopt call authentication and blocking technologies.

What type of impact will the adoption of these protections have on curbing the meteoric rise in the number of unwanted robocalls?

Mr. RUPY. Thank you for that question, Senator, and thank you for your leadership on this issue and this bill, and I think the TRACED Act will do two important things.

One, as Attorney General Peterson noted and Ms. Saunders, it will authenticate that number. It will restore trust in that number and that's important both to consumers and on the analytics side

as we look to, you know, try to separate the good calls from the bad calls.

Second thing it'll do, it'll enhance traceback and to Senator Gardner's point, USTelecom's Industry Traceback Group can find these individuals. We've traced them back to Croatia, India, and the Dominican Republic. We can find them and, you know, there have been enforcement actions against call centers in India and I would encourage those types of actions which were, you know, facilitated by the FTC.

Senator MARKEY. Thank you. So I thank you again, Mr. Chairman. I thank Ranking Member Schatz and Cantwell, Chairman Wicker. This has been bipartisan. There are no blue robocalls or red robocalls. There are just irritating robocalls and that's why it's so important that we take action.

Thank you, Mr. Chairman.

Senator THUNE. Hear, hear. Thank you, Senator Markey.

Senator Capito.

**STATEMENT OF HON. SHELLEY MOORE CAPITO,
U.S. SENATOR FROM WEST VIRGINIA**

Senator CAPITO. Thank you, Mr. Chairman. Thank all of you for being here, and I join my voice in the irritation category of spoofing.

I can tell you just walking, you know, walking around when you're grocery shopping, it's inevitable that somebody's going to say can you do something about these spoofing calls and these numbers that come in and so I'm glad that the TRACED Act has moved in that direction.

Here's my concern. Through the tools that we're giving in the TRACED Act to block and authenticate, I mean, there are people out there now trying to figure out how to get around that and so I guess my question is, in this bill, do we give the ability for the FCC and others to sort of look beyond to the next algorithmic scam that's going to be coming down the pike, Mr. Rupy?

Mr. RUPY. Thank you for that question, Senator.

Yes, there are definitely provisions in the bill that look toward forward-thinking developments on this issue and the fact of the matter is that this is a constantly evolving challenge.

I think industry has done an admirable job of not only developing these standards and deploying them but also looking at ways to deploy, you know, powerful and important tools for consumers.

So as the bad actors change their tactics, which they inevitably will, I think there is definitely a good strong effort by industry to basically counteract that—

Senator CAPITO. Good.

Mr. RUPY.—and the bill addresses that.

Senator CAPITO. Good. Ms. Saunders, one of the issues that came to my attention was a younger woman whose mother, who would be a senior, she said my mother doesn't answer the phone anymore. She's afraid to answer the phone. As a senior, she's afraid to answer the phone, even if she knows the number, she just doesn't trust it anymore because of these spoofing calls and robocalls, and so I see it as a real potential, if we don't get a handle on this, a real potential for fraud obviously for a senior, but also some really

serious safety concerns, particularly for seniors who really rely on the phone and maybe have one or two folks that they call every day and if somebody's calling in to say watch out, the river's rising, you've got to get out of here, they're not answering those calls.

Have you looked at that as a particular issue in terms of how this affects seniors?

Ms. SAUNDERS. Senator Capito, it's nice to see you.

Senator CAPITO. Good to see you.

Ms. SAUNDERS. We have been complaining about robocalls as being a major source of the reduction of value in our telephones. As Senator Schatz noted, it is a really serious problem.

We are trying to identify all of the different causes for this and the spoofing is one of the worst elements of the problem. We do think that the TRACED Act will make a big, big difference, but I feel like a broken record here because I keep saying the same thing, that it is not all that needs to be done.

We also must continue to give consumers control over who calls them, especially over automated calls to them, and that means strong implementation of the Telephone Consumer Protection Act, which will allow the senior, the example that you're providing, to go on the Do Not Call Registry and know that that means that any telemarketer that calls her, unless she has given prior expressed written consent, will have violated that law and that she can call the private attorneys or the attorney general, the FCC, and the FCC can go after that caller.

Senator CAPITO. OK. Good. Thank you.

Mr. Attorney General, do you feel that your office—I mean, some of this is pretty complicated stuff, I mean, in terms of—I mean, it's not complicated when you get a call. That's the uncomplicated part, but the unwinding of it all is very complicated.

Do you feel that as a state attorney general that you have the resources within your office or another state would have to handle this or would you think it would be better if you banded together and use that expertise maybe, you know?

I'm just concerned about overloading your office, Number 1, but also making sure—these are specialized telecom statutes.

Mr. PETERSON. Right. I appreciate the question, Senator. I had mentioned earlier and didn't really define it that well, but North Carolina Attorney General Josh Stein and also New Hampshire Attorney General Gordon MacDonald made the effort to coordinate attorney generals and I think 43 AGs are now engaged in the process and retained an expert because you're exactly right. The technology moves so quickly and, to be quite honest, among our AGs, we have limited talents in that area of technology.

So what they did is they retained the former FCC Chief of Technology Dr. Henning Schulzrinne, I hope I'm saying that correctly, but, anyway, to have that type of consulting.

Senator CAPITO. To answer this question?

Mr. PETERSON. Yes, exactly. And so I think we recognize our shortcomings as far as being able to have the bandwidth in our own office—

Senator CAPITO. Right.

Mr. PETERSON.—with these challenges and so I think that shows that we're trying to stay in front of it by getting some of the best

in the industry to consult with and that's how we deal with a lot of variety of issues we face.

Senator CAPITO. All right. Thank you. Good luck.

Mr. PETERSON. Thanks.

Senator THUNE. Thank you, Senator Capito.

Senator Tester.

**STATEMENT OF HON. JON TESTER,
U.S. SENATOR FROM MONTANA**

Senator TESTER. Thank you, Chairman Thune. I want to thank you all for being here. I appreciate it very, very much.

If there's one thing that we all agree on, these are a pain in the neck, OK, but I want to go off of what Senator Capito was saying about the fact that elderly people aren't answering their phone anymore and there's a lot of problems with that.

Do any of you have any data on the number of calls that are going unanswered? In other words, is the number of calls being answered going down?

Mr. RUPY. Senator, thank you for that question, and it's a good one, but I don't think there's any dataset on that. There's certainly anecdotal data that people are picking up their phone less or, you know, as Attorney General Peterson noted, letting it go to voice mail.

Senator TESTER. OK. So a couple questions that kind of spin off of this whole thing that have come to mind here.

Several times during this conversation, Mrs. Saunders, you have talked about the fact that the TRACED Act is a great first step, but, quite frankly, the full implementation of the Telephone Consumer Protection Act needs to happen, which contains the Do Not Call List.

Is there any teeth in that Do Not Call List? I'm on the Do Not Call List but I still get the damn calls and so when I tell them I'm on the Do Not Call List, they kind of laugh. Is there any teeth in that Do Not Call List?

Ms. SAUNDERS. There are some teeth in it, but the cases are unfortunately difficult to bring because TRACED Act has not yet been implemented.

Senator TESTER. OK.

Ms. SAUNDERS. But there is a private right of action but it is inadequate.

Senator Durbin actually is about to introduce a bill that tremendously adds to the private right of action under the Do Not Call List.

Senator TESTER. That's a good thing, I think, although I haven't seen the bill yet and I always reserve the right, but what you're saying is if the TRACED Act is implemented, which hopefully we can do, hopefully we can do it by UC, quite frankly, if it's implemented, that makes the Telephone Consumer Protection Act more powerful and more enforceable?

Ms. SAUNDERS. Yes, sir.

Senator TESTER. Good. You talked about—does anybody know the percentage of robocalls that are coming from offshore, from foreign countries?

Ms. SAUNDERS. I don't think we know that, sir. I haven't seen any statistics. Do you?

Mr. RUPY. That's another area that's lacking, Senator, and one of the challenges in this area, is that there's not—the FCC acknowledged in its recent report that the data out there is very scattered and inconclusive. But—

Senator TESTER. Go ahead. Finish, finish up.

Mr. RUPY.—there are certainly significant portion of the traffic comes from overseas, but I would note that in the cases involving Adrian Abramovich and Aaron Michael Jones, they were orchestrating those calls domestically.

So, in other words, Adrian Abramovich was based in Miami, Florida. He had a call center in Mexico—

Senator TESTER. Yes.

Mr. RUPY.—generating the calls.

Ms. SAUNDERS. May I add something?

Senator TESTER. You may.

Ms. SAUNDERS. Mr. Abramovich and others are lead generators and they are paid by sellers of real goods and services and if we are able to hold the sellers of those goods and services responsible for the making of the calls by their lead generators, that will stop a lot of these calls. At the moment, they are defending the actions and saying we know nothing.

Senator TESTER. You make a very good point. So let me ask you and maybe this is a question for the Attorney General.

So we passed the TRACED Act. We allow the Telephone Consumer Protection Act to be fully enforced. Can we go after those folks who are paying to have this done?

Ms. SAUNDERS. If the current law is good but the calling industry is pushing the FCC and the courts to change the law and make the callers independently liable but make the sellers responsible for the callers not liable. That's the push. That's one of the issues that's pending.

Senator TESTER. So talk to me.

Ms. SAUNDERS. So—

Senator TESTER. No. The question is, are we going down a line that's enforceable or are we going down a line that will never happen? It looks to me that you go after the money. OK. If these dudes don't have money or don't have enough money or whatever, go after the folks who are creating the problem to begin with.

What's your view on that matter, Mr. Rupy?

Mr. RUPY. Senator, the main point I wanted to raise was that Adrian Abramovich, when the FCC issued its citation, it noted he wasn't saying I'm calling from Adrian Abramovich Resorts.

Senator TESTER. No, no.

Mr. RUPY. He was co-opting the names of Disney Resorts, Marriott, Hilton, et cetera. So, you know, in a lot of instances, these lead generators are purporting to be from these organizations—

Senator TESTER. And they're not.

Mr. RUPY.—and that is not the case.

Senator TESTER. OK. All right. Well, look, I'm in the business of taking phone calls as a U.S. Senator and I leave a lot of them and, quite frankly, what really ticks me off is when they call me. I don't get a real person. I get a damn computer that's talking to me and

it takes me 15–20 seconds to figure out it's a computer and then when I call them back, I get a busy signal. It drives me crazy. But it's probably good they don't answer.

I would also say on a foreign call, I can't imagine that many regular people get many calls from foreign countries. Just I've been here for 62 years and I've had a handful of them. OK.

So thank you all very much.

Senator THUNE. Thank you, Senator Tester.

Senator Young.

**STATEMENT OF HON. TODD YOUNG,
U.S. SENATOR FROM INDIANA**

Senator YOUNG. Thank you, Chairman.

Well, I want to thank each of you for sharing your views on this important issue. It's really important to people that I represent. We've dealt with this issue of robocalls in the state of Indiana in a very public way for decades now. In fact, for a period of time, I characterized this as the Number 1 public policy issue among Hoosiers, getting what they regard as annoying calls at dinner time, interrupting their daily lives.

Still today, it's not uncommon I'll hear from Hoosiers. They get 10 calls a day from people they don't know, they didn't ask for the call, and so forth.

So I'm glad we're having this hearing, Mr. Chairman. I'm glad we're taking some action to crack down.

In 2018, YouMail, a third-party software company, indicated that approximately 725 million robocalls were placed to Indiana recipients. Now if used properly, I want to acknowledge, robocalls don't have to be burdensome if you have the proper consent between parties worked out. Many services utilize pre-recorded calls and they share important information with constituents and customers.

But at their worst, as you know, there are criminals out there who have the ability to steal people's information, to steal their resources, and to prey on unsuspecting American citizens.

So again I'm glad we've moved forward with a first step here with the TRACED Act, but we have to continue to review this issue and I look forward to working with all of you as we do that to see how we can empower regulators and, if necessary, consumers additionally to combat this problem.

Constituents tell me that they're on the National Do Not Call List. They're on our states' Do Not Call List and yet they still receive unsolicited phone calls and they can't figure out why that is. That doesn't seem right to them.

As it's currently envisioned, the SHAKEN/STIR standards would authenticate each call and allow the recipient to answer the phone with confidence. However, with the current use of voice traffic over the internet, phone spammers can route calls through a private telephone network based here in the United States. If marked as spam under these standards, the operators can easily re-establish another operation.

So my question for the panel is, how would you suggest adapting these proposed standards or national enforcement to stop private telephone network operators from setting up operations all over again to continue making these unsolicited robocalls?

Mr. RUPY. Senator, thank you for that question.

It's a very good question and I think the TRACED Act does two things that are going to help with that. The facilitation of the inter-agency working group, SHAKEN/STIR, will make finding those actors easier and faster, but I really think at the end of the day, the criminal enforcement component, so that when they get caught that first time, they can't set up shop again because they're in a jail cell.

Mr. PETERSON. Yes. The only thing, and, Senator, I'd like to thank the State of Indiana because I know the Attorney General's Office in Indiana has been one of the leaders among the AGs in this fight along with Missouri.

Senator YOUNG. A shout-out goes to Attorney General Carter and Attorney General Zeller in our state. They were very active on this front and I know that the effort continues with our current AG.

Mr. PETERSON. AG Hill, yes. To me, the regulations will be important and I think having the opportunity for the FCC to get the input of the states we consider to be an important effort, but this acceleration of technology, I think, is always going to be our challenge and that's why the industry's cooperation is going to be so important.

Senator YOUNG. Ms. Saunders, do you have anything to add to that?

Ms. SAUNDERS. No, sir.

Senator YOUNG. OK. So I would just note the STIR/SHAKEN framework confirms the identity of the caller, not the content of the call.

Do we need to be doing anything with respect to the content or you think the identity is where we should stop in this effort?

Mr. RUPY. Senator, I think that the authentication of the number is a very good start. That's an important start.

Senator YOUNG. OK.

Mr. RUPY. Spoofing has been the key driver, one of the key drivers for robocalls. Authenticating who is associated with that number, that's an important step, as well, and I know that's something industry is definitely looking at.

Senator YOUNG. OK. Great. Thank you, Mr. Chairman.

Senator THUNE. Thank you, Senator Young.

My understanding is that Senator Sinema is en route. Did you have another question, Senator Markey? A quick one?

Senator MARKEY. Thank you, Mr. Chairman. I actually have questions for the record.

Senator THUNE. You do? OK. Well, if you want to ask, go ahead. I mean, we're going to wait for—we've got one more member that's on their way here.

Senator MARKEY. Oh, great. So if I can play that role, then I'd be glad to do it.

There's an entire industry out there solely predicated on contacting consumers by any means possible and the only thing preventing these callers from bombarding the public in an unlimited number of unwanted calls is the Telephone Consumer Protection Act and consent is the bedrock of the Telephone Consumer Protection Act and while technology may change, the key principle does not, and therefore it is the FCC's obligation to use its authority to

adapt to changing technologies and ensure consumers have robust enforceable protections against the onslaught of unwanted and abusive calls and texts and their work is more important now than ever because the D.C. Circuit Court of Appeals struck down portions of the FCC's 2015 rules which updated protections for the smart phone era.

While the court case was a setback, the spirit and intent of the TCPA has always been very clear. Callers must have affirmative permission from the consumer before using auto-dialers which are technologies that can call and text countless consumers at one time, and consumers should always have reasonable means to revoke consent, to say "no" from receiving any more calls or texts.

So, Ms. Saunders, is there any reason why the Federal Communications Commission cannot use its authority under the TCPA to ensure consumers have an easy way to revoke consent and require callers using auto-dialers to receive permission before calling or texting a consumer?

Ms. SAUNDERS. Thank you for the question, Senator Markey.

The issue before the FCC—there are a number of issues. The two big issues you've just identified, one is how to define or how to interpret the definition for auto-dialer. The reason the ACA case was sent back to the FCC by the D.C. Circuit Court was that it said that the 2015 FCC Order was too broad and that as it read, it covered all smart phones.

The FCC now has before it a number of comments from consumer groups and industry arguing that concept and we have pointed out to the FCC that smart phones as they come from the factory do not have the capacity, the current capacity to make automated calls.

So to quibble with you slightly, Senator Markey, you said that smart phones could be automated dialers, that is not the case unless they add applications and that's a critical distinction to make for the FCC.

If the FCC were to include all smart phones, the case would be sent back again, but we think we've shown to them how they can avoid that.

If the FCC does what the industry wants and defines automated dialers as the U.S. Chamber and other callers have asked, the definition will not cover any of the dialers out there. The consequences will be that all these automated calls will be completely unregulated and there will not be any way to say stop because the TCPA won't apply to them.

Senator MARKEY. OK. So your response is that the Federal Communications Commission has clear authority—

Ms. SAUNDERS. Yes, sir.

Senator MARKEY.—and if strong protections are not established, consumers would lose their right to provide and revoke consent from any calls and I agree with that and that's why so many members of the Senate are communicating with FCC Chairman Ajit Pai to adopt key protections of comprehensive definition of auto-dialer, ensuring all callers must receive permission before robocalling or robotexting a consumer, and preserving a consumer's right to revoke consent should they no longer wish to receive calls or texts, and if the FCC fails to fulfill their legislative mandate, it's going

to be imperative for this Committee once again to take action in order to ensure the consumers always have the right to say no to robocalls.

Ms. SAUNDERS. Yes. May I respond? Senator Markey, you yourself wrote a letter. You've written several letters to the FCC but you specifically wrote a letter on this point which we appreciate because it supports the consumers' view of the necessity for the FCC to appropriately interpret the statutory definitions.

Senator MARKEY. I appreciate that. Thank you. Thank you, Mr. Chairman.

Senator THUNE. Thank you, Senator Markey.

Senator Sinema.

**STATEMENT OF HON. KYRSTEN SINEMA,
U.S. SENATOR FROM ARIZONA**

Senator SINEMA. Thank you, Mr. Chairman, for holding this important hearing, and thank you to our witnesses for participating today.

I'm sure you've heard this from other folks on the panel, but in Arizona, people are frustrated by the barrage of illegal robocalls which interrupt family dinners, ruin people's movie nights, and occasionally even wake them up in the middle of the night.

But beyond frustration, illegal robocalls frequently support fraudulent scams that threaten the personal and financial security of Arizona's seniors, families, and businesses.

We know the FCC estimates nearly half of all cell phone calls received this year will be spam and according to a recent study, robocalls reached record highs in every Arizona area code in 2018.

In June 2018 alone, Arizonans received 78.3 million robocalls. I hear from constituents every day about annoying, burdensome, and dangerous robocalls. One family, Donald and Rosemary, who live in Mesa, are harassed as early as 6:30 in the morning by robocalls. Alejandro, who's a volunteer in an Arizona County Sheriff's Department, receives robocalls at work which distract him from his duties. Eric, a constituent in Phoenix, worries that his 82-year-old mother will get scammed by a robocall or that she might stop answering the phone all together.

So as robocalls disrupt the lives of hard-working Arizonans, they deserve much-needed relief, which is why I'm proud to have co-sponsored our bipartisan legislation, the TRACED Act, which this Committee recently approved to crack down on illegal robocalls and hold perpetrators accountable.

Our bill increases criminal penalties and promotes call authentication and blocking technologies, and I'm committed to working with my colleagues on both sides of the aisle to make sure that that TRACED Act becomes law.

As Eric from Phoenix said to me, no one should be held hostage by their own device.

So my first question this morning is for Mr. Rupy. If enacted, the TRACED Act would require voice service providers to adopt call authentication technologies to verify the identity of incoming calls before connecting the consumer.

Can you explain the STIR/SHAKEN technology and how it will prevent Arizonans from receiving these unwanted robocalls?

Mr. RUPY. Thank you for that question, Senator.

And, yes, the Act does that and industry's committed to deploying that standard. They're doing that now and basically the way the standard works, I've equated it to a Notary Public. When that calls get originated, the number is authenticated.

Basically, the company originating that call says I own this number, I know where it's coming from, my network, and it passes through the network and in each subsequent hub, each network it goes through, that number continues to be authenticated throughout the process.

So it will work on a pure IP network. Comcast and AT&T have already had successful handoffs of that. Verizon's done the same. So at the end of the day, what it will do is when that consumer sees that number on their caller ID that's been authenticated, they will know that that is indeed the number.

Now it doesn't authenticate the content of the call but nevertheless the authentication of that number is a powerful and important step.

Senator SINEMA. Thank you.

My next question is for Ms. Saunders, but I also welcome the thoughts of Mr. Peterson.

A recent report by the *Wall Street Journal* indicates that although the FCC and FTC have imposed large penalties on illegal robocalls, only a very small amount of those fines have been collected. So the FCC has levied over \$200 million in fines but has collected only about \$7,000.

So how will the TRACED Act improve enforcement of the law and how can we better partner with state authorities to ensure enforcement for these types of violations?

Ms. SAUNDERS. I think the TRACED Act will improve enforcement of the law by providing the enforcers, both private and public and government enforcement officials, the ability to determine who is making the calls and then they can bring actions against them.

In terms of collecting more fines and fees, I think the problem may be that the people that are being prosecuted don't actually have the money and as I've been saying is that we need to also make sure that we can go after the sellers of goods and services for whom these robocallers are actually making the calls and providing the leads.

In my testimony in Footnotes beginning on Page 2, I've detailed a number of individual class actions brought privately that are against home security systems and cruise-selling robocall systems and Hilton and other telemarketers who are responsible for those robocalls, even if they're not actually making them.

Mr. PETERSON. Senator, the only thing I would add to that is the TRACED Act will help. It will give us greater options. It'll also create, I think, even stronger interagency and Federal and state cooperation.

It's not to say that there has never been any type of significant collections here, but, for example, in 2017, there were four attorney generals and the U.S. DOJ obtained a \$280 million judgment against DISH. So there has been some effective enforcement, but I agree with Ms. Saunders. I think one of the bigger challenges is

sometimes the collectability of the players and their fluid operations.

Senator SINEMA. Thank you. Mr. Chairman, my time's expired, but thank you again for hosting this hearing.

Senator THUNE. Thank you, Senator Sinema.

And as we wrap up, I think we want to get these bad actors in a headlock, as was alluded to earlier, and so hopefully we can move the legislation forward.

It occurred to me as I was listening to all this that not only you run the danger obviously of people who are being preyed upon by scam artists and fraud and everything else, but also there seemed to me an inherent danger when people are no longer picking up legitimate calls that might relate to their own health and safety and so particularly elderly people and that to me seems to be yet another reason why we need to get this issue addressed.

So it has been very helpful this morning. Thank you all, as always, for your input and testimony.

We will keep the hearing record open for a couple of weeks and so if members have questions that they want to submit for the record, if you would please respond to those as quickly as possible, and we'll include those as a part of the permanent hearing record.

I do want to ask that there's a letter from ITTA in support of TRACED, that that be made a part of the hearing record.

[The ITTA letter referred to follows:]

ITTA

Washington, DC, April 11, 2019

Hon. JOHN THUNE,
511 Dirksen Senate Office Building,
Washington, D.C.

Hon. EDWARD MARKEY,
255 Dirksen Senate Office Building,
Washington, DC.

Dear Senators Thune and Markey:

Thank you for your leadership as the sponsors of the Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act. We view this bill as an important step in Federal efforts to stop the illegal robocalls that have intruded on consumers' privacy and triggered millions of complaints to Federal and state agencies.

ITTA's members support aggressive civil and criminal enforcement against illegal robocallers by the Federal Trade Commission, Federal Communications Commission and Department of Justice. Various ITTA members have also worked on the many cross-industry efforts to reduce robocalls, including the Industry Traceback Group, and the development of the SHAKEN and STIR standards for call authentication. Together, these efforts can reduce the incentive and ability of bad actors to abuse the communications system, and give consumers tools to protect themselves.

As the TRACED Act moves toward enactment, the implementation process for the market-based call authentication measures has already begun by some carriers, including carrier network investments. To that end, we hope Congress and others in an oversight role will encourage all parties to work through the process in good faith. In many cases, the practical number of equipment and software options will be limited, and ITTA member companies will depend on a small number of technology vendors to come through on time with the appropriate technology and network updates, at reasonable prices, and in sufficient quantity to achieve the reasonable timelines envisioned in your bill. If all parties work cooperatively, we feel confident the goals can be reached.

We appreciate your leadership on robocalling and other issues.

Sincerely,

GENEVIEVE MORELLI,
President.

Senator THUNE. And we will look forward to working with our colleagues on this Committee, Senator Markey and I, and hopefully

in a very bipartisan way moving this legislation across the finish line and on to the President's desk for his signature.

I think we have 53 cosponsors at the moment and hopefully there will be more as time progresses.

So thank you all again, and with that, this hearing is adjourned.
[Whereupon, at 11:47 a.m., the hearing was adjourned.]

A P P E N D I X

NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS
Arlington, VA, April 10, 2019

Hon. JOHN THUNE,
Chairman
Subcommittee on Communications,
Technology, Innovation, and the
Internet,
Committee on Commerce, Science, and
Transportation,
United States Senate,
Washington, DC.

Hon. BRIAN SCHATZ,
Ranking Member,
Subcommittee on Communications,
Technology, Innovation, and the
Internet,
Committee on Commerce, Science, and &
Transportation,
United States Senate,
Washington, DC.

Re: Tomorrow's Hearing on "Illegal Robocalls: Calling All To Stop The Scourge"

Dear Chairman Thune and Ranking Member Schatz:

I write to you today on behalf of the National Association of Federally-Insured Credit Unions (NAFCU) in conjunction with tomorrow's hearing entitled "Illegal Robocalls: Calling All To Stop The Scourge." NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 116 million consumers with personal and small business financial service products. NAFCU and our members appreciate the Subcommittee tackling the scourge of unwanted, illegal robocalls, but we would caution the Subcommittee to ensure that efforts do not hamper the ability of credit unions to make legitimate communications to their members.

In particular, NAFCU would like to reiterate our concerns regarding the Federal Communications Commission's (FCC) continuing work on defining "automatic telephone dialing system" ("autodialer") issues with the *Telephone Consumer Protection Act* (TCPA). Since the FCC issued its problematic 2015 Declaratory Ruling and Order (2015 Order), the risk of facing a costly lawsuit over inadvertent TCPA violations has kept many credit unions from freely communicating with their members. The March 2018 *ACA International v. FCC* decision invalidated the 2015 Order's overly expansive definition of "autodialer" and the FCC's approach to liability for calls to reassigned numbers under the TCPA. Since then, courts have taken a variety of approaches in determining what qualifies as an "autodialer," leading to a maze of judicial interpretations of Congress's intent and meaning in passing the TCPA.

NAFCU supports a broad definition of "autodialer" that only includes equipment that uses a random or sequential number generator to store or produce numbers and dial those numbers without human intervention. NAFCU also supports other reforms to help credit unions contact their members with important information about their existing accounts, such as permitting callers to establish a reasonable opt-out method for revoking their consent to be contacted.

We appreciate the Subcommittee's continued oversight of the FCC and examination of this issue; and would urge the Subcommittee to modernize the TCPA to combat illegal robocalls, while also protecting credit unions' ability to freely communicate with their members on important issues related to their existing accounts. We also urge you to support the changes to S. 151, the TRACED Act, that we outlined in a letter to the Committee on April 1 of this year. We believe these changes would help ensure efforts to stop illegal robocalls do not negatively impact the ability of credit unions to contact their members for legitimate business purposes.

On behalf of our Nation's credit unions and their more than 116 million members, we thank you for your attention to this important matter. Should you have any

questions or require any additional information, please contact me or Alex Gleason, NAFCU's Associate Director of Legislative Affairs.

Sincerely,

BRAD THALER,
Vice President of Legislative Affairs.

cc: Members of the U.S. Senate Committee on Commerce, Science, and Transportation

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO
HON. DOUG PETERSON

Question 1. Mr. Peterson, since at least 2014, you and other states' Attorneys General have been calling on carriers to adopt call blocking technologies and services and make them widely available to their subscribers. For example, Nomorobo just announced that it has blocked its 1 billionth wireless call, and is offering for free its real-time feed of IRS call-back scammers. How has this type of market-based service helped to combat robocalls?

Answer. With respect to call-blocking options offered by voice service providers, we have come a long way since 2014. Today, a number of the largest service providers offer a variety of free or lowcost options for both wireline and wireless customers.

With respect to services offered by third parties such as Nomorobo, I continue to believe that these companies and their call-filtering applications remain critical in the fight against illegal robocalls. For some consumers, these applications may be cheaper than a service offered by their service provider, more effective for certain purposes (*e.g.*, creating a whitelist), or simply easier to utilize.

Regardless of whether the service is offered by a third party or the consumer's voice service provider, these tools provide consumers with critical information needed to reclaim their privacy and protect themselves from unscrupulous scam artists.

Question 2. Is there more that the industry can do to foster adoption of robocall solutions?

Answer. Yes, there is no doubt that more must be done by industry to adopt and enforce robocall solutions. In addition to implementing the STIR/SHAKEN call authentication framework, voice service providers must demonstrate their commitment to identifying and blocking illegal robocalls at the network level. This requires service providers to know their customers, actively monitor their networks for robocall traffic, and investigate suspicious calling patterns.

All service providers should also offer free, easy-to-use call blocking and labeling tools to their customers and ensure that those customers know such tools are available.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. EDWARD MARKEY TO
MARGOT FREEMAN SAUNDERS

Question 1. Consumers should have meaningful control over who can and cannot contact their mobile device. Yet, two years ago, the FCC sought comments on a petition to exempt ringless voice-mails from TCPA protections. Ringless voice-mails allow the calling party to leave automated voice messages in a consumer's voice-mail without the phone actually ringing. Had the petition been granted, consumers would have no way to block or stop these unwanted messages from clogging their voice-mail. Callers will seek to exploit any technological developments to bypass core TCPA protections—ringless voice-mails are just a recent example. Ms. Saunders, how can we ensure that consumers are protected from these emerging technologies, which seek to bypass TCPA protections?

Answer. The TCPA prohibits the making of "any call" other than an emergency call "using an "automatic telephone dialing system" to "any telephone number assigned to a . . . cellular telephone service" without the "prior express consent of the called party".¹ The users of ringless voice-mails argue that ringless voice-mails are "information service technologies" that are not subject to regulation by the TCPA.²

¹ 47 U.S.C. § 227(b)(1)(A)(iii).

² See *e.g.*, *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, No. 619CV196ORL31DCI, 2019 WL 2567971, at *2 (M.D. Fla. June 21, 2019).

However, courts have consistently held that calls resulting in voice-mail messages are subject to the TCPA.³ Indeed, this was the result in a recent case in Florida in which the caller tried to make telemarketing calls using the ringless voice mail technology. The court unequivocally struck down the defendant's arguments.⁴ Other cases have met a similar fate.⁵

As a result, as long as the Federal Communications Commission and the courts follow the law, we do not believe there is much risk that ringless voice-mails will be allowed to evade TCPA coverage and clog up consumers' voice-mail.

Question 2. Scammers can now robocall consumers en masse by downloading apps on a modern smart phone. Ms. Saunders, can you explain how a traditional smartphone could be converted into an autodialer and how this potential capability is contributing to the rise in unwanted calls and texts?

Answer. Smartphones as manufactured and delivered to consumers do not have the present capacity to dial multiple numbers simultaneously or send mass texts. The same is true for ordinary desk top or laptop computers. None of these devices come from the factory capable of being used as autodialers. They can, however, be adapted, with the addition of software, or through accessing the web, in ways that will allow them to become part of a system that makes autodialed calls.

Chairman Pai's dissent to the 2015 Omnibus Order⁶ when he was a Commissioner provides a framework for this analysis, as it points out the technological capacity of smartphones in a way that draws a simple and straightforward distinction between an ATDS and the ordinary use of a smartphone. In his dissent, then-Commissioner Pai stated his view that the test for whether a system meets the definition of ATDS must be based on its "present capacity" or "present ability."⁷ The problem he identified with applying a "potential capacity" test to smartphones was the ability to add features to the phone: "It's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers."⁸ These observations by Chairman Pai set forth a path for drawing a clear and simple distinction that excludes smartphones from the definition of ATDS: assuming that present capacity is the test, smartphones simply are not manufactured with features that enable users to make simultaneous calls or send mass texts.

As we said in our comments filed on October 17, 2018, a smartphone should be treated as a box into which various programs and features are packed—the ability to make voice calls, a clock, a music player, Internet access, texting capacity, etc. These capabilities should be examined one-by-one when determining whether a particular smartphone is an ATDS. The fact that apps *could be* downloaded to the phone should not make the phone an ATDS unless the user *has* downloaded and *has used* such an app. Likewise, for any special software that could enable mass dialing, unless it has been *installed on the phone* the smartphone would not act like or become an ATDS.

Smartphones—just like any computers—do have the *potential* to be part of a system that could be an ATDS. But they do not come from the manufacturer already configured to be an ATDS. Smartphones are not manufactured with any inherent features that make them ATDSs. Unlike predictive dialers, they cannot make simultaneous calls to a batch of numbers automatically from a stored list. Calls are made from a smartphone only when the human caller scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number or otherwise identifies the number to be called). That capability does not make the smartphone an ATDS. As Chairman Pai has noted,⁹ the Commission

³See, e.g., *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012) (stating that the TCPA "curtails the use of automated dialers and prerecorded messages to cell phones . . . and routing a call to voice-mail counts as answering a call") and *Castro v. Green Tree Servicing LLC*, 959 F.Supp.2d 698, 720 (S.D.N.Y. 2013) (holding that for purposes of liability under the TCPA, it was immaterial whether the calls at issue had been answered by the plaintiff or had gone to voice-mail).

⁴*Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, No. 619CV196ORL3IDCI, 2019 WL 2567971, at *2 (M.D. Fla. June 21, 2019).

⁵See, e.g., *Schaevitz v. Braman Hyundai*, No. 1:17-cv-23890, 2019 U.S. Dist. LEXIS 48906 (S.D.Fla. March 25, 2019) (holding that ringless voice-mails can constitute a "call" subject to the TCPA).

⁶2015 Order, ¶17, 2015 Order, Dissenting Statement of Commissioner Ajit Pai, at 8074; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92–90, Report and Order, 7 FCC Rcd 8752, 8775.

⁷*Id.*

⁸*Id.*

⁹*Id.* at 8774.

has already explicitly held that “speed dialing” does not fall within the definition of an ATDS.¹⁰

Additionally, a smartphone cannot send mass texts (as opposed to group texts with modest limits on their number) without downloading an app or connecting to an Internet program. After much investigation, the only case¹¹ we have found in which a smartphone was used to send mass texts involved a user who downloaded an app: the smartphone did not come with this capability. Accordingly, a smartphone should be considered part of an automated telephone dialing system for the purpose of sending mass texts *only when the smartphone actually has an app or additional software added to it, or has connected to a web-based mechanism to send texts en masse*.

As the Commission has said repeatedly, the test for whether a device is an ATDS is whether it can “dial numbers without human intervention” and “dial thousands of numbers in a short period of time.”¹² Smartphones, without the addition of apps or software, or the connection to the Internet to use web-capabilities, do not inherently meet these requirements.

Please let me know if I can answer any further questions.

Thank you.



¹⁰ *Id.* at 8776..

¹¹ *Wanca v La Fitness*, No. 11 CH 4131 (Lake County, Il). (Defendants had downloaded a mass texting application to an iPhone and used that to telemarket.).

¹² 2015 Order, at ¶67, citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278, Report and Order, 18 FCC Rcd 14014, 14092, para. 132–33; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, CG Docket No. 02–278, FCC Docket No. 07–232, 23 FCC Rcd 559 at 566, para 13 (2008); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02–278, Declaratory Ruling, 27 FCC Rcd 15391 at 15392, para. 2 n.5. (2012).