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A Recent FCC Order May Require Financial Institutions and Healthcare Providers to Put Robocalls to Wireless Phone Numbers on Hold

A recent Federal Communications Commission (FCC) Order issued July 10, 2015, (Robocall Order) clarifies several provisions in the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227) and the FCC's implementing regulations (47 C.F.R. § 64.1200). Those laws provide that an entity may not use autodialed, prerecorded, or artificial voice calls (commonly known as robocalls) to place calls to telephone numbers (residential or wireless) unless the caller has received prior express consent of the called party. Among the items the Robocall Order addresses are petitions from organizations representing financial institutions and healthcare providers seeking exemptions from the prior consent requirement for certain types of calls to wireless telephone numbers. Although the FCC grants those petitions, it establishes a new exemption from the prior consent requirement subject to several conditions, including one that is virtually impossible to meet – effectively gutting the exemption. Specifically, to take advantage of the exemption, financial institutions and healthcare providers must ensure that the called party will not be charged for calls (which include voice calls and text messages). As explained below, there is no way for callers to be certain that all calls to cell phone numbers will not be charged to the called parties. As such, it is essential that financial institutions and healthcare providers intending to rely on the exemption carefully review and understand all of the exemption's conditions.

In the Robocall Order, the FCC allows financial institutions and healthcare providers to use automated telephone dialing systems and pre-recorded or artificial voice calls to contact wireless telephone numbers that were provided by the call recipients. However, financial institutions (*i.e.*, institutions engaged in financial activities as defined in the Bank Holding Company Act) and healthcare providers (*i.e.*, “covered entities” and their “business associates” as defined in the HIPAA privacy rules) may only initiate calls to wireless telephone numbers if the following conditions are met:

- > Consent - Calls (voice calls or text messages) may only be placed to wireless telephone numbers provided by the customer or patient.
- > Contact Information - The calls must state the name and contact information of the financial institution or healthcare provider. For voice calls, this information must be provided at the beginning of the call.

- > Content - All calls may only be for limited financial-related or health-related treatment purposes. Calls must not include any telemarketing, solicitation, or advertising or any accounting, billing, debt-collection, or other financial content.
 - The allowed financial-related purposes are limited to the following:
 1. preventing fraudulent transactions or identity theft;
 2. notifying consumers about data security breaches and remedial actions;
 3. conveying measures consumers may take to prevent identity theft following a data breach, such as placing fraud alerts on credit reports or using credit monitoring services; and
 4. notifying transferring and recipient parties about issues related to money transfers.
 - The allowed health-related purposes are limited to the following:
 1. appointment and exam confirmations and reminders;
 2. wellness checkups;
 3. hospital pre-registration instructions;
 4. pre-operative instructions;
 5. lab results;
 6. post-discharge follow-up intended to prevent readmission;
 7. prescription notifications; and
 8. home healthcare instructions.
- > Length – Calls must be concise, meaning generally one minute or less for voice calls and 160 characters or less for text messages.
- > Frequency – A financial institution or healthcare provider may only initiate one call per day and a maximum of three calls (voice calls and text messages combined) to a wireless telephone number per week.
- > No Charge – Calls may not be charged to the recipient or counted against any plan limits on number of voice minutes or number of text messages. (The problems with this “no charge” condition are discussed below.)
- > Opt-out – Within each call, the caller must offer an easy means to opt out of receiving future messages. The caller must honor opt-out requests immediately.
 - Voice calls that could be answered by a live person must include an automated, interactive voice and/or key pressed activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call.
 - Voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the recipient can call to opt out of future healthcare calls.
 - Text messages must inform recipients of the ability to opt out by replying “STOP.”

If all of the above conditions are met, financial institutions and health care providers may use robocalling to provide consumers with important information. However, while a financial institution or healthcare provider can meet the majority of conditions by managing their conduct, the “no charge” condition for calls to wireless phones is problematic because there seems to be no way for the caller to comply with the condition.

Under the no charge condition, robocalls may not be made to wireless phones if the recipients are charged for those calls or if the calls are counted against any plan limits on number of voice minutes or number of text messages. Many consumers use prepaid wireless services where minutes of airtime are purchased in advance and calls and texts sent and received are charged against those purchased minutes balances (*i.e.*, consumers are charged). In addition, although less common than it once was, some postpaid service plans contain minute limits and consumers are subject to “overage” charges when they exceed their plan minutes. In such circumstances, consumers will be charged for robocalls. The Robocall Order says that there are third-party solutions that can be used for subscribers of the four nationwide wireless carriers to ensure that called parties are not charged for text messages. The FCC had no basis for this conclusion other than a statement made in a prior case by a party that such solutions existed. We contacted the FCC in an attempt to learn about those “solutions.” No one with whom we spoke was aware of them. Unless such solutions exist and are available (which does not seem to be the case), callers who initiate robocalls to wireless phones will not be able to meet the no charge condition. As a result, the healthcare and financial services exemptions discussed in the Robocall Order are subject to a no charge condition that no caller can meet.

Financial institutions and healthcare providers that plan to rely on the exemptions set forth in the Robocall Order are strongly cautioned that there may not be any available service that would enable them to ascertain whether wireless

telephone numbers are associated with services that do not involve per call (whether the call is a voice call or text message) or per minute charges. As such, there is significant risk associated with robocalling wireless telephone numbers unless the caller has assurances that the called party will not be charged for the calls. One possible solution could be to have the consumer indicate when he or she provides a cell phone number that the consumer is not charged for individual calls or texts. Even that solution would be imperfect since a consumer could indicate correctly that he or she is not charged for calls and later switch to a prepaid service without changing his or her phone number. The TCPA allows for private lawsuits, including class actions, as well as for statutory damages in the amount of \$500 per violation, which can be tripled if a violation is found to be willful. Therefore, violation of the TCPA could expose companies using robocalling to a risk of significant financial liability.

Several entities have appealed the TCPA Order to federal courts and those cases have been consolidated in the U.S. Court of Appeals for the D.C. Circuit. We do not know whether the no charge condition will be addressed in those appeals.

If you have questions about this latest FCC ruling or any other questions regarding robocalls or the requirements of the Telephone Consumer Protection Act, please contact us at your convenience.

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