

FCC/FTC Stake out Aggressive Robocall Position, Tell Gateway VoIP Providers to Block COVID-19 Robocalls – or Be Blocked Themselves

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April 16, 2020



The FTC and FCC have taken a number of actions to stem unlawful robocalls generally and, during the COVID-19 pandemic, [to stem harmful and deceptive calls](#) that seek to exploit the COVID-19 crisis. Even amid the backdrop of their long-standing commitment, the agencies' most recent action stands out as an aggressive new approach to unlawful calls. On April 3, 2020, the enforcement arms of each agency jointly sent warning letters to three Voice over Internet Protocol ("VoIP") service providers allegedly facilitating the transmission of international scam telemarketing calls originating overseas. The letters make an unprecedented demand: block the traffic of specific allegedly unlawful actors or have all of your traffic blocked by other carriers. In this post, we'll take a look at this new approach, and discuss its relationship to the broader provisions of the Telephone Robocall Abuse Criminal Enforcement Act ("TRACED Act"), which institutes a number of measures designed to combat illegal robocalls.

The Warning Letters

The agencies identified the three VoIP gateway providers as the sources of the illegal calls through the efforts of the USTelecom Industry Traceback Group, a consortium of phone companies that help officials identify potentially unlawful calls. The phone companies used a process known as "traceback," in which they share information to trace unlawful spoofed robocalls to their origination.

In the letters, the agencies reminded the companies that the COVID-19 scam robocalls are in fact illegal and directed them to cease transmitting the traffic immediately, as the calls have "the potential to inflict severe harm on consumers." The letters warned the companies that if they did not stop transmitting the identified traffic within 48 hours, the FCC would authorize other U.S. voice providers to block all calls from the companies and take any other steps necessary to prevent transmission of the calls. The agencies also sent a separate letter to USTelecom advising the trade association that, if the VoIP providers do not block the traffic, the FCC will authorize other U.S. service providers to block all calls coming from that gateway and will take other actions as necessary.

to authorize U.S. service providers to block traffic from the originating entities. In addition, the FCC encouraged other service providers to take immediate action to block unlawful calls pursuant to existing legal authority.

This action is a significant – and significantly aggressive – new approach by the agencies. While both agencies have taken actions to prevent and deter unlawful robocalls, the threat to block traffic from the originating carrier is a new tactic in the fight against unlawful calls. Notably, it is not clear under what authority the FCC can or would order the blocking of all traffic from the subject VoIP gateway providers if they failed to block the allegedly unlawful robocalls. The letter does not cite any provision of the Communications Act that would authorize such blocking. Moreover, existing FCC orders relating to call blocking have authorized only limited call blocking practices that were optional for the carriers. Were the FCC to order such blocking (and to make it mandatory), it appears that such action would be the first of its kind by the agency.

Briefly, we will review the agencies' recent history with anti-robocall activities.

The *Educare Services* Enforcement Action and Prior FTC Warning Letters

In the three letters to the VoIP gateway providers, the FCC and FTC reference the FTC's recent enforcement action against VoIP provider Globex Telecom. This action relied upon provisions of the FTC's Telemarketing Sales Rule ("TSR"), which addresses calls made for a telemarketing purpose. In December 2019, the FTC obtained a preliminary injunction against Educare Services and Globex Telecom Inc. for robocalling consumers to promote allegedly fraudulent credit card interest rate reduction services. The FTC complaint alleges that Globex played a key role in "assisting and facilitating" the illegal credit card interest rate reduction services Educare promoted by providing Educare with the means to call consumers via interconnected VoIP communication services and facilities. For a VoIP company to be liable under a TSR "assisting and facilitating" theory, the FTC must prove that the company "knew or consciously avoided knowing" the robocall campaigns violated the TSR.

A week before the joint letters, the FTC sent letters to nine VoIP service providers and other companies warning them that "assisting and facilitating" in the transmission of illegal COVID-19-related telemarketing or robocalls is unlawful. The agency also sent letters to nineteen VoIP service providers in January with a similar warning about all illegal robocalls.

FCC TRACED Act Implementation and the STIR/SHAKEN Mandate

Like the FTC, the FCC recently shifted its focus in robocall enforcement towards the originating carriers. On February 4, 2020, the FCC's Enforcement Bureau [sent letters](#) to seven VoIP gateway service providers, notifying them that unlawful robocalls had been traced to their networks and asking for their assistance in tracking down the originators of the calls. Although no enforcement action was threatened at the time, the FCC also asked each provider to detail their anti-robocall efforts to the Commission.

More recently, the FCC took several steps in implementing the [TRACED Act](#), which requires the FCC to initiate several near-term rulemakings and other actions aimed at addressing unlawful spoofing and robocalling operations. On March 27, the agency adopted a [Report and Order and Further Notice of Proposed Rulemaking](#) establishing rules for the registration of a single consortium to conduct private-led "traceback" efforts, which is expected to formalize the relationship with the USTelecom Industry Traceback Group. Additionally, on March 31, the FCC adopted a separate [Report and Order and Further Notice of Proposed Rulemaking](#) mandating that originating and terminating voice service

providers implement the STIR/SHAKEN framework in the IP portions of their networks by June 30, 2021. STIR/SHAKEN—the technology framework behind the “traceback” process—allows providers to verify that the caller ID information transmitted with a particular call matches the caller’s number as the calls are passed from carrier to carrier. FCC Chairman Pai previously [urged](#) major providers to adopt STIR/SHAKEN technology voluntarily and warned that the voluntary approach would become a mandate if the providers [did not move fast enough](#). Still to come are [comments on a “know your customer” obligation for service providers and rules to deny access to numbering resources to originators of unlawful calls](#).

As we have [previously noted](#), the TRACED Act also requires the implementation of an alternative call authentication framework in non-IP networks, extends the FCC’s statute of limitations for bringing some illegal robocall enforcement actions, and eliminates the requirement to give warnings before issuing certain filings.

Takeaways

These letters, coupled with the recent activity by the FTC and FCC to combat illegal robocalls, signal the agencies’ desire to cause a meaningful reduction in unlawful calling, and in particular, demonstrate a desire to prevent scammers from taking advantage of the COVID-19 crisis to carry out their deceptions. Both agencies can seek civil penalties and take other actions necessary to prevent the proliferation of these calls.

Importantly, the targets of agency action are not necessarily limited to the entities that place the unlawful calls. These federal actions are a good reminder for VoIP and other service providers to assess whether their customers’ practices may indicate unlawful use of VoIP or other services. With the warning letters, and now these blocking letters, the FCC and FTC increasingly are showing an openness to pursuing penalties under vicarious liability theories. If there are facts that support knowledge of the unlawful activity or “red flag” type practices (such as a customer being the target of multiple third party government subpoenas, among other facts), that’s a good indication that further steps by the VoIP provider may be warranted to mitigate the risk of facing an enforcement action by the FTC or FCC. If you have questions about how these enforcement trends and related risk factors are relevant to your business, please contact your Kelley Drye counsel.