

## Legislation Looking Likely on a Number of TCPA “Hot-Button” Issues

Article By:

Laura H. Phillips

Qiusi Y. Newcom

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[Senate Bill 151](#), now called “the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act” (the “TRACED Act”), has been reconciled with the House of Representatives’ bipartisan bill [House Bill 3375](#) and was [passed in the House on December 4, 2019](#). This revised amendment has been returned to the Senate for a final vote and is expected to become final legislation “if not this week, then next week,” according to the bill’s sponsor, Representative John Thune. Thus, the prospects for passage of TCPA legislation currently look quite positive.

As drafted, the legislation will kick off a number of activities by the FCC, and may, as a practical matter, require the agency to take prompt actions on long-awaited rulings on critical statutory definitions. We highlight below some of the most notable revisions in the TRACED Act made since July 2019.

### Adoption of Many, But Not All, of House Bill 3375’s Proposals

The compromise bill now pending at the Senate largely consists of a literal combination of the May 2019 version of the Senate Bill 151 and the House Bill 3375. The compromise bill generally adopts the proposed changes we previously discussed in [our coverage of House Bill 3375](#), including the extension of the statute of limitations for the FCC’s enforcement against intentional violators from two to four years.

One exception is the omission of the language originally in the House Bill 3375, which would direct the FCC to clarify what would constitute “automatic telephone dialing systems” (ATDS) and “calls made using an artificial or prerecorded voice.” Because these issues would no longer be addressed in this compromise bill, the broad-sweeping and uncertain scope of ATDS and prerecorded voice, at least for the time being, will remain a battleground for plaintiffs and defendants. Even without this ATDS language, we can expect that interested parties will renew or increase their efforts at the FCC to urge a ruling on clarification of what is and is not an ATDS in [a proceeding](#) that has been open for more than eighteen months and fully briefed for more than thirteen.

### Changes to Address the Need to Curb Criminal Calling and Texting

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In an effort to curb obvious criminal activity, both houses of Congress recognize that the FCC's enforcement efforts can be significantly frustrated when TCPA texting or calling violators adopt another identity, address, or phone number after receiving a citation from the FCC. As a result, the compromise bill would amend the TCPA so that the FCC is no longer required to issue a citation of the violation and to provide the entity accused a reasonable opportunity to challenge the facts in the citation. Other measures, including clarifying that a forfeiture penalty would apply in addition to any other penalty available to the FCC, and amending the TCPA so that broadcast stations holding FCC licenses would no longer be exempt from forfeitures imposed under the TCPA, are also intended to strengthen the FCC's tools to address criminal activities.

## **Short Reprieve for Some Voice Service Providers on Implementing SHAKEN/STIR**

The bill continues to require “full participation of all classes of [voice service providers] and types of voice calls” to implement or be subjected to mandatory call authentication frameworks within eighteen months after its enactment. Voice service providers subject to this deadline would be able to satisfy the implementation requirement if they “will be capable of fully implementing an effective call authentication framework” (and specific for voice service providers in VoIP networks, the FCC's existing call authentication framework STIR/SHAKEN) by the deadline.

Notably, some changes to this version seem to suggest that the compromise bill is a nod to the concerted efforts among industry in the past months advocating for a more nuanced approach to implementing the STIR/SHAKEN framework, essentially allowing more time for some providers to test and implement their inter-provider authentication protocols.

During congressional [hearings on robocall bills that occurred earlier this year](#), industry representatives expressed serious concerns about the STIR/SHAKEN framework because it is not compatible with the non-Internet Protocol (IP) traditional public switched telephone network used to transmit non-voice-over-Internet-Protocol (VoIP) voice calls. They also pointed out that adopting the framework would require significant upgrades to telecommunications systems used by service providers and callers – especially organizational callers. These challenges, along with whether robocall bills should allow presumptive blocking of calls failing authentication under the existing framework, have been among the issues at the center of a heated policy debate about balancing a number of interests.

While specifically imposing the same eighteen-month deadline on voice service providers in the non-IP networks, the compromise bill would now recognize several exemptions where voice service providers may be granted “delay of compliance” for a reasonable period of time. Thus, the legitimate concern that calls on non-VoIP networks cannot be authenticated under the SHAKEN/STIR framework appears to be addressed by the exemption, by postponing compliance deadline until a call authentication protocol for calls delivered over non-IP networks “has been developed” and “is reasonably available.” Voice service providers that “materially rel[y] on” a non-IP network for the provision of voice service or calls can benefit from this exemption, but must still implement “an appropriate robocall mitigation program to prevent unlawful robocalls from originating on the network of the provider.”

The FCC would also have explicit authority to “require” or “prescrib[e] certain specific robocall mitigation practices.” Failure to take “reasonable efforts” to implement mitigation programs or having been found to have repeatedly originated large-scale unlawful calling campaigns could result in the

FCC limiting or terminating a granted delay of compliance so that the voice service provider would no longer be shielded from enforcement actions and potential liability.

## Significant New FCC Reporting and Rulemaking Mandates Ahead

With relatively high-level legislation, questions remain as to how call authentication frameworks can work to bring non-VoIP carriers into the fold. To that end, the compromise bill directs the FCC to submit several reports to Congress and directs the initiation of a range of rulemaking proceedings in a short time frame with an eye towards new implementation regulations.

The compromise bill would require that the FCC assess any burdens or barriers to the implementation for several categories of voice service providers. These would include voice service providers whose networks use time-division multiplexing, small or rural voice service providers, voice service providers in IP networks who are unable to purchase or upgrade equipment to support the SHAKEN/STIR framework, or voice service providers in IP networks for whom the equipment supporting the SHAKEN/STIR framework is not available.

Within a year of the amendment's enactment, the FCC would also be required to submit an implementation report that provides an analysis on voice service providers' implementation status of the SHAKEN/STIR framework, availability of necessary equipment and equipment upgrades, and the efficacy of the SHAKEN/STIR framework in addressing all aspects of call authentication.

On other issues, the compromise bill would also adopt three proposals from House Bill 3375 requiring that the FCC specify several aspects of its robocall exemptions and mandating that the FCC submit two sets of reports to Congress on the implementation of its reassigned numbers database and enforcement actions against robocalls and spoofed calls.

Looking ahead to next year, the FCC can be expected to adopt several new rules. Within 180 days after the enactment of the amendment, the FCC would be required to commence a proceeding to determine requirements for voice service providers who have access to number resources to take sufficient steps to know the identity of their customers and appropriately police illegal activities. At a maximum of twelve months after the enactment, the FCC would be required to issue best practices about the implementation of effective call authentication framework and to adopt rules protecting calls that are subject to a delay of compliance granted to a service provider from being blocked if they are not fully authenticated. Addressing the customer-facing side of call authentication implementation, the bill states that the FCC rules should incorporate a requirement that voice service providers not incur any additional line item charge for the costs service providers may bear by their provision of call authentication, [a matter of deep concern for Commissioner Rosenworcel and Commissioner Stark](#).

If enacted, the compromise bill will lead to another busy year of TCPA rulemaking at the FCC. Companies initiating a large volume of business calls can benefit from advance planning for operational changes in the upcoming year and closely monitoring related legal developments.

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