



October 2015

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 (defined in the Robocall Order to include both voice calls and text messages) to telephone numbers (residential or wireless) unless the caller has received prior express consent of the called party. Telemarketing calls require prior express written consent; non-telemarketing calls require prior express consent. Among the items the Robocall Order addresses are petitions from organizations representing financial institutions and healthcare providers seeking clarifications about the prior express consent requirement and exemptions from the prior express consent requirement for certain types of calls to wireless telephone numbers.

First, the FCC clarifies that the provision of a wireless telephone number to a healthcare provider constitutes prior express consent for healthcare calls made by a "covered entity" and its "business associates" as those terms are defined by the Health Insurance Portability and Accountability Act (HIPAA), if the calls are within the scope of the consent given. The FCC explains that the call must be closely related the purpose for which the telephone number was previously provided. For example, a patient who provides a telephone number at the time of admission to a hospital for surgery consents to being called to provide information related to the surgery or follow-up procedures for the surgery.

Second, the FCC grants, in part, petitions by financial institutions and healthcare providers for exemptions from the prior express consent requirement by establishing a new exemption from the prior express 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 or text messages 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 (and entities acting on behalf of healthcare providers) may only initiate calls or texts 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 (*i.e.*, the subscriber or the non-subscriber customary user of a number has consented to receive calls made to the telephone number provided).
 - 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 and text limits and consumers are subject to “overage” charges when they exceed their plan minutes or permissible number of text messages. 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 did not identify those solutions and 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 any. 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. Therefore, the healthcare and financial services exemptions discussed in the Robocall Order are subject to a no charge condition that no caller can meet. As a result, all financial-related and health-related non-telemarketing calls to wireless telephone numbers require prior express consent. As noted above, the provision of a telephone number may constitute prior express consent to receive non-telemarketing calls that are closely related to the purpose for the number was provided.

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. In addition, the FCC has authority to initiate enforcement actions against callers who violate the TCPA and to impose monetary penalties with a base forfeiture amount of \$16,000 per violation (the FCC has authority to make downward or upward adjustments to the base forfeiture amount depending on the circumstances of the violation). In the case of robocalling, the forfeiture amount is often applied per call with each unlawful call being deemed a separate violation. 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. In addition, Anthem, Inc., a health benefits company, filed a Petition for Declaratory ruling with the FCC asking the FCC to exempt certain types of healthcare calls placed by health plans and providers to wireless telephone numbers from the TCPA’s prior express consent requirement. In a Public Notice seeking comments on Anthem’s Petition, the FCC noted that Anthem’s request differed from the Robocall Order’s prior consent exemption for non-telemarketing calls made for healthcare treatment purposes and that are not charged to the called party in that Anthem requests relief for additional types of calls and does not state that the calls would not be charged to the called party. The FCC has not issued a decision on Anthem’s Petition.

This *GT Alert* was prepared by **Mitchell F. Brecher** and **Debra McGuire Mercer**. Questions about this information can be directed to:

- > [Mitchell F. Brecher](mailto:brecherm@gtlaw.com) | +1 202.331.3152 | brecherm@gtlaw.com
- > [Debra McGuire Mercer](mailto:mercercdm@gtlaw.com) | +1 202.331.3194 | mercercdm@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

Albany +1 518.689.1400	Delaware +1 302.661.7000	New York +1 212.801.9200	Silicon Valley +1 650.328.8500
Amsterdam + 31 20 301 7300	Denver +1 303.572.6500	Northern Virginia +1 703.749.1300	Tallahassee +1 850.222.6891
Atlanta +1 678.553.2100	Fort Lauderdale +1 954.765.0500	Orange County +1 949.732.6500	Tampa +1 813.318.5700
Austin +1 512.320.7200	Houston +1 713.374.3500	Orlando +1 407.420.1000	Tel Aviv[^] +03.636.6000
Berlin⁻ +49 (0) 30 700 171 100	Las Vegas +1 702.792.3773	Philadelphia +1 215.988.7800	Tokyo[⌘] +81 (0)3 3216 7211
Berlin-GT Restructuring⁻ +49 (0) 30 700 171 100	London[*] +44 (0)203 349 8700	Phoenix +1 602.445.8000	Warsaw[~] +48 22 690 6100
Boca Raton +1 561.955.7600	Los Angeles +1 310.586.7700	Sacramento +1 916.442.1111	Washington, D.C. +1 202.331.3100
Boston +1 617.310.6000	Mexico City⁺ +52 55 5029.0000	San Francisco +1 415.655.1300	Westchester County +1 914.286.2900
Chicago +1 312.456.8400	Miami +1 305.579.0500	Seoul[∞] +1 82-2-369-1000	West Palm Beach +1 561.650.7900
Dallas +1 214.665.3600	New Jersey +1 973.360.7900	Shanghai +86 21 6391 6633	

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ⁻Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ⁻ Berlin - GT Restructuring is operated by Köhler-Ma Geiser Partnerschaft Rechtsanwälte, Insolvenzverwalter. ^{}Operates as Greenberg Traurig Maher LLP. ^{**}Greenberg Traurig is not responsible for any legal or other services rendered by attorneys employed by the strategic alliance firms. ⁺Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [∞]Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. [^]Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. [⌘]Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [~]Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2015 Greenberg Traurig, LLP. All rights reserved.*