

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL COMMUNICATIONS COMMISSION

Advanced Methods to Target and Eliminate Unlawful Robocalls

CG Docket No. 17-59 FCC 17-24

June 30, 2017

By notice published May 17, 2017 the Federal Communications Commission (“FCC”) requests comments on a proposed rule to block calls that are reasonably likely to be illegal based on objective criteria.¹ The rule would, among other things, allow phone providers to block calls from numbers they know to be unassigned, invalid, or not allocated to any provider.

Pursuant to the agency’s request, the Electronic Privacy Information Center (“EPIC”) submits these comments to highlight the substantial harms to consumers caused by robocalls and comment on the specific proposals of the FCC’s proposed rule.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and protect privacy, the First Amendment, and constitutional values.² EPIC has a particular interest in protecting consumer privacy and has played a leading role in defending consumer privacy interests at the FCC for

¹ *Advanced Methods To Target and Eliminate Unlawful Robocalls*, 82 Fed. Reg. 22,625 (May 17, 2017) [hereafter “Robocall Proposed Rule”].

² EPIC, About EPIC (2016), <https://epic.org/epic/about.html>.

almost twenty years. EPIC played a leading role in the creation of the Telephone Consumer Protection Act (“TCPA”) and continues to defend the Act,³ one of the most important and popular privacy laws in the history of the United States.⁴ EPIC provided numerous comments to both the FCC and the Federal Trade Commission (“FTC”) on the implementation of the TCPA, and maintains online resources for consumers who seek to protect their rights under the TCPA.⁵

Illegal and Unwanted Robocalls Cause Substantial Consumer Harm

Robocalls are a consistent source of annoyance and harm for American consumers and the vehicle through which bad actors engage in identity theft, financial fraud, and debt collection scams. Robocalls are consistently one of the top complaints made to both the FCC and the Federal Trade Commission.⁶ The FTC has brought more than a hundred lawsuits against individuals responsible for illegal robocalls and for “Do Not Call” violations.⁷

Robocall scams often have dire financial consequences for consumers. A long running IRS robocall scam cost Americans over \$300 million over several years;⁸ another scam in which a robot asks “Can you hear me?” prompting the recipient to say “yes” has been used to authorize

³ See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304, Before the Subcomm. on Telecomms. And Fin. of the H. Comm. on Energy and Commerce, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of CPSR Washington Office director Marc Rotenberg), <https://www.c-span.org/video/?18726-1/telephone-solicitation>; Brief of *Amici Curiae* Electronic Privacy Information Center (EPIC) and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir. Jan. 22, 2016), <https://epic.org/amicus/acaintl/EPIC-Amicus.pdf>; National Consumer Law Center et al., Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration In the Matter of Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278 (2016).

⁴ Justice Brandeis described privacy as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁵ See, e.g., EPIC, EPIC Administrative Procedure Act (APA) Comments, <https://epic.org/apa/comments/>; EPIC, Telemarketing and the Telephone Consumer Protection Act (TCPA), <https://epic.org/privacy/telemarketing/>.

⁶ *Consumer Complaint Center*, FCC, <https://consumercomplaints.fcc.gov/hc/en-us/articles/115002234203-Unwanted-Calls>; *FTC Releases Annual Summary of Consumer Complaints*, FTC, Mar. 3 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-releases-annual-summary-consumer-complaints>.

⁷ *Consumer Information: Robocalls*, FTC, <https://www.consumer.ftc.gov/features/feature-0025-robocalls>.

⁸ Helaine Olen, *The Feds Raided the Scammers behind Those Fake IRS Robocalls. It’s Not Enough.*, Slate, Oct. 28, 2016, http://www.slate.com/blogs/moneybox/2016/10/28/the_feds_busted_the_fake_irs_robocall_scam_it_s_not_enough.html.

fraudulent charges from credit cards stored on utility accounts;⁹ and another promised to help individuals reduce their debt load while opening new credit card accounts in their name. Adding to the problems caused by these scams is that individuals engaging in this illegal behavior are outside of the United States and are using cheap, readily available technology to target unwitting Americans.

Despite the success of the TCPA, consumers continue to be plagued by unwanted robocalls and text messages. The transition from land lines to mobile phones¹⁰ has only made the problem worse. Unsolicited calls and texts facilitate fraud, drain battery life, eat into data plans and phone memory space, and demand attention when the user would rather not be interrupted. Because we carry our phones with us everywhere,¹¹ unwanted calls and texts interrupt sleep, disturb meetings and meals, and disrupt concentration wherever we go. We no longer have to eat at home to be interrupted by an unwanted telemarketing call at dinner. For low-income consumers who often rely on pay-as-you-go, limited-minute prepaid wireless plans,¹² these

⁹ Mike Snider, *Don't Say 'Yes' When Robocall Scam Rings*, USA Today, Mar. 27, 2017, <https://www.usatoday.com/story/tech/talkingtech/2017/03/27/dont-say-yes-when-robocall-scam-rings/99709634/>.

¹⁰ 95% of American adults own at least one cell phone and 77% own smartphones. *Mobile Fact Sheet*, Pew Research Ctr. (Jan. 12, 2017) <http://www.pewinternet.org/fact-sheet/mobile/>; Over half of American households do not have a land line. Stephen J. Blumberg & Julian V. Luke, Ctrs. for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2016*, at 2 (May 2017), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>.

¹¹ More than 70% of smartphone users keep their phones within five feet a majority of the time. Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013), <http://pages.jumio.com/rs/jumio/images/Jumio%20-%20Mobile%20Consumer%20Habits%20Study-2.pdf>.

¹² Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Eighteenth Report, WT Docket No. 15-125, ¶¶ 44, 73, 95-96 (Dec. 23, 2015).

unwanted calls and texts are particularly harmful.¹³ These calls are especially harmful to the elderly because many who engage in these illegal practices believe they have amassed significant wealth over their lifetime, will be unable to tell that they are being taken advantage of, or are unlikely to report that a crime has occurred.¹⁴

Current laws and penalties for illegal robocalls have not been enough to stop these calls that plague consumers year after year. Even with the private right of action contained within the TCPA, illegal, predatory behavior continues. This is despite the fact that in general TCPA cases are among the most effective privacy class actions because they typically require companies to change their business practices to comply with the law. However, more must be done. While consumers now have more options to block calls from their home and cell phones, they can only do so after they have received these illegal and bothersome phone calls. It is for these reasons that the FCC must take steps to allow providers to be more proactive in preventing these calls.

Provisions of the FCC Rule

Definition of Illegal Robocall

The FCC is proposing to define an “illegal robocall” as one “that violates the requirements of the TCPA, the related Commission 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.”¹⁵

¹³ Bill Moack, *Feds, Fla. Shut Down Robocall Ring That Targeted Seniors*, Clarion Ledger Jun. 9, 2017, <http://www.clarionledger.com/story/business/2017/06/09/feds-fla-authorities-shut-down-robocall-ring-targeted-seniors/371452001/>.

¹⁴ *Fraud Against Seniors*, Federal Bureau of Investigation, <https://www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors>; Anne-Marie Botek, *Robocalls and Fear Tactics Help Scammers Swindle Seniors*, Aging Care, <https://www.agingcare.com/articles/robocalls-fear-tactics-scam-seniors-167323.htm>.

¹⁵ Robocall Proposed Rule at 22627.

EPIC supports this definition of “illegal robocalls.” This definition would capture a numerous calls that have no other purpose than to trick consumers into providing sensitive personal and financial information. While many FCC regulations and federal and state laws have been enacted combat this problem, the problem persists. Having a strong definition of an illegal robocall so that when they occur they can be easily identified by consumers, providers, and those agencies charged with enforcing various regulations aimed at protecting consumers from these calls will be beneficial.

Calls from Unassigned Numbers

The FCC has identified three categories of numbers that would be defined as “unassigned.” (1) numbers that are invalid under the North American Numbering Plan (NANP); (2) numbers that have not been allocated by a North American Numbering Plan Administrator (NANPA) or National Number Pool Administrator and; (3) numbers that have been allocated to a provider but are not currently assigned to a subscriber.¹⁶

EPIC supports the proposal to have phone providers proactively block these numbers. Because the numbers are unassigned it is not possible that an individual could be using them without the providers knowledge. When the numbers are eventually assigned the providers will have the ability to unblock the number allowing whoever has been assigned that number the ability to make and receive phone calls. Proactive blocking of these numbers is the most effective way to protect consumers. If providers were to wait until they received a certain number of complaints consumers will be exposed to calls that are predatory and fraudulent in nature.

¹⁶ *Id.*

Calls Originating From Invalid Numbers

The Commission is proposing to initiate a rule that will allow providers to block numbers that are not valid under the NANP.¹⁷ As the Commission correctly points out, it is impossible for these numbers to be from legitimate, lawful callers and the chance that an individual or business will be harmed by blocking these types of numbers is non-existent. The Commission also correctly points out that no individual would attempt to “spoof” these numbers for any lawful purpose.

Many consumers may proactively choose not to answer calls from numbers that they know are invalid, such as those from area codes they do not recognize or do not appear to be associated with a given location on their caller ID or numbers that are the same number repeated ten times. However, proactive blocking of these calls would ultimately benefit consumers. Some consumers, especially those that rely on landlines, may not have or use caller ID and upon answering the phone they would have no way to be alerted to the fact that the call they are receiving is likely to be an illegal robocall.

Calls from Numbers Not Allocated By A Provider

The Commission is proposing to allow for provider blocking of calls that are valid but have not yet been assigned to a subscriber.¹⁸ EPIC supports this proposal. While these numbers are valid, providers are the only ones who would be aware that they have not currently been assigned to a caller. Furthermore, by proactively blocking these calls providers can prevent harm to consumers. If an individual were to become aware of what numbers had not yet been assigned (ex. through hacking into a providers database) to a subscriber and spoof them to engage in illegal robocalling or to engage in any other unlawful behavior, then the fact that they had been

¹⁷ *Id.* at 22627-8.

¹⁸ *Id.* at 22628.

able spoof a valid number would not matter. If the number was already blocked by the provider then anyone attempting to spoof it would find whatever their purpose was in using an unassigned number frustrated.

Even though these calls are not presumptively invalid, because they are not assigned anyone using them without the providers knowledge is almost certainly engaging in unlawful activity. The likelihood that harm would be caused by the blocking of these numbers is minimal. When an individual was subscribed one of these numbers providers could promptly remove that number from the blocked number list.

Opt-In Consent

The Commission seeks to enforce these call blocking mechanisms without obtaining consumer consent. EPIC supports this proposal. No reasonable consumer wants to receive robocalls. This is evident from the fact that these calls are consistently the number one complaint at both the FTC and the FCC and are the focus of numerous federal and state attempts to strengthen laws for consumers and to issue harsher fines and penalties to those that engage in robocalling. There is simply no individual who wants to receive a phone call from an individual or group who is trying to sell them something they do not want or seeking to obtain a way to steal their identity, engage in financial fraud, or capitalize on individuals fear of debt, back-taxes, or medical bills. Requiring providers to get consent from all of their subscribers before engage in blocking of the aforementioned calls will be unduly burdensome for providers and will ultimately harm consumers.

Conclusion

For the reasons stated above EPIC supports the Commissions proposed rule. Enacting provider initiated call blocking is currently the most effective way to reduce the number harassing and illegal calls made to consumers.

Respectfully Submitted,

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