

In Battle Against Robocalls, FCC Opens the Door to More Aggressive Call Blocking

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For many consumers, answering a phone call from an unknown number has effectively turned into a gamble. Is it a potential new client? A medical emergency? Or, more likely, is it an incredible offer-to-stay-at-a-Caribbean-resort-of-your-choosing-please-hold-for-a-representative?

Not surprisingly, no issue generates more complaints at the Federal Communications Commission (FCC) and the Federal Trade Commission than robocalls – according to one estimate there were 47 billion illegal and unwanted calls in 2018. In response, the FCC last week released a **Declaratory Ruling and Third Further Notice of Proposed Rulemaking** (CG Docket No. 17-59, WC Docket No. 17-97) clarifying that voice service providers may offer consumers call-blocking tools through an opt-out process rather than an opt-in basis, as is typically done today. The FCC issued this clarification to address concerns that the majority of consumers are not requesting available call-blocking services.

Alongside this growing chorus for more robust call blocking, however, are concerns by legitimate callers of over-blocking. Calling parties fear that the adoption of widespread call blocking may result in unintended consequences as call-blocking tools rely on analytics to determine when calls are likely to be illegal, spam or telemarketing. The challenge is that legitimate calls may share some of the same analytical tendencies (e.g., a high volume of short duration calls originating from a toll-free number), resulting in the blocking of wanted calls, such as credit card fraud notifications, flight delays or school closing alerts.

To this end, the Declaratory Ruling clarifies when voice service providers may implement call-blocking programs, what other types of call-blocking tools they may offer to customers, and what options, if any, calling parties have to challenge over-blocking.

Opt-Out Method

First, the Declaratory Ruling clarifies that voice providers may implement call-blocking programs to subscribers on an opt-out basis. Many voice providers only offer call-blocking services on an opt-in basis, requiring subscribers to specifically request these services. However, either because of a lack of awareness of options, or just general inertia, the vast majority of subscribers have not opted to use such services.

And rather than set specific rules for which calls are blocked, the Declaratory Ruling permits calls to be blocked based on “any reasonable analytics designed to identify unwanted calls.” Such “reasonable analytics” can be based on a broad combination of factors, including: callers with a large number of complaints, large bursts of calls within a short time period, calls with low average call duration, invalid numbers placing large numbers of calls, sequential dialing patterns, and other indicia of illegal calling. Regardless, providers must apply such analytics in a “non-discriminatory, competitively neutral manner.”

In order for consumers to make an informed choice about the consequences of these services, providers will need to offer “sufficient information” about the call-blocking service and should clearly disclose in plain language what types of calls may be blocked and other risks relating to call blocking.

In response to over-blocking concerns, the FCC “encourages” providers to notify callers that their calls have been blocked. Further, a provider with a call-blocking program will need to provide a point of contact for legitimate callers to report erroneous blocking, as well as a system for resolving such complaints. Alternatives are limited – callers who find a service provider’s call-blocking program to be unreasonable may file a petition for declaratory ruling with the Commission. At the same time, the FCC cautions providers against blocking calls from emergency operations centers or other law enforcement agencies.

The FCC claims that the cost to a voice service provider to implement opt-out blocking is “far less expensive than the costs of allowing unwanted calls to bother its subscribers.” The Commission also “expect[s]” that voice service providers will offer an opt-out service for free to subscribers (as many already do), and with no extra line-item charge. The FCC does not address the potential costs to legitimate calling parties whose calls are blocked and must resolve complaints with voice service providers or the FCC.

White-List Programs (Default Call Blocking)

Perhaps an even more powerful tool than the opt-out blocking option, is what the FCC calls the “white-list program,” whereby a subscriber specifies the telephone numbers from which they wish to receive calls. For example, such a program would block calls from any telephone numbers not included in a subscriber’s contact list. Like the opt-out rules, use of a white list requires a subscriber’s informed consent.

Third Further Notice of Proposed Rulemaking

Along with the Declaratory Ruling, the FCC issued a Third Further Notice of Proposed Rulemaking (“NPRM”) that proposes additional steps to combat illegal calls.

First, the FCC proposes to create a safe harbor for voice providers that block calls that fail authentication through the SHAKEN/STIR framework. Under the SHAKEN/STIR standard, providers can authenticate and verify an originating caller at multiple points throughout the call path, thereby reducing the likelihood that the calling telephone number has been spoofed or is otherwise phony. The FCC seeks comment on why and how calls fail SHAKEN/STIR authentication, whether failed authentication is a good proxy for determining whether a call is likely to be illegal, and what to do about false positives.

The NPRM also solicits comments about potential safe harbors for call blocking based on other SHAKEN/STIR-related procedures, as well as other popular call authentication methods. The Commission seeks comment about how narrowly or broadly these safe harbors should be crafted and whether the Commission is “striking the appropriate balance” between expansive safe harbors that encourage compliance and more narrow rules to account for false positives, over-blocking, and other “technical problems.”

The FCC also proposes requiring voice service providers to implement SHAKEN/STIR if they fail to do so voluntarily by the end of 2019. The NPRM also calls for comment on who should be covered by these various requirements and when and how to mandate implementation.

The FCC also proposes a “Critical Calls List” for numbers that should never be blocked, including 911 call centers and other government emergency outbound numbers. The NPRM seeks comment on this proposal and asks for any additional numbers that should be protected from call-blocking systems and whether such numbers need to be authenticated to remain on the list.

Call Blocking Deployment Status

Finally, the FCC directed its Consumer and Governmental Affairs Bureau (“CGB”) (in conjunction with the Wireline Competition Bureau and Public Safety and Homeland Security Bureau) to prepare annual reports over the next two years on the state of deployment of methods to eliminate illegal calls. To prepare these reports, CGB is authorized to collect “any and all relevant information” from voice service providers.

Conclusion

It remains to be seen how effective the FCC’s most recent measures will be in protecting consumers and legitimate callers alike. In the meantime, the FCC appears poised to expand the tools it will permit voice service providers to use in the fight against illegal and unwanted calls.