

ALERT

FCC Proposes Record \$225 Million Fine for Robocall Campaign That Misappropriated Well-Known Brands

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On June 9, 2020, the Federal Communications Commission (FCC or Commission) proposed the largest fine its 86-year history – a \$225 million fine against Texas-based telemarketers for allegedly making approximately one billion illegally spoofed robocalls during the first four-and-a-half months of 2019. The robocalls falsely claimed to offer health insurance plans from well-known health insurance companies such as Aetna, Blue Cross and/or Blue Shield plans, Cigna, and UnitedHealth Group. The Notice of Apparent Liability (NAL) alleges violations of the Truth in Caller ID Act by John C. Spiller and Jakob A. Mears, who used business names including Rising Eagle and JSquared Telecom (collectively “Rising Eagle”).

Factual Background

Beginning in 2018, wireless carriers and government enforcement personnel identified a significant increase in health insurance-related robocalls. The USTelecom Industry Traceback Group (ITG) determined that approximately 23.6 million health insurance robocalls were crossing the networks of the four largest wireless carriers each day, and there were further indications that many or possibly all of the offending robocalls contained false caller ID information.

After receiving a referral from the ITG in September 2018, the FCC’s Enforcement Bureau launched a formal investigation to determine who was responsible for the apparently unlawful spoofed robocalls. ¶ 7. The Bureau’s investigation determined that Rising Eagle allegedly used approximately 170,000 unique caller IDs to make over a billion calls, and that none of the phone numbers were assigned to Rising

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Eagle. The Bureau also uncovered evidence that many of the robocalls at issue included false or misleading statements about the identity of the caller and the products being offered and purported to offer health insurance plans from well-known health insurance companies such as Aetna, Blue Cross and/or Blue Shield plans, Cigna, and UnitedHealth Group. ¶ 9.

The impact of the robocalls on legitimate brands was significant. One health insurance company's telephone network became unusable because it was inundated with so many callbacks from angry consumers. In another instance, the Blue Cross Blue Shield Association reported that Blue Cross and/or Blue Shield plans have been sued multiple times by plaintiffs' attorneys seeking damages under the TCPA's private right of action and suffered direct financial harm as a result of the robocalls that falsely invoked the Blue Cross and/or Blue Shield name. ¶ 10.

Basis for \$225 Million Forfeiture

The FCC's NAL notes that spoofing is unlawful under the Truth in Caller ID Act when it is done with the intent to defraud, cause harm, or wrongfully obtain anything of value and that Rising Eagle's actions satisfied all three forms of unlawful intent. ¶ 18. Based on these findings, the FCC proposed a forfeiture in the amount of \$225,000,000. Commission staff verified 150,000 apparently unlawful spoofed calls, yielding a base forfeiture of \$150,000,000, but then applied an upward adjustment to the proposed amount to reflect "the nature, circumstances, extent, and gravity of the apparent violations for which Rising Eagle is highly culpable." ¶ 19. The FCC based its conclusion on its findings that Rising Eagle: 1) knew it was using inaccurate caller ID information; and 2) intended to defraud, cause harm, and wrongfully obtain something of value. ¶¶ 18-19.

Rising Eagle Knew it Was Using Inaccurate Caller ID

The Commission's NAL succinctly addresses Rising Eagle's affirmative knowledge that it was using inaccurate caller ID information. After analyzing a small sample of the illegal robocalls, the FCC noted that of 60 distinct telephone numbers that Rising Eagle spoofed, not one was assigned to the company. ¶ 20. In addition, Mr. Spiller allegedly told an ITG consultant that "Rising Eagle *had started* acquiring numbers to use as caller IDs", indicating that the company "knew that prior to that time, it had been using inaccurate caller ID information." ¶ 20 (emphasis in original).

FCC Alleges that Rising Eagle Intended to Defraud Consumers

The NAL notes that the Truth in Caller ID Act and the Commission's rules prohibit knowingly displaying misleading or inaccurate caller ID information with the intent to defraud. ¶ 21. The NAL alleges that Rising Eagle satisfied this first prong, since it intended to defraud consumers into thinking that they were being offered health insurance products from well-known health insurance brands. The FCC noted that Rising Eagle made "material, affirmative misrepresentations in spoofed prerecorded voice message calls", that "created a false impression that the robocalls were made by, or were otherwise affiliated with, specific health insurance companies when that was not the case." ¶ 22. The NAL states that such misrepresentations were "critical," since they induced consumers to engage with the telemarketers, and that Rising Eagle's spoofing also "made it more likely that consumers would answer the phone and listen to the fraudulent sales pitch." ¶ 22.

Rising Eagle Allegedly Intended to Harm Well Known Brands, Consumers and Others

The NAL also alleges that Rising Eagle intended to cause harm to health insurance companies, subscribers of the spoofed numbers, consumers, and carriers. It notes that the FCC has held that the element of “harm” in the Truth in Caller ID Act is broad and “encompasses financial, physical, and emotional harm”, and that an intent to harm can be demonstrated when the harms are “consequences which are desired” or “substantially certain.” ¶ 23. The FCC alleges that Rising Eagle harmed health insurance companies by tarnishing their well-known brands with consumers and exposing the companies to “numerous TCPA class actions lawsuits.” ¶ 24. Subscribers of the spoofed numbers were harmed, since “people frequently redial a spoofed number to determine who called or to express outrage.” ¶ 25.

Several numbers belonging to Genworth North America Corporation, a health insurance company, were spoofed by Rising Eagle, which resulted in the disabling of portions of Genworth’s phone network and consumers erroneously blaming it for the robocalls. ¶ 26. The NAL also alleges that consumers were harmed due to Rising Eagle’s spoofed calls which also violated the TCPA. For example, Rising Eagle made at least 86,864,456 calls to wireless numbers and 56,635,935 calls to numbers on the National Do Not Call Registry, using a prerecorded voice message. ¶ 30. The NAL also alleges that Rising Eagle harmed carriers, since the spoofed robocalls burdened their networks with illegal calls, and increased the workload of their customer service agents, who were inundated with angry calls from subscribers. ¶ 33.

Rising Eagle Obtained Value by Evading TCPA Liability

Finally, the NAL alleges that Rising Eagle intended to wrongfully obtain financial compensation and evade liability. Rising Eagle was paid to make the illegal robocalls and was paid to generate leads for some of its clients. ¶ 35. In addition, the NAL notes that the statutory term “anything of value” is not limited to tangible assets. Since the spoofed robocalls helped Rising Eagle evade law enforcement as well as private civil lawsuits for violations of the TCPA, Rising Eagle benefited from the “avoidance of culpability.” ¶ 36. The NAL further notes that Rising Eagle’s TCPA liability has an ascertainable dollar value given the \$20,489 per unlawful call in a forfeiture action brought by the FCC, and the potential liability of up to \$1,500 per illegal robocall in a private action. ¶ 36.

FCC Asserts That Egregious Actions Warrant “Significant Upward Adjustment” to The Proposed Penalty and Piercing of the Corporate Veil

After proposing a base forfeiture of \$1,000 for each of the 150,000 allegedly unlawful spoofed robocalls, the FCC concluded that the circumstances in the case warranted a “significant upward adjustment to the base penalty.” ¶ 40. Among other things, the FCC noted that Rising Eagle’s robocall campaign was the largest in magnitude ever encountered by agency, that the robocalls were connected with a fraudulent telemarketing scheme, and that consumers were misled due to their incorrect belief that the calls originated from well-known and reputable health insurance companies. ¶ 41. The NAL also notes Mr. Spiller’s alleged acknowledgements that he was spoofing numbers, calling consumers on the National Do Not Call Registry and continuing to make abusive robocalls despite being warned about their illegal and unlawful nature. ¶ 41.

The FCC also proposed to pierce the corporate veil of Rising Eagle and hold Mr. Spiller and Mr. Mears personally liable. ¶ 42. Applying federal common law principles, the FCC found that (1) there was a “unity of interest and ownership” between the individuals and Rising Eagle, and (2) adhering to corporate formalities would sanction fraud, injustice, and evasion of legal obligations. ¶¶ 42–45. First, the Commission found a unity of interest because the individuals commingled personal and corporate funds and operated alone in personally supervising the corporation’s unlawful acts. ¶¶ 43–44. Second, the FCC found that preserving corporate formalities would allow Mr. Spiller and Mr. Mears to unjustly enrich themselves from fraudulently obtained corporate profits and would prevent the Commission from fulfilling its statutory mandate to prevent unlawful robocalls. ¶ 45.

Moving Forward

This historic enforcement action indicates that robocalls still are—and will remain—the FCC’s “top consumer protection priority.” It further indicates that the FCC will pursue robocall enforcement actions for a broad range of harms, including not only direct consumer harm but also related damage to corporate brands and telecommunications carriers.