



February 18, 2022

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278; Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On February 16, 2022, Leah Dempsey, Vice President and Senior Counsel, ACA International, and Mark Brennan and Arpan Sura, counsel to ACA International, met with Danielle Thumann, Policy Advisor to Commissioner Brendan Carr, to discuss Chairwoman Rosenworcel's press release announcing the circulation of a Declaratory Ruling and Order ("Draft Order") that would classify ringless voicemails ("RVM") as "calls" under the Telephone Consumer Protection Act ("TCPA").¹

During the meeting, we expressed support for the Commission's efforts to protect consumers against scam, fraud, and other unlawful robocalls. We also discussed our concern that the Commission might vote on the Draft Order based on a stale record, without meaningful opportunity for public input, and in a way that could create harmful side effects for consumers and legitimate callers acting in good faith. The Draft Order is not currently available for public review, even though it proposes to expand substantially the meaning of a key statutory term ("call") in a way that could have far-reaching consequences for modern communications technologies. At a minimum, we encouraged the Commission to provide further notice and seek stakeholder input on the specific proposals under consideration before a vote.

Stale Record. The Commission has no pending petition before it regarding the classification of RVM. Although three RVM petitions were filed within the last eight years,² all

¹ Press Release, Chairwoman Rosenworcel Aims to Protect Consumers From Unwanted 'Ringless Voicemail' Robocalls (Feb. 2, 2022), <https://bit.ly/3523spl>.

² Petition For Expedited Declaratory Ruling of VoAPPs, Inc., CG Docket No. 02-278 (filed July 31, 2014); Petition for Declaratory Ruling of All About the Message, LLC, CG Docket No. 02-278 (filed Mar. 31, 2017) ("2017 All

three were withdrawn.³ The press release suggests that the Draft Order relies on the record developed in response to the 2017 petition from All About the Message. Comments from 2017, however, do not reasonably support a finding in 2022 that RVMs are “calls.” To be reasonable, such an analysis requires a deep understanding of *current* RVM technology and its interaction with the public-switched telephone network. The Commission has no record about the legally relevant ways RVM technology might have changed.

As we also discussed, while section 1.2 of the Commission’s rules allows the Commission to issue a declaratory ruling “on its own motion” to “terminat[e] a controversy” or “remov[e] uncertainty,”⁴ the Commission faces no active controversy or uncertainty. The Commission has a backlog of dozens of TCPA petitions spanning years and years, but none of those petitions is focused on RVM. RVM litigation is rare, and there is no split of authority among the courts. The Commission therefore has no need to rush at the expense of reasonable public input.

Harmful Side Effects for Consumers. A decision on the Draft Order before the appropriate opportunity for public input and comment could introduce disruptive side effects. For example, unintended consequences may come from whether and how the Draft Order defines “ringless voicemail,” which has not been disclosed to the public. As USTelecom noted in 2021, RVMs do not comprise a monolithic category.⁵ They come in different flavors, each of which “raise different legal and policy issues that may be relevant to the Commission’s consideration.”⁶

Applying a one-size-fits-all approach to a wide range of heterogenous technologies could have ramifications far beyond RVM. And any new gloss on the meaning of “call” could destabilize the regulatory treatment of Title I technologies that have historically fallen outside the TCPA’s scope. Stakeholder input is necessary to ensure that the Draft Order does not sweep too broadly.

Discussion of new regulatory developments since 2017 is also critical for a complete record before moving forward. For example, the Consumer Financial Protection Bureau has issued new rules related to debt collection calls since 2017 under Regulation F. These and other

About the Message Petition”); Petition for Declaratory Ruling of Perdue for Senate, Inc., CG Docket No. 02-278 (filed July 2, 2021).

³ See Withdrawal of Petition for Expedited Declaratory Ruling of VoAPPs, Inc., CG Docket No 02-278 (filed June 11, 2015); Withdrawal of Petition for Declaratory Ruling of All About the Message, LLC, CG Docket No. 02-278 (filed June 20, 2017); Withdrawal of Petition for Declaratory Ruling of Perdue for Senate, Inc., CG Docket No 02-278 (filed Nov. 18, 2021).

⁴ 47 C.F.R. § 1.2(a) (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

⁵ See Comments of USTelecom, CG Docket No. 02-278 (filed Oct. 4, 2021).

⁶ See *id.* at 2-3 (“The different mechanisms used by various RVM technologies raise different legal and policy issues that may be relevant to the Commission’s consideration of the Petition But because of the complexities and differences among the multiple RVM techniques, any declaratory relief should be based on a sufficient factual record to both understand the techniques actually at issue and avoid conflating the legal and policy considerations relevant to different techniques.”).

potential side effects underscore the lack of record evidence for the Commission to find that all RVMs are “calls” made using technologies that would trigger the TCPA consent requirements.

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For these reasons, we encourage the Commission to provide an opportunity for meaningful stakeholder input on current RVM issues, including through a Public Notice that describes the current proposal with specificity and establishes an associated comment period. Sunshine remains the best way to protect consumers, avoid unintended side effects, and comply with the Administrative Procedures Act.

Pursuant to Section 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,

/s/ Leah Dempsey
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cc: Danielle Thumann