

Enforcement Action in Focus: FCC Imposes Potential Liability on Technology Platforms for Involvement in Unlawful Robocalls

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On July 26, 2017, the Federal Communications Commission (FCC or Commission) released the text of the [Forfeiture Order](#) adopted at the Commission's July 2017 open meeting against Dialing Services, LLC for enabling unauthorized prerecorded message calls (a/k/a "robocalls") by third parties to wireless phones in violation of the Telephone Consumer Protection Act (TCPA). The Forfeiture Order is significant for a number of reasons – not the least of which was Republican Commissioner Michael O'Rielly's strong dissent questioning the action's legal and policy bases. This marks the first time that the FCC has imposed liability on a company that enables robocalling campaigns by third parties, even when the company does not directly create the robocall messages or direct who will receive the robocalls. Moreover, the Commission's use of a different (and arguably lesser) standard than the "high degree of involvement" standard applicable to fax broadcaster liability could trigger a new wave of litigation for calling platform vendors and other applications that enable or permit mass calling or texting.

History of the FCC Investigation

The Forfeiture Order is the culmination of an investigation of Dialing Services that began in 2012. Dialing Services offered a service for sending prerecorded message calls. Dialing Service allowed users to upload prerecorded messages they made, or to use the company's platform to record messages that would be sent to target recipients. Dialing Services would send the messages, using lists provided by the company's clients. Thus, Dialing Service in essence operated as a broadcaster for calls created by and distributed by its customers.

In 2012, staff from the FCC's Enforcement Bureau contacted the company and issued an informal warning that such actions may violate the TCPA unless Dialing Services or its clients had the prior express consent of the called parties. Following additional robocalls made through the company's platform, the Enforcement Bureau issued a [Citation](#) to Dialing Services in March 2013 for alleged TCPA violations and warned that enabling further unauthorized robocalls could result in fines. (A Citation is a prerequisite to the FCC issuing a fine under the Communications Act where, as here, the target entity does not hold an FCC authorization). The Enforcement Bureau subsequently found that Dialing Services enabled additional unauthorized robocalls to wireless phones and the FCC issued a [Notice of Apparent Liability for Forfeiture](#) (NAL) against the company in 2014. Dialing Services contested the NAL, arguing, among other things, that it could not be held liable for merely originating its customers' messages.

The FCC Forfeiture Order

The Forfeiture Order reiterates many of the bases cited in the NAL for penalizing Dialing Services, and rejects numerous arguments by the company that it should not be held liable for alleged TCPA violations resulting from third-party robocalling campaigns. In particular, Dialing Services asserted that it was not liable because it did not “make” or “initiate” the robocalls in question; it just provided the platform to send the robocalls. The Commission rejected this claim, citing to the frameworks set forth in a [2013 declaratory ruling against DISH Network](#) and the [2015 TCPA Omnibus Order](#) (issued after the NAL against Dialing Services). Under those frameworks, a party makes or initiates a call by “tak[ing] the steps necessary to physically place a telephone call,” or by being “so involved in the placing of a specific telephone call as to be directly liable for making it.”

In the Forfeiture Order, the Commission conceded that Dialing Services may not have created or directed the robocalling campaigns under the first prong, but nevertheless determined that Dialing Services was liable under the second prong of its test. Significantly, the FCC found sufficient involvement to impose liability based on the following factors: (1) Dialing Services “offers caller ID blocking and spoofing that are apparently used in a deceptive manner”; (2) Dialing Services “assists customers in structuring the message of the call”; and (3) Dialing Services “had specific notice that its service was being used to make unlawful robocalls.”

Implications

This ruling, as the first such action against a calling (or texting) platform, is potentially significant for other platform providers. However, it is important to recognize: (1) that each of the Forfeiture Order’s assertions were contested factually by Dialing Services in the NAL Response, and may be contested further in a petition for reconsideration or a subsequent collection action; and (2) that the FCC applies a “totality of the circumstances” approach to liability, which may limit the applicability of this ruling in future cases.

With these caveats in mind, a few Commission statements deserve closer consideration, including:

- Consent for Third-Party Robocalls: “The fact that Dialing Services has no preexisting relationship with the called parties does not absolve the Company of its obligation to obtain consent. ... Similarly, the fact that the called parties are unaware of Dialing Services’ involvement, and thus do not have a way to consent (or refuse consent) to the contacts does not relieve Dialing Services of its obligation to obtain their respective consents.” This appears to hold providers of calling services or platforms to essentially the same standard as their customers, which are the entities with a direct relationship with called parties.
- “Contracting Away” TCPA Liability: Dialing Services had a provision in its contracts assigning the duty for TCPA compliance on its customers. However, the FCC held: “Nothing in the statute or [the Commission’s] rules suggest that the [TCPA] consent requirement may be overcome by a general statement from third parties that they will not violate the law. [The Commission] reject[s] the idea that the Company may satisfy its independent obligation under the TCPA by relying on a broad promise by a third party that it will not violate the TCPA.” As a result, it does not appear that provisions in a contract or terms of service that mandate client compliance with federal law will provide much protection, at least not against primary responsibility for FCC fines.
- Intent Does Not Matter: “Whether Dialing Services intended to violate the TCPA is not relevant to determining whether the Company’s conduct was willful. Dialing Services willfully committed the act of making prerecorded message calls—a service for which it received financial compensation from its clients—and those calls violated the TCPA. Dialing Services’ violations

were therefore willful.” This reiterates the Commission’s longstanding position that a “willful” violation does not require intent to violate the TCPA, the Commission’s rules, or any other law.

Commissioner O’Rielly’s Dissent

Although Commissioner O’Rielly often saw eye-to-eye with Chairman Pai when they dissented on prior enforcement actions, Commissioner O’Rielly parted from his Republican colleague on the Forfeiture Order. O’Rielly’s dissent cited an apparent lack of tangible evidence to support the penalty and expressed concerns about the broader implications of the Forfeiture Order. First, O’Rielly questioned the FCC’s authority to punish a calling services platform for TCPA violations and criticized the Enforcement Bureau for not taking enforcement action against the underlying third-party robocallers. Second, he challenged the facts supporting the FCC’s determination that Dialing Services was sufficiently involved in making the robocalls to justify TCPA liability. While the Forfeiture Order highlighted the spoofing capabilities of Dialing Services’s platform, O’Rielly pointed out that none of the robocalls under investigation involved spoofing and that spoofing may be used for legitimate, lawful purposes. The Commissioner also argued that the Forfeiture Order failed to adequately address Dialing Services’s claim that it did not assist clients in the creation of robocall scripts and played no role in directing the robocalling campaigns. Third, O’Rielly stated that the Forfeiture Order makes numerous assumptions about what Dialing Services knew about its clients’ robocalling campaigns and that the FCC should only impose liability on a robocalling platform when the platform had a “clear intent” to violate the TCPA. He warned that the liability standard adopted in the Forfeiture Order would undermine legitimate calling platforms and trigger a wave of TCPA lawsuits against platform providers.

As noted previously, this Forfeiture Order could have a significant impact on any entity that offers or is a customer of third-party calling services. We encourage anyone who has questions or concerns to review the Forfeiture Order with counsel carefully.