

May 28, 2019

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Room TW-A325
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentations
CG Docket Nos. 02-278, 17-59, 18-152; WC Docket No. 17-97**

Dear Ms. Dortch:

On May 23, 2019, the following individuals (collectively, the Associations) met with Federal Communications Commission (FCC or Commission) Commissioner Michael O’Rielly and his Wireline Advisor, Arielle Roth, and separately with Jamie Susskind, Chief of Staff for Commissioner Brendan Carr: Jonathan Thessin with the American Bankers Association; Mark W. Brennan of Hogan Lovells US LLP, on behalf of the American Association of Healthcare Administrative Management; Mahlet Makonnen with the National Association of Federally Insured Credit Unions; James Locke with the U.S. Chamber of Commerce Institute for Legal Reform; Leah Dempsey with ACA International; Celia Winslow with the American Financial Services Association; Elizabeth Kersey with PRA Group; Karl Koster with Noble Systems Corporation and on behalf of PACE; and Michael Pryor of Brownstein, Hyatt, Farber and Schreck and Robert Flock, on behalf of the Credit Union National Association.¹

During the meetings, the Associations expressed support for the Commission’s efforts to address illegal automated calls. The Associations also raised concerns that the draft call blocking *Declaratory Ruling*² currently scheduled for the Commission’s vote on June 6, 2019 could harm consumers by resulting in the erroneous blocking of lawful calls — including urgent calls affecting consumer health, safety, and financial well-being. Public safety alerts, fraud alerts, data security breach notifications, healthcare reminders, and power outage updates, among others, all could be inadvertently blocked under the draft *Declaratory Ruling*.

¹ Ms. Kersey did not attend the meeting with Commissioner O’Rielly and Ms. Roth. Ms. Winslow and Mr. Locke did not attend the meeting with Ms. Susskind.

² *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Draft Declaratory Ruling and Third Further Notice of Proposed Rulemaking, CG Docket No. 17-59, WC Docket No. 17-97, FCC-CIRC1906-01 (May 16, 2019) (*Draft Declaratory Ruling*).

As an initial matter, the draft *Declaratory Ruling*, which would allow for call blocking on an opt-out basis, is contrary to the Communications Act and Commission precedent. For example, the FCC has historically limited Title II service providers from deciding which call traffic to allow or block,³ and the draft *Declaratory Ruling* goes far beyond the “certain, well-defined circumstances”⁴ for call blocking that the Commission has previously articulated by proposing opt-out call blocking of “unwanted” calls based on “reasonable analytics.”⁵

The draft *Declaratory Ruling* also categorically concludes that opt-out call blocking based on “reasonable analytics” – including the blocking of lawful calls – would generally constitute a “just and reasonable” practice and would not qualify as an impairment of service under Sections 201(b) and 214(a) of the Communications Act.⁶ That conclusion cannot be correct. As described above, allowing broad call blocking on an opt-out basis could endanger consumer health and safety, including potentially creating life-threatening situations for consumers. The Associations provided numerous examples of health and safety calls that could be blocked or mislabeled under the draft *Declaratory Ruling*, including alerts from a child’s school (e.g., closures, school shootings); electric utility outages; public safety notifications; healthcare and dosing reminders; data breach, fraud alert, and service disruption notifications; and urgent vehicle safety recall notifications. These calls could potentially be blocked under the *Declaratory Ruling* due to, for example, the large volume of outbound calls that a company places from each number in a short period of time, which is one analytical factor described for determining whether a call can be blocked.⁷

These problematic side effects have also arisen because the draft *Declaratory Ruling* treats “alerts and reminders” sent from legitimate companies in the same manner as fraudulent and scam calls.⁸ Consumers value time-sensitive alerts and reminders about their accounts with their bank, credit union, doctor’s office, and utility company. Because the draft *Declaratory Ruling* places the burden on consumers to opt out of call blocking, consumers may not receive the calls that they want (and may not even know that such calls were blocked).

The Associations also explained that lawful communications – including, for example, those to individuals with whom the Associations already have an established relationship – are often already highly regulated and may in fact have conflicting regulatory requirements with the

³ See 47 U.S.C. § 202 (prohibiting service providers from unreasonable discrimination in their provision of services to consumers); Proposed Rule, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 82 Fed. Reg. 22,625, 22,626 (May 17, 2017) (referencing the “Commission’s historic prohibitions on call blocking”); *Anderson v. New York Telephone Co.*, 361 N.Y.S.2d 913, 915-16 (N.Y. 1974) (“The telephone company is a public utility which is bound to make its equipment available to the public for any legal use to which it can be put.”).

⁴ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9710 ¶ 9 (2017).

⁵ *Draft Declaratory Ruling* ¶ 33.

⁶ *Id.* ¶ 30.

⁷ *Id.* ¶ 34 (observing that a “call-blocking program might block calls based on large bursts of calls in a short timeframe,” among other factors).

⁸ See *Draft Declaratory Ruling* ¶ 9 (acknowledging that call-blocking third parties “do not generally differentiate between legal and illegal calls, wanted and unwanted”).

draft *Declaratory Ruling*.⁹ Blocking lawful calls would also run at cross-purposes with other federal policy priorities. As one example, an overbroad approach to call blocking authority would directly conflict with CFPB Director Kathy Kraninger’s recent recognition of the benefits of communicating with consumers.¹⁰ As another example, preventing lawful communications may contravene Executive Order 13772, which makes “efficient, effective and appropriately tailored” regulations a national policy with respect to the financial system.¹¹

An overwhelming bipartisan majority of the Senate – by a vote of 97-1 – recently directed the FCC to protect legitimate callers, through passage of S. 151, Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act.¹² In particular, the Senate Commerce Committee report for the TRACED Act states that the Commission should not “support blocking or mislabeling calls from legitimate businesses” and that the “FCC should require voice service providers to unblock improperly blocked calls in as timely and efficient a manner as reasonable.”¹³

The Associations also emphasized the need for clarity concerning the Telephone Consumer Protection Act and asked the Commission to act on the pending Petition for Declaratory Ruling on automated telephone dialing systems, including the questions remanded by the D.C. Circuit Court of Appeals.¹⁴

The Associations urged the Commission to seek comment on the proposals in the draft *Declaratory Ruling* by recasting the *Declaratory Ruling* as a *Notice of Proposed Rulemaking*. In addition, and as part of any effort to seek comment, the Commission should clarify that the proposals would only apply to the blocking of illegal calls. The Commission should propose that

⁹ For example, the Consumer Financial Protection Bureau’s (CFPB) “Early Intervention Rule” requires “live contact” or a good faith effort to establish live contact within 36 days after a mortgage loan becomes delinquent. 12 C.F.R. § 1024.39. The Home Affordable Modification Program requires that an entity “proactively solicit” customers for inclusion by making a minimum of four telephone calls to the customer at different times of the day. See U.S. Department of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010).

¹⁰ Kathleen L. Kraninger, *CFPB Director Kathleen L. Kraninger’s Speech at the Debt Collection Town Hall* (May 8, 2019) (“There has also been a lot of misreporting about emails and text messages, here are the facts: the FDCPA prohibits collectors from harassing or abusing consumers or engaging in unfair practices. These standards apply today and under the proposed rule, they would continue to apply. A collector who emails or texts too frequently may face liability. But, the proposed rule would provide additional clarity for consumers and collectors on how the law specifically applies to newer technology and particularly to emails. It would make clear the rules of the road for industry and consumers. And, it would add a requirement that collectors must provide in every text or email an unsubscribe option. Consumers are accustomed to seeing and using an unsubscribe option and they will be able to use it to stop emails and texts. And, the proposed rule makes clear that collectors must honor requests to stop certain channels of communication so that a consumer could simply say ‘never text me’ and the collector must comply.”).

¹¹ Executive Order 13772, 82 FR 9965 (Feb. 8, 2017).

¹² S. Rep. No. 116-41, at 15 (116th Cong. 2019).

¹³ *Id.*

¹⁴ *ACA Int’l, et al. v. FCC*, 885 F.3d 6 (D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015)).

there be sufficient notice of blocking to the caller and to the call recipient, such as through use of an intercept message when a call is blocked, and propose to provide a mechanism for prompt unblocking of any erroneously blocked numbers.

The Commission should seek comment on the draft *Declaratory Ruling*. It should also act consistent with the Communications Act and Congress's instructions on call blocking so that consumers can continue to receive the calls that they want and expect. Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions.

Respectfully submitted,

/s/ Mark W. Brennan

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