Questions for the Record from Chairman John Thune
To
Ms. Becca Wahlquist

Question 1*. Would a concrete standard for revocation of consent in the TCPA regulations, as there is for the FDCPA, FCRA, and other banking laws, be helpful in reducing the types of contact intended to be prohibited by the TCPA?*

Answer: The FCC majority's pronouncement in its July 2015 Order that consumers who had provided a business with prior express consent to make certain types of autodialed/prerecorded calls could revoke prior consent at any time and by any means (including informing a store clerk at a storefront location that consent was being revoked) has put American businesses in an untenable position. Businesses have no realistic way to collect and record such revocations. Moreover, there is no mention in the TCPA of revocation for a "prior consent", and thus no direction for how such a revocation should be made by a consumer.

A concrete standard for revocation (such as that established in the FDCPA and other laws) would be helpful both to consumers and to businesses. Consumers would know that their revocation requests would be received and processed by the business, and businesses would have notice when revocation requests were made via the required channels. The standard could then require that a business process and implement the revocation request within a set timeframe, such as 15 days for calls or 3 days for text messages (which can also be stopped immediately through a "STOP" reply to a text). Consumers would have a means to control the communications they opt to receive from companies, and businesses could ensure that procedures and practices existed to comply with requests made in accordance with the concrete standard.

Establishing a means and method for revocation is particularly important to curb litigation abuse. Since the FCC majority's order in July 2015, companies have found themselves being "set up" with revocation requests made in unorthodox means or with unclear language that would not alert a representative or an automated system that the consumer wishes to revoke prior express consent for certain communications. With a concrete standard for revocation in place, only those companies that ignore revocation requests made via those established procedures would face TCPA liability for continued communications placed after the time to process and implement requests has passed. And companies who do the right thing will have a clear standard to follow.

Question 2*. Attorney General Zoeller and a number of other attorneys general sent a letter to this committee urging support for the HANGUP Act, arguing that it was necessary because, "As amended, the TCPA now permits citizens to be bombarded by unwanted and previously illegal robocalls to their cell phones if the calls are made pursuant to the collection of debt owed to or guaranteed by the United States." Is that your understanding of what will necessarily be allowed as a result of the Federal Communications Commission's implementation?*

Answer: I appreciated the opportunity to address the Committee on the TCPA and its impact on American businesses; the HANGUP Act is beyond the scope of my testimony, which was limited to the TCPA. As to the position of the Attorney General, I note that I was very encouraged at the hearing by Attorney General Zoeller's discussion of the need for TCPA affirmative defenses for companies that strive to comply with this law and that develop policies, procedures, and training to ensure compliance.

***Question 3**. What are some of the benefits and challenges of moving forward with a mandatory reassigned numbers database?*

Answer: While a reassigned database is a good idea in theory, actual implementation could be challenging. For example, it is difficult to see how any such database could be created and maintained by the government absent enormous expenses of time and resources. Further, similar databases are being explored in the private sector.

Importantly, a reassigned number database does not resolve all liability-it would do nothing to help businesses who received a telephone number that was wrongly-provided by a consumer from the very start, or whose consumers are sharing telephone numbers across family plans and changing phones within those plans without notice to the phone provider.

What well-intentioned American businesses need is not a future and partial solution to TCPA litigation; companies need more immediate help through the implementation of affirmative defenses into Section 227(b) that exist already in Section 227(c)'s private right of action section, and through legislative clean-up of the TCPA to include provisions that exist in every similar federal statute providing a private right of action (i.e., statute of limitation and damages caps). The final section of my written testimony provided earlier to the Committee addresses several updates to the TCPA that could provide meaningful reform.

***Question**. Is there a helpful way to distinguish between random or sequential telemarketing calls and texts versus calls or texts to numbers originally provided by customers that have been subsequently reassigned?*

Answer: It is important to distinguish between the two types of calls described in this question: random and sequentional telemarketing calls were the intended target of Section 227(b) of the TCPA, which is likely why that section does not include the affirmative defenses provided in Section 227(c), as there would be no defense for a company attempting to reach its own customers at customer-provided numbers if the company was randomly reaching out to any and every telephone number generated by the kind of ATDS in use in 1991.

On the other hand, calls or texts to customer-provided telephone numbers that have been reassigned to different consumers are entirely different. The recipient of a call or text to a customer-provided number includes receiving targeted communications designed to reach a company's actual customer. The company cannot benefit from, and would not want to send, such targeted messages (generally transactional and customer-specific information) to a wrong party.

As to whether or how the two types of calls described in this question could potentially be distinguished by an entity such as a telephone service provider, I do not have the technical expertise to know whether such a distinction could be made, let alone who could make it. But I do know that Congress in 1991 could never have envisioned companies facing such staggering financial liability for reaching out, with modem technologies, to customer-provided numbers that the company, in good faith, believes are being made with that customer's prior express consent, to the customer's given point of contact.

***Question 5**. Are texts less intrusive than phone calls? If so, would it make sense to have reduced penalties for text message violations of the TCPA in order to encourage contact through text messaging rather than phone calls?*

Answer: It is clear from the legislative history of the TCPA that text messages were not envisioned at the time it was drafted (nor could they be, when no cellular telephone capable of receiving a text message existed in 1991). Technology has advanced, and the advent of text messaging has provided a new and less intrusive means for communications. Rather than involving a series of loud rings, and the need for the recipient to pick up a telephone line to speak with a caller, a text message provides a communication that can be seen with a glance, at the recipient's convenience. Furthermore, companies sending text message communications to customers can enable systems to recognize a "STOP" reply to that text message quickly and efficiently, so that a consumer can easily and almost immediately stop further text communications if they become unwanted.

Given the nature of text messages, and the fact that the TCPA has no provision addressing this type of communication that was not conceived of in 1991 (when even email was a novel thing used by few), it could make sense for the TCPA to be updated to specifically address text messaging and whether and how penalties should apply (for example, if a company continues to send text messages after a customer has revoked prior consent). Of course, affirmative defenses should be provided to protect a company from staggering financial liability in the event of a mistake or good faith error (such as the affirmative defenses in Section 227(c) for violations of the Do Not Call provisions).

As for a reduction in per-message potential liability for text messages versus telephone calls, while such a provision could make sense and could be implemented given the nature of text messages, the most important revision in terms of liability is a cap on the available individual and class damages available under the TCPA, as detailed in the written testimony I provided earlier to the Committee. Indeed, a per-text damages reduction, even to a number such as $25 per text message, does little to help a company with millions of customers when a class action is filed. For example, if damages were set at $25 per text (or 5% of the current per-message liability), a lawsuit claiming that five text messages were sent over the course of a year in violation of the TCPA to each of a company's20 million customer-provided numbers would immediately put a minimum of $250 million at issue in a classwide litigation.

Question 6*. Are you aware of any negative consequences resulting from the Commission's 2015 Omnibus Declaratory ruling, including the movement of call centers overseas?*

Answer: While I do not have direct knowledge of the movement of call centers oversees in response to the July 2015 Order, I have heard anecdotal evidence of such events. What I can speak to, with personal knowledge, is the significant increase in TCPA litigation after that Order was issued.

TCPA litigation is flooding and crowding federal courts, threatening businesses with annihilating damages, and offering no real benefit to the consumers who constitute putative class members in actions designed to provide significant attorneys' fees to the counsel bringing TCPA class actions. I discuss these trends in the written testimony I provided in advance of the May I8,2016, hearing.

Question 7*. Is there a database on which callers can reasonably rely that identifies numbers that have been reassigned?*

Answer: There are several companies within the private sector that are making strides towards providing solutions to companies that will mitigate risk of TCPA lawsuits caused by calls to reassigned telephone numbers. The Committee has heard of Neustar, and I am also aware of a newer company-Early Warning- that has developed its own solution to identify when a telephone number may have

changed hands after being provided to a company. We can anticipate that private sector companies will continue to develop databases and tools to mitigate TCPA risks, and that larger businesses (in particular) will be able to contract to use such tools. However, it is important to note that even if every reassigned telephone number eventually could be flagged via such a solution, a business is still at risk of calling a "wrong" number because it was wrongly provided at the start by the customer (e.g., the customer transposes two digits, or gave a friend's number), or because a family plan masks the identity of the actual user of a telephone.

I am currently defending a number of TCPA cases brought in circumstances in which a reassigned number database could not have been helpful. For example, one class action suit is headed by a mother who provided a company with a telephone number that was later given by her to her teenage daughter (who received the calls at issue); the family-plan telephone number is owned by the mother and bills paid by the mother, so any search would show that number still belongs to the mother/customer. I am also defending a class action suit brought by someone whose telephone number was erroneously provided by a customer as her own number so that from the very start, the company had a wrong number that was never reassigned. Such lawsuits highlight the need for affirmative defenses to be added to Section 227(b) to protect companies who implement compliance policies, procedures, and training and who make communications in good faith to customer-provided numbers, as well as the need for caps on available damages under the TCPA for individual and class litigations.

***Question 8**. What action could Congress or the Federal Communications Commission take to help callers avoid costly discovery/litigation in cases where they have not violated TCPA?*

Answer: Congress should explore modernizing the TCPA to help businesses avoid costly discovery and litigation in TCPA lawsuits by providing affirmative defenses for Section 227(b) claims, and capping available statutory damages for this no-actual-harm-needed statute, as detailed in my previously provided written testimony. Moreover, Congress can make a significant difference through discovery rules on proportionality, so that the recipient of a single call cannot seek discovery into all telephone calls placed by a company within the previous four years, if that person's own claim can be refuted via discovery focused only on the call that person received.

Congress could also help American companies by shifting some of the cost burdens involved in pulling class-wide discovery on millions of communications to the TCPA plaintiffs' firms, who are seeking that information in a bid to accumulate a significant enough number of a tissue calls to force class-wide verdicts or settlements (from which those firms plan to seek significant fees and costs). If the person requesting such classwide discovery was required to pay the costs companies incur to accumulate and provide that information, then abusive litigation would be curbed and litigation more likely to have merit would proceed.

***Question 9**. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation?*

Answer: I am personally aware of many small businesses whose existence were threatened by the TCPA. For example, one current small-business client of mine is losing sleep over the thought that if we are not successful in our early defenses, it may need to bankrupt its business and let its six full-time employees go because of the limited funds it has available to defend the putative class action brought against it.

Similarly, I have spoken with the owner of a Detroit company with thirty employees who would have had to shutter its businesses if it lost in a lawsuit brought for some targeted faxes it sent to its customer list, with a Pennsylvania family-owned plumbing company deciding whether it needed to bankrupt in light of similar TCPA litigation, and with a Florida husband-and-wife start up debating whether to use its entire family savings account to fund its defense of a TCPA suit.

So while (thankfully) none of my small business clients have gone out of business as the result of TCPA litigation, given the onslaught of TCPA litigation and the number of small businesses targeted in such litigation across the country, I would not be surprised to find that various small companies have closed up shop when faced with the expense of defending TCPA litigation.

Question 10*. Are you aware of any small businesses that have gone out of business as a result of the legal fees or settlements associated with a TCPA litigation?*

Answer: I incorporate herein my response to Question 9 above.

Question 11*. In the recent CFPB Notice of Proposed rulemaking for arbitration, the CFPB appears to recognize the challenges small businesses have when faced with TCPA related class action litigation. In the rule they note, "... the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages awards." Do you have similar concerns about how the statutory damages associated with TCPA litigation can threaten small businesses?*

Answer: I have long been concerned with how uncapped statutory damages associated with TCPA litigation can threaten small businesses; as I noted in response to Question 9 above, I have spoken with various small business owners whose first knowledge of the TCPA came through service of a class action complaint seeking damages that would bankrupt even a larger and established company. I have one client accused of sending a single text message to 64,000 persons without prior consent (despite the company's belief that it was sending that text only to people who had affirmatively asked for that message). That single transmission has led to a putative class action suit seeking $96 million in trebeled damages available under the TCPA (even though this class action is the only complaint that was filed regarding that single text message).

With the uncapped statutory damages available under the TCPA, a transmission of 5,000 facsimiles sent in a targeted advertising campaign by a small business (many of which transmissions were received as e-mails via the recipient's fax server) would, for example, lead to a minimum of $2.5 million in TCPA damages. This is a staggering amount of liability for a small business to face. Given such numbers, small American businesses are forced into hefty individual settlements with putative class representatives in order to avoid the costs of defense and the risks of annihilating damages-settlements that alone, even at "small" amounts such $25,000, are enough to threatened the continued growth and success of that business.

Thus, the legislative revisions I outlined in my original written testimony are needed for small American businesses as much as they are needed for the larger companies often targeted by TCPA suits.

Questions for the Record from Senator Deb Fischer
To
Ms. Becca Wahlquist

Question 1*. The FCC's 2015 order for TCPA reassigned numbers allows one call across an entire enterprise, even if it has multiple subsidiaries, before a caller can be liable for contacting a consumer. This is the case even though there is a no reassigned number list available to check, and the caller will often have no knowledge that a numbers has been reassigned. Is there a reason the caller should not be required to have "actual knowledge" that the called number is not that of the initial person? What reasonable means can a caller take to ensure a number has or has not been assigned?*

Answer: The FCC majority's 2015 Order did businesses no favor in providing a safe harbor under Section 227(b) of a single call for businesses who believe they are reaching out to a customer, but who instead are unknowingly contacting a different person because a telephone number was reassigned or wrongly provided in the first place. I believe that the FCC thought that this single call exemption would mirror the one-call safe harbor provision in Section 227(c), in which the statute itself makes clear that a person must receive two calls placed in violation of Do Not Call rules before being able to bring a private action under that section of the TCPA for all but the first call. But when it comes to Section 227(c), companies have a federal Do Not Call list and their own internal Do Not Call lists to check against, and thus are on notice as to what numbers cannot receive telemarketing calls. This "one free call" actually provides for a single mistaken call (made despite DNC list membership) before litigation can be brought.

However, as to Section 227(b), and texts or calls that are autodialed/prerecorded and placed to cellular phones, a company has no guarantee that a phone number provided by its customer remains in possession of, or is primarily used by, that customer. So the "one free call" doesn't provide leniency for a single mistake; while there might be an indication from that single call that the telephone number no longer belongs to the intended recipient (i.e., someone answers and informs the caller that it is a wrong number), in most circumstances the company will learn nothing from that call that would provide notice that the telephone number has changed. Thus, actual knowledge of reassignment should be required before a caller can be held liable under the TCPA for making additional calls to a reassigned number.

Knowledge cannot be presumed, and the FCC majority recognized that it will be impossible for businesses to know to a certainty that a telephone number has been reassigned simply from calling that number, instead noting in its July 2015 Order several "indicators" that could be helpful in learning of a reassignment. But my experience with companies doing their best to comply with the TCPA, and who only reach out to their own customers, is that often these indicators (i.e., a voicemail providing a different person's name than the customer in its greeting) are not present.

I note that most businesses do contractually require customers to update their contact information if it should change, but there is no way to ensure that customers will do so. And the FCC's "solution" to the fact that a company often cannot know when a number has changed is no solution at all: in footnote 302 of the July 2015 Order, the FCC opines that American businesses calling a wrong number because a customer did not update its information should consider suing those customers. See In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C.Rcd. 7961, n.302 (2015) ("The failure of the original consenting party to satisfy a contractual obligation to notify a caller about such a change does not preserve the previously existing consent to call that number, but instead

creates a situation in which the caller may wish to seek legal remedies for violation of the agreement."). This is hardly a consumer-friendly approach to the problems of TCPA litigation abuse.

So, the problem is that there is no way to guarantee that a customer-provided telephone number has not changed hands (particularly when it is passed from one family member to another in a group-paid family plan). The “one call" safe harbor provides no real protection. American businesses are left without any reasonable method to avoid TCPA liability, further highlighting the need for specific affirmative defenses within Section 227(b) that would protect good-faith callers who implement compliance policies, procedures, and training, as detailed in my written testimony provided in advance of the May 18, 2016, hearing.