

ALERT

To Thwart Robocalls, FCC Moves to Establish Call Blocking Safe Harbors

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On June 25, 2020, the Federal Communications Commission (FCC or Commission) released a draft Third Report and Order, Order on Reconsideration, and Fourth Further Notice of Proposed Rulemaking (Order, Order on Reconsideration, and FNPRM) that will be considered at its July 16, 2020 Open Meeting. If adopted, the Order would establish two distinct safe harbors for voice service providers engaged in certain types of call blocking, as well as rules to ensure certain public safety calls are unimpeded by such blocking. The draft Order on Reconsideration would deny two requests to reconsider the Commission's 2019 Declaratory Ruling which provided clarity and flexibility for providers to offer opt-out call blocking services based on reasonable analytics. Finally, the draft FNPRM would seek comment on further implementation of the landmark Pallone-Thune TRACED Act and other efforts to thwart illegal and unwanted robocalls.

The final item may change between now and its presumed adoption on July 16. The following highlights the main aspects of the current draft released by the FCC.

Draft Order Would Establish Two Distinct Safe Harbors for Voice Service Provider Blocking

First, the draft Order would adopt two distinct safe harbors for provider blocking. ¶ 21. The first safe harbor would protect terminating voice service providers from liability under the Communications Act and the Commission's rules for the blocking of calls based on reasonable analytics designed to identify unwanted calls, so long as information from the STIR/SHAKEN call authentication framework is taken into account. ¶ 25. Specifically, the draft Order would require that at a minimum, a terminating voice service provider

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seeking safe harbor protection must have deployed an effective caller ID authentication framework within their own network, accept caller ID authentication information transmitted by an upstream voice service provider, and incorporate that information into its analytics where that information is available. ¶ 28. However, terminating voice service providers could also rely on the safe harbor even when blocking calls where caller ID authentication information is not available, so long as they incorporate caller ID authentication information into their analytics wherever possible. ¶ 34. Additionally, to take advantage of the safe harbor, voice service providers must give consumers the opportunity to opt-out and must offer these blocking services without a line-item charge to consumers. ¶ 25.

The second safe harbor would address carrier blocking of traffic from bad-actor voice service providers that, either negligently or intentionally, continue to allow unwanted calls to traverse their networks. ¶ 36. This second safe harbor is targeted at bad actors identified by the Commission, based on information likely provided by the Traceback Consortium. In its draft Order, the Commission states its view that because specific providers “can pass large volumes of bad traffic . . . a robust blocking scheme includes both blocking of traffic coming from the networks of bad actor providers along with blocking of individual calls.” ¶ 38.

Finally, the draft Order would require that voice service providers make all reasonable efforts to ensure that calls from Public Safety Answering Points (PSAPs) and government outbound emergency numbers are not blocked. ¶ 52. In general, the Order would require voice service providers to: 1) designate a single point of contact for callers and other voice service providers, to address blocking errors; 2) investigate and resolve such blocking disputes in a “reasonable amount of time;” 3) publish contact information clearly and conspicuously on their public-facing websites; and 4) promptly cease blocking calls from a number unless circumstances change when a caller makes a credible claim of erroneous blocking and the voice service provider determines that the calls should not have been blocked. ¶ 54. The draft Order also declines to adopt a “Critical Calls List,” based on the Commission’s view that “such a list would likely . . . do more harm than good.” ¶ 57.

Draft Order on Reconsideration Would Deny Requests to Reconsider Aspects of the 2019 Opt-Out Call Blocking Declaratory Ruling

In July 2019, the Commission adopted a Declaratory Ruling making clear that voice service providers may offer call blocking services based on reasonable analytics on an opt-out basis. In the draft Order on Reconsideration, the Commission considers and ultimately plans to deny two requests to reconsider that Declaratory Ruling. ¶ 70. In doing so, the draft Order on Reconsideration confirms that the Commission “give [s] . . . voice service provider discretion to determine the best means of informing their customers” about call blocking programs. ¶ 73. The draft Order on Reconsideration also reiterates the flexibility the Commission provides to voice service providers with respect to call blocking based on reasonable analytics, explaining that “[i]n our June 2019 decision, we struck a balance between blocking flexibility and unfettered discretion, and [the request to reconsider] offers no evidence at this point that we need to upset that balance by prescribing definitions that might be used by illegal callers to evade blocking programs.” ¶ 77.

Draft FNPRM Would Propose Traceback and Robocall Mitigation Obligations, Along With Consumer Transparency Measures

The draft FNPRM seeks comment on proposed rules that would further implement certain portions of the TRACED Act, place affirmative obligations on voice service providers in the context of traceback and robocall mitigation, and provide transparency to consumers by requiring voice service providers to identify a list of blocked calls.

First, the draft FNPRM would seek comment on implementing various rules required under Sections 4, 7, and 10 of the TRACED Act. ¶ 79. For example, with respect to Section 4, the draft FNPRM seeks comment on other instances where voice service providers should be permitted to block based in whole or in part on caller ID authentication information and on extending the safe harbor to cover such blocking. ¶¶ 82–83. It would also seek comment on a remediation process for callers adversely affected by incorrect blocking. ¶ 84. With respect to Section 7 of the TRACED Act, the draft FNPRM would seek comment on protecting subscribers from receiving unwanted calls or text messages from a caller using an unauthenticated number. ¶ 88. The item would also seek comment on the Section 10 directive to ensure that robocall-blocking services provided on an opt-out or opt-in basis are “provided with transparency and effective redress options” for consumers and callers with no line-item charge for consumers or additional charge for callers. ¶ 91. Finally, the draft FNPRM would also ask about “other steps [the Commission] should take to ensure that emergency public safety calls are not blocked.” ¶ 93.

Second, the draft FNPRM proposes to establish an affirmative obligation for voice service providers to respond to certain traceback requests, mitigate bad traffic, and take affirmative measures to prevent customers from originating illegal calls. ¶ 94. With respect to the former, the Commission would propose to “affirmatively require all voice service providers to respond to traceback requests from the Commission, law enforcement, or the Traceback Consortium.” ¶ 95. The draft FNPRM would also propose to require all voice service providers to “take effective steps to mitigate bad traffic when notified of that traffic by the Commission” ¶ 97. It would also propose requiring voice service providers to “take affirmative, effective measures to prevent new and renewing customers from using their networks to originate illegal calls.” ¶ 100.

Finally, the draft FNPRM would propose to require terminating voice service providers that block calls to provide a list of blocked calls to their customers on request and at no additional charge. ¶ 104. It would also seek comment on what information should be included on such a list and any technical challenges associated with maintaining and offering such a list. The draft FNPRM would also seek comment on particular challenges to smaller or TDM-based voice service providers, whether such a list should cover a minimum or maximum time period, and whether it should be limited to certain blocked calls. ¶ 104.