Sen. John Thune (R-SD), chairman of the Senate Commerce Committee, and Sen. Ed Markey (D-MA), a member of the Committee and author of the Telephone Consumer Protection Act (TCPA), recently introduced S. 3655, the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (the TRACED Act), to prevent illegal robocall scams. In brief, the bill would extend the statute of limitations for the Federal Communications Commission (FCC) to pursue robocall scammers and others who intentionally violate the law, impose additional penalties on such violators, require call authentication and blocking technologies, and establish an interagency working group to explore further ways to prosecute robocallers who intentionally violate the law.

The genesis of the bill rests with the Commerce Committee’s April 2018 hearing (previously discussed here) on abusive robocalls and caller ID spoofing, and how to combat them. During the hearing, Committee members and witnesses highlighted the fact that robocalls and ID spoofing have “exploded in recent years” and that “about a quarter of these calls are scam calls.” Senators agreed that consumer
education, aggressive FCC and Federal Trade Commission enforcement actions, and the use of new ID verification and robocall-blocking technologies are important tools in combating these calls, and identified gaps and shortcomings in these tools. For example, as Chairman Thune said in introducing the TRACED Act, the current “enforcement regime is totally inadequate for scam artists, and we need to do more to separate enforcement of carelessness and other mistakes from more sinister actors.”

To address these gaps and shortcomings, the TRACED Act would:

- broaden FCC authority to impose civil penalties of up to $10,000 per call on those who intentionally violate the law and to impose criminal fines on such persons;

- extend the statute of limitations from one year to three years for the FCC to pursue civil actions against those who intentionally violate the law;

- eliminate the requirement that the FCC issue a citation against such violators before pursuing civil actions, although it would require the FCC to provide notice before initiating such actions;

- establish an interagency working group led by the Department of Justice in consultation with the FCC, and consisting of various federal agencies, state attorneys general, and other non-federal entities, to identify and report to Congress on improving deterrence and criminal prosecution of robocall scams at the federal and state levels;

- direct the FCC to adopt a rule that requires voice service providers (defined to include voice-over-Internet (VOIP) providers) to implement appropriate and effective call authentication technologies that enable such providers to verify that incoming calls are legitimate before they reach consumers’ phones;

- delay implementation of the FCC authentication technology rule if the agency determines after public notice and comment that each voice service provider has established voluntary rules for an appropriate and effective authentication framework and is implementing the framework; FCC Chairman Ajit Pai recently sent letters to companies urging the adoption of such voluntary rules;

- direct the FCC to adopt rules that provide for (1) a safe harbor for voice service providers from liability for unintended or inadvertent blocking or misidentification of calls, and (2) a process permitting a calling party adversely affected by the authentication framework to verify the authenticity of the party’s calls; and

- direct the FCC to adopt a rule to help protect subscribers from receiving unwanted calls or text messages from a caller using an unauthenticated number.

With the current Congress scheduled to wrap up business next month, little if any action is expected on the bill this year. At the same time, the bill is noteworthy, and should not be ignored, for a number of reasons:
First, it is bipartisan bill, and could garner support not only in the Senate, but also in the soon-to-be Democratic-controlled House. In addition, both the telecom industry and consumer groups issued positive statements on the bill after its introduction.

Second, we expect Sens. Thune and Markey to re-introduce the bill next Congress and we understand that House Energy & Commerce Committee members have expressed interest in the legislation as well. Sens. Thune and Markey are well-positioned to help pass the bill. Sen. Thune was just elected the Senate Majority Whip for the next Congress, and although he has to give up his chairmanship of the full Commerce Committee because of Senate Republican term-limit rules, he could decide to chair the Committee’s Communications Subcommittee. Sen. Roger Wicker (R-MS), the current Communications Subcommittee Chairman, who also cosponsored the bill, is likely to be the next chairman of the full committee. Further, Sen. Markey could play an influential role not only in the Senate, but also with his former House colleagues on the Energy & Commerce Committee.

Finally, scam robocalls and illegal ID spoofing are clearly a serious problem, and the FCC and Congress support multiple solutions to help combat them. In the case of the TRACED Act, Sen. Markey said it “will provide every person with a phone much-needed relief” and will do so using “a simple formula: call authentication, blocking, and enforcement.” As Sen. Thune noted, it also is intended to go after really bad actors and not legitimate businesses. For this reason, it could help legitimate businesses and help clear the way for future legislation providing badly-needed TCPA reforms. Yet, as we noted last spring after the Senate hearing leading to the introduction of the bill, there is risk that legitimate businesses could be adversely affected by the bill and that attempts could be made, especially in the Democratic-controlled House, to amend it to expand rather than reform the TCPA. So, again, businesses should keep a close eye on the legislation.

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