

# FCC Enforcement Actions Demonstrate Ramifications of Failing to Cooperate in TCPA Investigations

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Privacy and Data Security / Communications and Media

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Recent enforcement actions brought by the Federal Communications Commission (“FCC”) have made it increasingly clear *all* entities—even those that do not hold FCC licenses—must cooperate in any FCC investigation (including those pertaining to the Telephone Consumer Protection Act) or potentially face substantial fines and penalties.

## Background

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Although the FCC typically can take immediate enforcement action against companies that hold FCC licenses, it must take additional steps before doing so against entities that do not hold a license, permit, certificate, or other authorization from the agency. For those entities, any enforcement action must (1) be preceded by a “citation” to the entity, (2) give the entity a reasonable opportunity for a personal interview with a Commission official, and then (3) the entity must “subsequently engage[] in conduct of the type described in [the] citation.”<sup>1</sup> In other words, the FCC first must issue a warning to the entity and the entity that receives that warning must again engage in prohibited conduct before the FCC can take enforcement action.

An FCC investigation typically is initiated through a Letter of Inquiry (“LOI”). In practice, some entities that do not hold FCC licenses or authorizations have in the past failed to respond to LOIs or provided only partial responses to those LOIs on the theory that they could face an enforcement action (and thus a monetary penalty) only if they subsequently engaged in the conduct the agency challenged as unlawful. Some recent enforcement cases, however, demonstrate that the FCC will bring an enforcement action against an entity that fails to fully respond to an LOI—regardless of whether the entity engages in the underlying conduct again.<sup>2</sup>

## Recent Developments

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On December 4, 2014, FreeEats.com (“FreeEats”), a company that pays registered users to view its clients’ advertising on mobile devices, received an LOI from the FCC seeking

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<sup>1</sup> 47 U.S.C. § 503(b)(5).

<sup>2</sup> See, e.g., FreeEats.com, Inc., Citation and Order, DA 15-369, 2015 WL 1309910, at \*1 (Mar. 24, 2015) (“FreeEats Citation”).

information about its telemarketing and automated text message transmission practices, which are governed in part by the Telephone Consumer Protection Act (“TCPA”), a statute that the FCC administers.<sup>3</sup> According to the FCC, FreeEats provided only partial responses to the LOI, and its responses were furnished after the agency’s deadlines and did “not provide[] all of the documents and responses required by the LOI.”<sup>4</sup> FreeEats’ first response was provided nearly two months late, answered only 24 of the LOI’s 35 questions, and did not respond to any of the FCC’s document requests.<sup>5</sup> Two later partial productions included “some of the pending documents and responses owed to the Commission, but not all of them.”<sup>6</sup>

Eventually, the FCC had enough, and on March 24, 2015, the FCC issued a citation and order to FreeEats.com, putting the company on notice that if it “engages in any conduct of the type this Citation describes—and *specifically fails to respond to the FCC’s inquiries*—FreeEats may be subject to civil penalties, including but not limited to, substantial monetary forfeitures or other penalties.”<sup>7</sup> In other words, the FCC based its citation not only on FreeEats’s purported TCPA violations, but also on FreeEats’s failure to respond fully to the FCC’s LOI. This presumably means that if FreeEats continued to fail to respond to the LOI or to future FCC’s inquiries, that failure itself could result in an enforcement action and monetary penalties.

The FCC characterized FreeEats’s conduct as “particularly egregious,” because of the “wide latitude of additional time” given for the company to respond and because “[m]isconduct of this type exhibits contempt for the Commission’s authority.”<sup>8</sup> It found that the company “violated a Commission order by failing to provide the information and documents required by the LOI” and required it to do so within 30 days.<sup>9</sup> If it does not, the citation stated that the FCC could impose forfeitures of \$16,000 per day.<sup>10</sup>

While it is more common for the FCC to bring actions against companies it licenses,<sup>11</sup> the agency has recently brought other actions against companies it does not license when they fail to respond fully to LOIs.

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<sup>3</sup> *Id.*; see also FreeEats, About, <https://www.freeeats.com/Home/About> (last visited April 2, 2009).

<sup>4</sup> *FreeEats Citation*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Technical Communication Network, LLC, Notice of Apparent Liability, 28 FCC Rcd 1018 (2013) (imposing \$25,000 forfeiture); Net One International Net One, Notice of Apparent Liability, 26 FCC Rcd 16493 (2011) (imposing \$25,000 forfeiture); LDC Communications, Inc., Notice of Apparent Liability, 27 FCC Rcd 300 (2012) (imposing \$25,000 forfeiture); Fox Television Stations, Inc., Notice of Apparent Liability, 25 FCC. Rcd 7074 (2010) (imposing \$25,000 forfeiture); SBC Communications, Inc., Forfeiture Order, 17 FCC Rcd 7589 (2002) (imposing \$100,000 forfeiture).

In February 2015, the FCC issued separate \$25,000 forfeiture orders against two robocallers, Message Communications (“Message”) and Calling Post Communications (“Calling Post”), after previously issuing citations to those companies for failing to respond to LOIs.<sup>12</sup>

The forfeiture order against Message stated that the company’s conduct constituted “obstruction of an . . . investigation” after it failed to respond fully to a March 2013 LOI.<sup>13</sup> While Message did produce documents in response to the LOI, the agency found the response “materially deficient” because, among other things, Message provided documents “almost wholly outside the period of interest specified in the LOI.”<sup>14</sup> The company’s counsel apparently also did not respond to repeated email and telephone messages from the agency.<sup>15</sup> The FCC issued a citation in October 2013, and one month later Message submitted a written response stating only that the company “stands by” its initial response to the LOI.<sup>16</sup> The FCC took enforcement action against the company in July 2014, proposing the \$25,000 forfeiture.<sup>17</sup>

Calling Post received an LOI in February 2013, but failed to provide “a single document or answer[] a single question of the LOI.”<sup>18</sup> While the company’s counsel had been in contact with the FCC and had received extensions of the deadline to comply with the LOI, he told officials that he was “absolutely swamped,” and that he would be unable to comply by the new deadline.<sup>19</sup> After the FCC issued a citation in June 2013, counsel asked for an additional 30 days to respond, but never contacted any of the division staff thereafter.<sup>20</sup> The FCC took enforcement action in July 2014, stating the company “continued to ignore the warnings” of potential liability and that it “provided no answers—merely more excuses.”<sup>21</sup>

In the citations issued to FreeEats, Message, and Calling Post, the FCC cited its authority under Sections 4(i), 4(j) and 401 of the Communications Act, under which it claims “broad authority to investigate potential violations of the Act.”<sup>22</sup> The FCC warned that under these authorities, “[a]

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<sup>12</sup> Message Communications, Inc., Forfeiture Order, DA 15-155, 2015 WL 456558 (Feb. 3, 2015) (“Message Forfeiture Order”); Calling Post Communications, Inc., Forfeiture Order, DA 15-152, 2015 WL 456555 (Feb. 3, 2015) (“Calling Post Forfeiture Order”).

<sup>13</sup> Message Forfeiture Order.

<sup>14</sup> Message Communications, Inc., Citation and Order, 28 FCC Rcd. 14523 (2013) (“Message Citation”).

<sup>15</sup> *Id.*

<sup>16</sup> Message Communications, Inc., Notice of Apparent Liability, 29 FCC Rcd. 8214 (2014).

<sup>17</sup> *Id.*

<sup>18</sup> Calling Post Communications, Inc., Citation and Order, 28 FCC Rcd. 9016 (2013).

<sup>19</sup> *Id.*

<sup>20</sup> Calling Post Communications, Inc., Notice of Apparent Liability, 29 FCC Rcd. 8208 (2014).

<sup>21</sup> *Id.*

<sup>22</sup> See FreeEats Citation; Message Citation; Calling Post Citation. These statutes provide for the duties and powers of the Commission, authorize the Commission to conduct proceedings, and authorize the Commission to conduct an inquiry on its own motion. See 47 U.S.C. § 154(4)(i) (authorizing FCC to “issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its

party may not ignore the directives in a Commission order issued by the Bureau pursuant to delegated authority in an LOI.”

Given these recent actions, even entities not typically subject to the FCC’s jurisdiction should take seriously their obligation to respond to any LOI they receive from the agency, or be subject to a potential enforcement action for failing to offer a full response.

If you have any questions concerning the material discussed in this client advisory, please contact the following:

**Yaron Dori**  
**Kate Goodloe**

+1 202 662 5444  
+1 202 662 5505

[ydori@cov.com](mailto:ydori@cov.com)  
[kgoodloe@cov.com](mailto:kgoodloe@cov.com)

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functions”); 47 U.S.C. § 154(4)(j) (authorizing the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice”); 47 U.S.C. § 403 (providing the FCC power to conduct an inquiry on its own motion, including “full authority and power at any time to institute an inquiry . . . as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter. . .”).