ACA INTERNATIONAL
The Association of Credit and Collection Professionals

May 30, 2019

Submitted via Electronic Comment Filing System

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Ex Parte Presentation, CG Docket No. 17-59, WC Docket No. 17-97

Dear Ms. Dortch:

ACA International ("ACA") respectfully writes to express serious substantive and legal concerns with the draft *Declaratory Ruling* scheduled to be considered by the Federal Communications Commission ("FCC" or "Commission") at its June 6, 2019 open meeting.[1]

I. ABOUT ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses. According to a recent survey, 44 percent of ACA member organizations (831 companies) have fewer than nine employees. Additionally, 85 percent of members (1,624 companies) have 49 or fewer employees and 93 percent of members (1,784) have 99 or fewer employees.

[1] *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*).

ASSOCIATION HEADQUARTERS
4040 WEST 70TH STREET 55435
P.O. BOX 390106, MINNEAPOLIS, MN 55439-0106
TEL (952) 926-6547 FAX (952) 926-1624

FEDERAL GOVERNMENT AFFAIRS OFFICE
509 2ND STREET NE, WASHINGTON, D.C. 20002
TEL (202) 547-2670
FAX (202) 547-2671

ACA@ACAINTERNATIONAL.ORG WWW.ACAINTERNATIONAL.ORG

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

An academic study about the impact of debt collection confirms this basic economic reality: "In a competitive market, losses from uncollected debts are passed on to other consumers in the form of higher prices and restricted access to credit; thus, excessive forbearance from collecting debts is economically inefficient. Again, as noted, collection activity influences on both the supply and the demand of consumer credit. Although lax collection efforts will increase the demand for credit by consumers, the higher losses associated with lax collection efforts will increase the costs of lending and thus raise the price and reduce the supply of lending to all consumers, especially higher-risk borrowers."[2] In short, consumer harm can result in several ways when unpaid debt is not addressed, and ACA members work to help consumers understand their financial situation and what can be done to address it, and improve it.

Multiple regulators recognize the important role that debt recovery plays in today's economy. The Bureau of Consumer Financial Protection ("CFPB" or "Bureau"), the agency Congress provided supervisory and rulemaking authority with in the Dodd-Frank Wall Street Reform and Consumer Protection Act for the debt collection industry, has recognized the importance of the industry on numerous occasions. These points were reiterated as recently as a few weeks ago in the CFPB's Notice of Proposed Rulemaking for the Fair Debt Collection Practices Act (Regulation F).[3] After nearly seven years of researching communication issues surrounding debt collection, the Bureau proposed comprehensive rules in this area, which unfortunately the FCC's actions do not appear to account for, or consider.

---

[2] Todd Zywicki, "The Law and Economics of Consumer Debt Collection and Its Regulation," (Sep. 2015), *available at* https://www.mercatus.org/system/files/Zywicki-Debt-Collection.pdf.

[3] CFPB Director Kathleen L. Kraninger's Speech at the Debt Collection Town Hall, "The practice of debt collection predates the use of money (May 8, 2019) ("Kraninger Speech"), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-kathleen-l-kraninger-speech-debt-collection-town-hall/ ("Debt collection is an important part of any credit ecosystem. And there is no doubt that a healthy credit ecosystem is vital to the lives of most Americans. It enables us to make purchases and repay the costs over time. It enables us to pay for services and pay in arrears. It enables us to weather financial storms. But when consumers do not make timely payments on their debts they become delinquent and they enter the collections part of the ecosystem. A collections item can start as an overdue medical bill, utility bill, or any kind of unpaid loan or invoice. Sometimes it affects a person who has overextended themselves financially; and sometimes the individual has lost a job, fallen ill, had an accident, or something else has happened to set them back financially. Whatever the reason, large numbers of Americans fall behind on their debts at one time or another….").

II. THE DRAFT *DECLARATORY RULING* THREATENS LAWFUL CALLS FROM ACA INTERNATIONAL'S MEMBERS.

ACA has strongly supported the FCC's efforts to target the serious problem of illegal and fraudulent robocalls. ACA members are also consumers, and like many consumers, ACA's members greatly dislike fraudulent and illegal robocalls. Accordingly, we appreciate the work of the FCC to stop those making such abusive calls. These efforts are certainly worthwhile and deserve the serious attention they have been given by the FCC and Congress. However, since scammers by their very nature are operating outside the bounds of the law and have no intention to follow the law as it is now or in the future, they very often they do not pay the fines levied against them for bad behavior as recently noted in the *Wall Street Journal*, and similarly find workarounds to blocking technologies.[4]

Despite the FCC's very well-intentioned efforts to target these bad actors, the draft *Declaratory Ruling* is facially overbroad in its attempt to meet the laudable objective of stopping illegal robocalls. In the draft *Declaratory Ruling*, the Commission has somehow arrived at the point where it now appears to find it appropriate to mislabel lawful calls as scam or fraud; allow the blocking of legitimate and needed calls with no notice of the blocking, no required recourse, and no required correction; and impugn any call that is simply "*unwanted*." Among countless other flaws in this approach, this ignores a Congressional directive from as recently as this month in the Senate Report accompanying the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (the TRACED Act).[5] As noted in the Report accompanying S. 151, "Not all robocalls are illegal or unwanted. The majority of companies who use robocalls are legitimate companies. And valid robocalls can benefit consumers. Many important services are carried out via robocalls when institutions and call recipients have established a prior relationship: pharmacies provide updates to consumers that a prescription is ready for pick up; school closing announcements provide families with important and timely information; banks provide customers with fraud alerts, data security breaches, and even calls to convey measures consumers may take to prevent identity theft following a breach; auto manufacturers can warn vehicle owners of urgent safety recalls. These legitimate calls can have life or death consequences for the intended recipient." As the Senate Report adds, "The process established by the FCC should require voice service providers to unblock improperly blocked calls in as timely and efficient a manner as reasonable."

Unfortunately, the draft *Declaratory Ruling* does not follow this directive and additionally provides little clarity to legitimate callers, despite D.C. Circuit Court of Appeals' concerns with nebulous rules that provide scant guidance under the Telephone Consumer Protection Act.[6] Moreover, the draft directly conflicts with the CFPB's ongoing rulemaking

[4] Sarah Krouse, *The FCC Has Fined Robocallers $208 Million. It's Collected $6,790*, Wall St. J., *available at* https://www.wsj.com/articles/the-fcc-has-fined-robocallers-208-million-its-collected-6-790-11553770803 (March 28, 2019).

[5] TRACED Act, S. 151, 116th Cong. (2019). The Senate adopted the Act 97 to 1. 165 Cong. Rec. S.151, S3073-3075.

[6] *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).

efforts. In contrast to the *Declaratory Ruling*, the CFPB is accepting public comments on its NPRM so that it can consider the feedback from consumers, advocates, and industry.[7] The draft also contravenes Executive Order 13772, which makes "efficient, effective and appropriately tailored" regulations a national policy with respect to the financial system.[8] The contradictory nature of the FCC's actions with directives from financial services regulators is well documented by a diverse group of financial services market participants.

Consumers often need the information that ACA members provide them to maintain their financial health, and open communication can often lead to the most favorable outcome for them. While some of these calls may be "*unwanted*" by some consumers, they are legal and already heavily regulated. They also may be critical to help a consumer maintain their financial health and continue to access credit and services.

III. THE DRAFT *DECLARATORY RULING* IS UNLAWFUL UNDER THE COMMUNICATIONS ACT AND ADMINISTRATIVE PROCEDURE ACT.

Beyond the policy infirmities that PRA Group, Inc. and others have identified, the draft *Declaratory Ruling* finds no basis in the Commission's statutory authority, is contrary to the Communications Act, and violates longstanding principles of administrative law. The FCC has no authority to issue a Declaratory Ruling that would allow the widespread blocking of lawful communications from ACA members and thousands of other legal businesses for better providing consumers with information that they need in a timely and efficient way. To that end, we support and agree in full with all of the concerns and arguments provided by PRA Group, Inc. in their May 29, 2019 filing concerning the *Declaratory Ruling*, as well as the May 30 filing from the Credit Union National Association.[9]

First, the draft *Declaratory Ruling* exceeds the Commission's statutory authority. The Commission may act only pursuant to an express delegation of authority from Congress.[10] Indeed, the Commission's current leadership repeatedly has cited and embraced this principle.[11]

---

[7] *See* Kraninger Speech ("I want to add that the Bureau's Notice of Proposed Rulemaking, issued yesterday, takes into account much research and effort. As I have said before, I believe in a rulemaking process that is transparent; that allows stakeholders to submit comments; that reflects rigorous economic and market analysis; and that provides for judicial review. Under my leadership, the CFPB will proceed deliberately and transparently in its rulemakings. So I am glad to say that for more than five years now—before my time and across administrations—the Bureau has been studying the debt collection market and researching the best ways to bring it much-needed clarity.")

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

[9] *See* Letter from Yaron Dori, Counsel for PRA Group, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59, WC Docket No. 17-97 (filed May 29, 2019); Letter from Mitria Wilson, Credit Union National Association, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59, WC Docket No. 17-97 (filed May 30, 2019).

[10] *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355,374 (1986) (A federal agency "literally has no power to act... unless and until Congress confers power upon it."); *Comcast Corp. v. FCC*, 600 F.2d 642, 654 (D.C. Cir. 2010).

[11] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Red 311,313 H 4 (Jan. 4,2018) (where the Commission has "not identified any sources of legal authority that could justify" its rule, it cannot act); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Red 5601, 5975 (2015) (Dissenting Statement of then-Commissioner Pai) (where "Congress did not delegate substantive authority to the FCC" to regulate under a given provision, "the agency's attempt to adopt" a rule under such provision "must fail"); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Red 13911, 14124 (Dissenting Statement of

Yet the draft *Declaratory Ruling* does not cite an express delegation of authority for default call blocking. Instead, the draft *Declaratory Ruling* attempts to justify the Commission's action by arguing that default blocking by voice service providers does not contravene the Communications Act because consumers have the right to block calls.[12]

But it does not follow that merely because consumers have the right to affirmatively block calls, voice service providers (and especially telecommunications service providers, which are Title II common carriers) can exercise that right without prior consumer consent—or indeed in the absence of any action by the consumer whatsoever. Tellingly, the draft *Declaratory Ruling* cites no authority for such a proposition. It merely makes the unsupported assertion that because consumers can consent to call blocking, call blocking initiated by their service providers on an opt-out basis is not an "unjust and unreasonable practice" in violation of Section 201(b).

The Commission's reliance on Section 214(a) as the legal basis for its draft *Declaratory Ruling* is similarly inapt. Section 214(a) states that a carrier may not "impair" service to a community or even to part of a community unless the Commission determines that "neither the present nor future public convenience and necessity will be adversely affected" by the impairment.[13] The draft *Declaratory Ruling* presents no factual basis to make such a legal determination, and it is implausible that the Commission could do so given the absence of such evidence on the record. To the contrary, and as parties have submitted into the record, the mechanisms currently in use to label and block just a narrow category of illegal calls already result in the overbroad blocking of a broad range of legal calls as well. The consumer harm resulting from overblocking will only exacerbate once the draft *Declaratory Ruling* takes effect.

Second, the Commission lacks statutory authority to allow the default blocking of calls that a voice service provider unilaterally deems "unwanted". The draft *Declaratory Ruling* states that providers may block "unwanted" calls by default, but it does not indicate whether this set of calls is broader or different than "unlawful" calls. At times the draft refers to "illegal or unwanted calls," suggesting that the two are distinct. At other times, the draft conflates the two categories altogether. It cannot be the case that whether a call is "unwanted" (whatever that means) can vary from carrier to carrier based solely on the carrier's determination.

To the extent the draft *Declaratory Ruling* permits blocking of unwanted but nevertheless lawful calls, these rules would be *ultra vires*. The Commission cites no statutory authority allowing voice service providers to intercept and terminate such calls, and none exists. Indeed, it is well settled that the absence of a prohibition in a statute does not equal a grant of authority to regulate. Allowing providers to block "unwanted" calls by default would be particularly inappropriate because determining whether a call is unwanted is inherently subjective and governed by no ascertainable criteria. Under the draft *Declaratory Ruling*'s default framework, providers may block calls without any indication from the recipient that a call is unwanted, and indeed without any action whatsoever on the subscriber's part.

Commissioner O'Rielly) ("The FCC is not empowered to supplement its own authority, even if it believes it has policy reasons to do so.").

[12] Draft *Declaratory Ruling* ¶¶ 22, 30.

[13] 47 U.S.C. § 214.

Third, the draft *Declaratory Ruling* violates the Communications Act and Commission precedent regarding the obligations of Title II common carriers. For instance, the draft permits "voice service providers" to block calls by default, and it includes in the definition of voice service providers "traditional wireline and wireless carriers."[14] Under the Communications Act and Commission precedent, traditional wireline and wireless carriers are "telecommunications carriers" and thus Title II common carriers. For decades, common carriers have been required to adhere to certain statutory and regulatory safeguards, including sections 201 and 202 of the Communications Act, as noted above. Authorizing them to block calls in a widespread manner that will ensnare lawful calls would violate these provisions and this precedent.

Finally, the draft *Declaratory Ruling* represents an unlawful form of rulemaking initiated without sufficient notice and consent. In particular, the draft *Declaratory Ruling* is untethered from the Further Notice of Proposed Rulemaking ("2017 FNPRM") that accompanied the November 2017 Call Blocking Order, which sought "comment on two discrete issues:" (1) "potential mechanisms to ensure that erroneously blocked calls can be unblocked as quickly as possible and without undue harm to callers and consumers" and (2) "ways [the Commission] can measure the effectiveness of [its] robocalling efforts.[15]

The draft *Declaratory Ruling* and its boundless approach to default call blocking — without any mention of "mechanisms to ensure that erroneously blocked calls can be unblocked"—is not a logical outgrowth of the limited issues enumerated in the 2017 FNPRM.[16] The only notice of any proposed changes beyond those identified in the 2017 FNPRM was a later request from the Consumer and Governmental Affairs Bureau in 2018 to "refresh the record". That request did not mention the possibility of default blocking of legal or "unwanted" calls. In addition, the draft *Declaratory Ruling* contains a number of major erroneous assumptions and statements that do not appear to have any factual support in the record. Simply put, adversely affected parties—in this case, good-faith callers placing lawful calls—did not have sufficient notice of the proposed call blocking framework before the draft *Declaratory Ruling* went on circulation in May 2019.

IV. CONCLUSION

Although reasonably tailored efforts to combat illegal and fraudulent robocallers are important objectives that ACA wholeheartedly supports, the draft *Declaratory Ruling* greatly misses the mark by crafting overbroad remedies that ultimately target legitimate callers making lawful communications.

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

[14] Draft *Declaratory Ruling* ¶ 2 n.1.
[15] *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-151, CG Docket No. 17-59, ¶¶ 57, 59 (Nov. 17, 2017).
[16] *See, e.g.*, *Allina Health Servs*., 746 F.3d at 1107; *Daimler Trucks N. Am. LLC v. EPA*, 737 F.3d 95,100 (D.C. Cir. 2013).

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,

Leah Dempsey
Vice President and Senior Counsel, Federal Advocacy
ACA International
509 2nd St., NE
Washington D.C. 20002
Phone: 202-810-8901
Dempsey@acainternational.org