

ALERT

TCPA Update: FCC Imposes New Call Limits and Opt-Out Requirements

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On December 30, 2020, the Federal Communications Commission (FCC or Commission) released a Report and Order updating a number of Telephone Consumer Protection Act (TCPA) exemptions. The Report and Order codifies exemptions for calls to wireless numbers, and adds call limits and opt-out requirements for exemptions for calls to residential lines. Importantly, this latest move does not create any new TCPA exemptions; it instead updates already-existing exemptions to comply with criteria set forth in the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act).

Entities that rely on TCPA exemptions—including entities placing calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA calls), political callers, and non-profit entities—should ensure that their outbound calls are in compliance with the TCPA in light of these updates.

Background

The FCC's latest TCPA action was required under the TRACED Act—landmark legislation enacted at the end of 2019 that deals with the problem of illegal robocalls. While the TRACED Act most prominently imposed new call authentication requirements, it also launched a host of additional proceedings at the FCC, including this one to “ensure that any exemption adopted pursuant to sections 227(b)(2)(B) or (C) includes requirements with respect to: (1) the classes of parties that may make such calls; (2) the classes of parties that may be called; and (3) the number of such calls that may be made to a particular called party.” ¶ 2.

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Telecom, Media & Technology
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The FCC issued a Notice of Proposed Rulemaking (NPRM) on October 1, 2020 proposing measures to implement this TRACED Act directive. The Commission explained in the NPRM that it was “seek[ing] to protect individual privacy interests without preventing calls consumers want.”

Important Updates to TCPA Exemptions

With this Report and Order, the FCC takes a number of steps that will impact multiple existing TCPA exemptions. *First*, the Report and Order **codifies existing exemptions for calls to wireless numbers** into the TCPA rules. This step is intended to “make those exemptions more clear and understandable for both callers and consumers.” ¶ 10. Beyond codifying the existing exemptions, however, the Commission determines that “the conditions [it] has already imposed on exemptions for calls made to wireless telephone numbers under section 227(b)(2)(C) satisfy [the TRACED Act],” and accordingly, the Report and Order makes no changes to exemptions for: “(1) package delivery-related calls to a wireless number; (2) financial institution calls to a wireless number; (3) healthcare-related calls to a wireless number; and (4) inmate calling service calls to a wireless number.” ¶ 10.

Second, the Report and Order **amends TCPA exemptions for calls made to residential telephone lines**. Specifically, it amends exemptions for: “(1) non-commercial calls to a residence; (2) commercial calls to a residence that do not include an advertisement or constitute telemarketing; (3) tax-exempt nonprofit organization calls to a residence; and (4) HIPAA-related calls to a residence.” ¶ 10.

- **Call Limits:** For all exempted calls to a residence, the Report and Order adopts new limitations on the number of calls that can be made pursuant to the exemptions. It limits the number of exempted calls to three artificial or prerecorded voice calls within any consecutive thirty-day period for non-commercial calls to a residence (¶ 15), commercial calls to a residence that do not include an advertisement or constitute telemarketing (¶ 28), and tax-exempt nonprofit organization calls to a residence (¶ 33). For HIPAA calls to a residence, the call limit is distinct, matching the condition imposed on exempted healthcare calls to wireless numbers. Accordingly, for HIPAA calls to residences, the new limit is one artificial or prerecorded voice call per day up to a maximum of three artificial or prerecorded voice calls per week. ¶ 38.
- **Opt-Out Requirement:** For all exempted calls to a residence, the Report and Order also amends the TCPA rules to require callers to allow recipients of calls that fall under the exemptions to opt out. ¶¶ 21, 29, 34, 40. Importantly, with respect to these new opt-out requirements, the Commission explains that it “does not apply to those artificial or prerecorded voice message calls that are made for an ‘emergency purpose’ or with the prior express consent of the called party because such calls are not made pursuant to an exemption adopted under section 227(b)(2)(B).” ¶ 22 & note 61.

Additionally, for commercial calls to a residence that do not constitute telemarketing, the Report and Order deems the classes of parties that may make exempted calls to be “those making calls for a commercial purpose where the call does not introduce an advertisement or constitute telemarketing. ¶ 26

To allow entities that rely on these exemptions time to comply with the amendments, the Report and Order establishes a six-month gap between the publication of the Report and Order in the Federal Register and OMB approval of the rules, and the effective date. ¶ 42.

Third, the Commission declines to change its existing TCPA exemption for cellular carriers because that exemption—established in 1992—is outside of the scope of the TRACED Act directive. ¶¶ 49-50.

We have a deep and experienced robocalling and robotexting bench. Our experts handle federal and state policy issues; compliance with federal and state requirements; complex TCPA issues, including political and charitable outreach; and TCPA enforcement actions and investigations. If you have questions about how this update impacts your TCPA compliance plan, do not hesitate to reach out to one of the authors listed on this alert.