

Battle Over Collection of Robocall Fines Illustrates Broader Enforcement Issues, Not a Lack of Willpower on TCPA

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A new [report](#) from the Wall Street Journal on FCC robocall enforcement set off a minor scrum over the effectiveness of the FCC's TCPA efforts under Chairman Pai. The report claimed that, despite recent [eye-popping enforcement actions](#) and [policy proposals](#) aimed at curbing unwanted calls, the FCC collected only a fraction of those fines so far. Out of \$208.4 million in fines issued since 2015 for violations of the FCC's robocalling and associated telemarketing rules, the agency collected just \$6,790, or less than one-hundredth of one percent. None of the over \$200 million in robocall-related fines imposed under Chairman Pai's leadership have been collected to date, including the [record-setting](#) \$120 million penalty issued last year against a robocalling platform and its owner for placing over 96 million "spoofed" marketing robocalls.

This report prompted commentary from Commissioner Rosenworcel, who [tweeted](#) that these "measly efforts" were "not making a dent in this problem" and called for carriers to provide free call blocking tools to consumers. In our view, however, the report really doesn't relate to the vigor – or alleged lack thereof – of FCC robocall enforcement efforts. Instead, the small amount of assessed fines that are actually collected starkly demonstrates the internal and external hurdles faced by the FCC, which impact all types of enforcement actions, not just robocalls. The report likely will rekindle [Congressional criticism](#) of FCC enforcement processes and calls for more systematic solutions to the problem of unwanted calls.

The collection issues outlined in the report are not unique to robocalling enforcement. Rather, the low collection rates are a function of the process for collection and the parties against whom cases typically proceed to forfeiture (versus those settled by consent decrees). These problems predominate in all areas of FCC enforcement.

First, the FCC faces significant procedural hurdles, both inside and outside the agency, to forcing violators to pay assessed fines. As we previously [highlighted in our podcasts](#), unlike many other federal agencies, the FCC does not have the authority to sue violators directly in court to collect unpaid fines. Instead, the agency must refer unpaid penalties to the Department of Justice ("DOJ"), which has the final say on whether or not to bring a collection action in court. In many cases, DOJ attorneys may be unwilling or unable to take on FCC collection action referrals due to resource constraints or higher-priority cases. If the DOJ sues, the party against whom the collection action is brought is entitled to a "trial *de novo*," which presents the potential for complicated litigation over the facts of the violation and the FCC's legal conclusions in assessing the fine. Perhaps as a result of this, in our experience, even when federal prosecutors do act on referrals, they often agree to

settlements below the penalty originally assessed by the FCC. Moreover, in the case of robocall enforcement, some of the targets against whom the fines were assessed are foreign persons or corporations. Collection actions against foreign nationals raise complicated process issues, and often at a minimum involve significant delay before a collection action can be commenced.

Second, the parties against whom forfeiture actions are taken play into this. Most FCC enforcement is against entities that hold licenses or other authorizations from the agency. These entities often are motivated to resolve an enforcement allegation by consent decree, many times even before a formal action is brought. Given the importance of a good relationship with one's primary regulator, it is not hard to understand why most parties may settle allegations even if they disagree with the FCC's factual findings or legal conclusions. However, in some cases, the FCC's posture makes settlement unattractive or, potentially, impractical. It is here where the FCC arguably deserves some of the blame for the dearth of fine collections, at least in the context of robocall violations. Nearly all of the recent robocall-related enforcement actions targeted small companies and/or individuals. The FCC imposed millions in penalties in these cases despite (likely credible) claims by the violators that they could not pay the proposed amounts. The Communications Act [requires](#) the FCC to consider a violator's ability to pay when assessing fines. But the FCC found in the robocall cases that the violator's inability to pay was outweighed by other statutory factors, including the alleged egregiousness of the violations, warranting the hefty penalties regardless. As a result, the FCC assessed fines for robocall-related violations and other misconduct that it very likely knew were uncollectible, possibly in order to send a message, set precedent, and/or to push the offending companies out of business. As most FCC collection actions result in settlement, very few cases see the inside of the courtroom and the agency's practice of assessing fines far beyond a violator's ability to pay thus far has escaped judicial scrutiny.

As a result, in some ways all FCC fines face obstacles to collection, and the FCC's choice of targets thus far in robocall enforcement made collection even more unlikely. With this situation unlikely to change, the report may inject new life into FCC policy proposals to curb unwanted calls. In particular, the FCC recently began using its bully pulpit to push changes by service providers to limit robocalling opportunities. In November 2018, Chairman Pai issued a [letter](#) asking service providers about their efforts to implement call-verification systems like SHAKEN/STIR and threatened regulatory action in 2019 if carriers do not voluntarily implement such systems. The Chairman also urged all carriers to participate in USTelecom's Traceback Group, which helps identify sources of unwanted calls. Commissioner Rosenworcel's call (joined by some consumer advocacy groups) to require carriers to [block robocalls](#) fits in this same vein. The FCC has not teed up any rulemakings on these proposals yet, but whether a carrier has sufficient "safeguards" in place to limit unlawful robocalls will be a major FCC policymaking focus area this year.

More broadly, the factors limiting FCC collection of fines will remain. Until there is an easier path to judicial review of FCC enforcement actions, and unless and until parties against whom forfeitures are assessed have the means to dispute and, ultimately, pay, FCC fines, we don't expect material differences in FCC collection rates. Perhaps it is time to examine fundamental reform to the FCC's enforcement authority and procedures.