

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Advanced Methods to Target and) CG Docket No. 17-59
Eliminate Unlawful Robocalls)
)

REPLY COMMENTS ON NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

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These are the reply comments of the Insights Association,¹ the leading and largest nonprofit association representing the marketing research and analytics industry, to the Federal Communications Commission’s (FCC) Notice of Proposed Rulemaking and Notice of Inquiry (NPRM/NOI) on advanced methods to target and eliminate unlawful robocalls.²

The FCC stated in the NPRM/NOI that it “must balance competing policy considerations—some favoring blocking and others disfavoring blocking—to arrive at an effective solution that maximizes consumer protection and network reliability.” In order to do that, the agency proposed to codify “that voice service providers may block telephone calls in certain circumstances to protect subscribers from illegal robocalls,” particularly “when the subscriber to a particular telephone number requests that calls originating” from a certain number “be blocked.” The FCC also sought input “on proposed rules authorizing providers to block calls from three categories of numbers: invalid numbers, valid numbers that are not allocated to a voice service provider, and valid numbers that are allocated but not assigned to a subscriber.”

On July 13, 2017, the FCC approved additional Notices of Inquiry into two more potential solutions to unlawful robocall problem: call authentication frameworks and a reassigned numbers database.³ The Insights Association will be responding to those notices soon as well.

Robocall Task Force

The NPRM/NOI (and the notices on call authentication and reassigned numbers) come in the wake of the convening of a Robocall Strike Force by the FCC in the summer and fall of 2016.⁴ Then-Chairman Tom Wheeler had called on the CEOs of major telecommunications companies on July 21, 2016 to “offer call-blocking services to their customers now – at no cost” to customers. He also “sent letters to intermediary carriers that connect robocallers to the consumer’s phone company, reminding them of their responsibility to help facilitate the offering of blocking technologies.” The Task Force issued a final report on October 26, 2016.⁵

Defining an unlawful robocall

The NPRM/NOI opened the discussion of current law with a fallacy: “The 1991 Telephone Consumer Protection Act (TCPA) addresses illegal robocalls and their threat to consumer privacy and public safety.” In fact, although the TCPA never mentioned the term “robocalls,” nor has such a term ever been defined in statute or regulation, the FCC has made a habit of using

¹ Launched in 2017, the Insights Association was formed through the merger of two organizations with long, respected histories of servicing the marketing research and analytics industry: CASRO (founded in 1975) and MRA (founded in 1957). Our membership includes both research/analytics companies/organizations, as well as the researchers and research departments inside of non-research companies/organizations. The Insights Association helps empower intelligent business decisions as a voice, resource and network advancing the companies and individuals engaged in this important work.

² <https://ecfsapi.fcc.gov/file/0323136149698/FCC-17-24A1.pdf>

³ “Battle of FCC v. Robocalls Continues.” By Howard Fienberg. July 21, 2017.

<http://www.insightsassociation.org/article/battle-fcc-v-robocalls-continues>

⁴ “Robocall Strike Force and FCC Data Dumps Could Cut Off More Telephone Research Calls.” By Howard Fienberg. August 26, 2016. <http://www.insightsassociation.org/article/robocall-strike-force-and-fcc-data-dumps-could-cut-more-telephone-research-calls>

⁵ <https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf>

the term as a general pejorative. The Insights Association has warned against such poor terminology before, such as in our comments on the NAAG petition on call blocking,⁶ and in our initial response to the FCC's 2015 TCPA rules.⁷

Thus, it makes sense that the FCC now seeks to define the term "illegal robocall." We also applaud FCC commissioners for recognizing the need to do so.⁸

"Based on the Robocall Strike Force's recommendation," the FCC suggested that an "illegal robocall" is "one that violates the requirements of the Telephone Consumer Protection Act of 1991, the related FCC regulations implementing the Act, or the Telemarketing Sales Rule, as well as any call made for the purpose of defrauding a consumer, as prohibited under a variety of federal and state laws and regulations, including the federal Truth in Caller ID Act."

Until reform of the agency's 2015 regulations (which dramatically expanded the definitions of terms like "automated telephone dialing system" to include most any technology short of a rotary dial phone), the proposed definition of "illegal robocall" could mean that just about any "lawful" telephone call would be either encouraged or required to be blocked. Thus, many or most legitimate phone calls for the purposes of bona fide survey, opinion and marketing research could be cut off. As commented by Encore Capital Group, "The overly broad term "robocall" sweeps in normal, expected and desired communications into the same bucket as telemarketing and scam calls, and is an impediment to much-needed clarification under the TCPA."⁹

The FCC's proposed definition of "illegal robocall" thus needs to replace the words "as well as any call" with "and is." The amended definition should read: "*one that violates the requirements of the Telephone Consumer Protection Act of 1991, the related FCC regulations implementing the Act, or the Telemarketing Sales Rule, and is made for the purpose of defrauding a consumer, as prohibited under a variety of federal and state laws and regulations, including the federal Truth in Caller ID Act.*"

The FCC may wish to expand the list of legal violations beyond fraud to include other unlawful calls, such as for stalking or harassment.

The problems with presumptive call blocking

This approach already presents difficulties. As commented by ACA, "outside of the bright-line categories of calls identified in the NPRM, individual consumers – as opposed to voice service providers – are better situated to decide which calls should be blocked and already have the authority to do so."¹⁰

The FCC has been, perhaps unwittingly, been creating such problems itself. The agency has been conducting regular dumps of data from its consumer complaint database since 2015, with the express aim of helping "developers build and improve 'do-not-disturb' technologies that

⁶ Comments of the Marketing Research Association. January 23, 2015. <http://www.insightsassociation.org/article/call-blocking-technology-could-block-marketing-research-calls-even-though-intended-fight>

⁷ CASRO and MRA comments. June 10, 2015. <http://www.insightsassociation.org/article/casromra-urge-fcc-modernize-tcpa-regulations-calling-cell-phones>

⁸ As Commissioner Michael O'Reilly commented on the call authentication and reassigned numbers NOIs, "I appreciate the challenge of trying to corral and decrease illegal robocalls, many of which originate overseas. Do note that I said illegal robocalls, as not every robocall is problematic. In fact, many are extremely beneficial to consumers, providing information they want and expect to receive from trusted companies. The Commission's job should be to ensure that it doesn't prevent or squash legitimate robocalls in its ferocious quest to curtail unlawful ones."

http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0713/DOC-345773A4.pdf

⁹ <https://ecfsapi.fcc.gov/file/10703585415251/Encore%20comments%20CG%20Docket%20No.%2017-59%207.3.2017..pdf>

¹⁰ <https://ecfsapi.fcc.gov/file/10703029145993/Comments-ACA%20International-TCPA%20NPRM%20and%20NOI-7-3-17-FINAL.pdf>

allow consumers to block or filter unwanted calls and texts,” as explained by Alison Kutler, chief of the Consumer and Governmental Affairs Bureau.¹¹

What kind of data quality control goes on at the agency to verify complaints and the originating numbers? For instance, is the call that Consumer X complained about actually a telemarketing call, or was it perhaps a research call? Was the prerecorded call about which Consumer Y filed an FCC complaint one for which the consumer actually provided prior express consent and just doesn't remember (or didn't stay on the line long enough to realize)?

These questionable FCC data releases¹² also bring spillover effects. Venable's Daniel Blynn lamented that this data is “a treasure trove for the plaintiffs' bar, and there will likely be a significant uptick in TCPA class action complaint filings across the country” resulting from it.¹³ Some of those class actions will be further automated by mobile apps that collect and sue most any phone number that dials a user.¹⁴ Delivering all those originating numbers from disparate and unverified consumer complaints to voice service and call blocking service providers will probably do more to disrupt legitimate dialing than to combat illegal robocalls.

We urge the FCC to reconsider, or at least improve the quality of, such data releases.

Protecting legitimate callers with a white list

The NPRM/NOI recognized that “there might be some situations in which legitimate calls would be blocked. For example, high-volume callers that properly obtain prior express consent might run afoul of call-per-minute restrictions even though all calls made are legal. This might occur if a call center lawfully spoofs the Caller ID on outgoing calls to utilize the business's toll-free number that consumers can use to call back or that might be familiar to consumers in a way that helps to identify the caller. We seek to avoid the blocking of such legitimate calls and, instead, seek to ensure that legitimate calls are completed.”

So the FCC asked if voice service providers should be required to “white list” legitimate callers and if there should be some form of “challenge mechanism for callers who may have been blocked in error?”

The concept raises a lot of the same questions as the potential reassigned cell phone number database, in that the white list could be commissioned or run by the FCC, or by individual providers. The biggest downside we see with a white list commissioned or run by the FCC itself will be the time involved before it could become operational. The research industry cannot wait months or years for the deployment of such a white list, since call blocking is already happening. However, we worry about (1) how a researcher could know every voice service provider with which he must register his company/organization's phone numbers, if each provider were to keep separate white lists, and (2) how expensive would it get for a researcher to register (and maintain) with each individual white lister every number utilized by that research company/organization? Depending on the size of the dialing operation, a research call center could be dialing from hundreds or thousands of telephone lines on a regular basis.

A central FCC white list may ultimately be preferable, in which case the agency's concerns about limiting access to the list are pertinent. Obviously, such a white list could be gold to illegal dialing operations looking to spoof their way past providers and blocking services. However, the

¹¹ https://apps.fcc.gov/edocs_public/attachmatch/DOC-335972A1.pdf

¹² <https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e>

¹³ “There's a Storm Coming, Mr. Wayne” – FCC Decides to Release Robocall and Telemarketing Consumer Complaints. By Daniel Blynn. October 28, 2015. <https://www.allaboutadvertisinglaw.com/2015/10/theres-a-storm-coming-mr-wayne-fcc-decides-to-release-robocall-and-telemarketing-consumer-complaints.html>

¹⁴ “There's An App For...What?!” by David Almy. September 28, 2015. <http://www.insightsassociation.org/article/there-s-app-for...what>

FCC can institute a simple enough process to vet providers and contract them to certain behavior with regard to the white list, similar to that which binds telemarketers accessing the Do Not Call Registry. However, this approach is likely more effective and safe in this case, since there are only a limited number of providers of which the agency or its designee would have to keep track. Moreover, some of the advancements in call authentication frameworks under exploration in the most recent NOI may help abate some of the threat of caller ID spoofing.

Fixing mistakes in blocking would be another concern. The FCC asked about if and how to implement “a process to allow legitimate callers to notify providers when their calls are blocked and to require providers immediately to cease blocking calls when they learn that the calls are legitimate.” We support such a process mechanism, but it presumes that a legitimate dialer will be informed, whether in a timely fashion or at all, that a given voice service provider has blocked their calls. There is in fact an “information asymmetry,” as commented by TeleTownhall,¹⁵ wherein most dialers may never know calls or lines are being blocked by a specific provider (let alone why they have been blocked).

Therefore, the Insights Association recommends:

1. Whether the FCC chooses to establish a single white list for all providers, or to have providers keep their own white lists, voice service providers and call blocking service providers should be required to run origination numbers through that white list before blocking a number, and to regularly update both the white list and the numbers being blocked. As commented by TeleTownhall, “such numbers should then be considered presumptively legitimate and not subject to unilateral blocking by carriers.”¹⁶
2. If the FCC leaves it to individual voice service and call blocking service providers to maintain their own white lists, the agency must maintain a listing of all such service providers and information on how legitimate dialers can contact them, vetting mechanisms, procedures and processes for getting numbers added and updated, and so forth, to be shared publicly.
3. Whatever process or mechanism is deployed for submitting and updating numbers on a white list, the FCC should require it to be as simple and clear as possible. For instance, Encore Capital Group suggested the use of a hotline or dedicated email address for the purpose.¹⁷ Simplicity and clarity will be the most important part of keeping costs low to both legitimate dialers and providers (and thus to subscribers).
4. Similar principles should apply to the vetting of dialing entities so that the operator(s) of a white list can easily identify and track legitimate dialing entities. Partnering with trade associations representing various industries could simplify the vetting process for the white list operator(s).
5. The FCC should set strict timeframes in which providers must honor requests to add or update whitelisted numbers and respond to challenges of the blocking of a given call or line.¹⁸ Providers of voice services and call blocking services should be penalized for failing to respond to either instance in the required amount of time.

Conclusion

There is no demonstrable harm from survey, opinion and marketing research calls. Research calls also provides significant benefit to consumers and the broader public. It is unlikely that all

¹⁵ https://ecfsapi.fcc.gov/file/1070650674834/15136209_1.pdf

¹⁶ https://ecfsapi.fcc.gov/file/1070650674834/15136209_1.pdf

¹⁷ <https://ecfsapi.fcc.gov/file/10703585415251/Encore%20comments%20CG%20Docket%20No.%2017-59%207.3.2017..pdf>

¹⁸ For instance, Encore Capital Group recommended that the timeframe for remediation of a blocking error be set at 24 hours.

potential users of call-blocking technology would wish to be disenfranchised from research studies (which serve as an ombudsman for the American public). The federal government goes to great lengths to ensure that all citizens are represented equally in the decennial Census, so why should the Commission allow coverage bias and make it less likely for wide swaths of consumers to be represented? The FCC has a responsibility to avert such outcomes.

We look forward to working with the FCC, and voice service providers and call blocking service providers, to combat illegal robocalls (as defined in these reply comments), while protecting the conduct of legitimate dialing activities and legitimate callers (particularly survey, opinion and marketing research, and the companies and organizations that practice it).

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Fienberg". The signature is fluid and cursive, with a prominent initial "H" and a stylized "F".

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