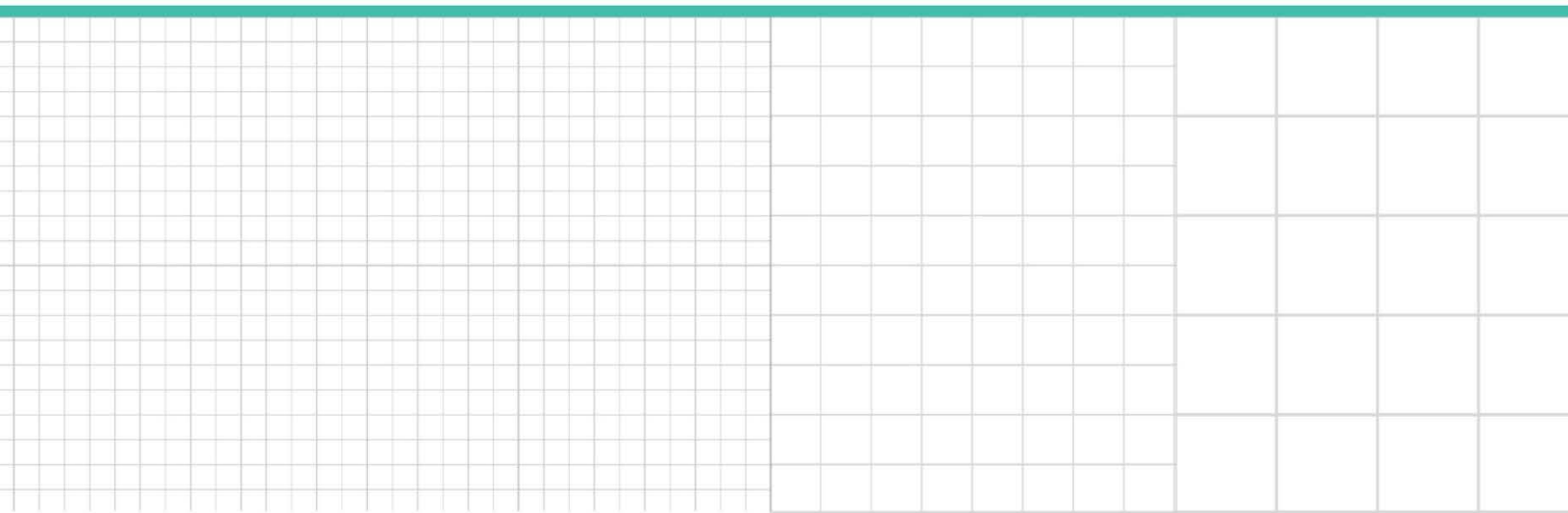


Professional Perspective

TCPA Relief for Covid-19 Communications Could Extend to Financial Institutions

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TCPA Relief for Covid-19 Communications Could Extend to Financial Institutions

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Financial institutions face unprecedented and rapidly evolving challenges in the wake of the Covid-19 pandemic, including the need to communicate quickly and efficiently with customers in the face of government-issued stay-at-home orders. But the Telephone Consumer Protection Act, with its steep statutory damages of between \$500 and \$1,500 per call, complicates matters. The TCPA generally prohibits calls or texts placed with an autodialer or prerecorded or artificial voice without the prior express consent of the called party.

Financial institutions have been hopeful that the government would provide relief and allow them to freely communicate with their customers during the pandemic without the threat of TCPA liability. The government has yet to do so, but there is good reason to remain hopeful.

Existing TCPA Exceptions Leave Questions

The TCPA provides a number of well-recognized exceptions to protect certain calls from liability even before the Covid-19 pandemic. In particular, under current law, communications made for “emergency purposes” can be exempt from the TCPA’s prior express consent requirement.

Before the Covid-19 pandemic, the Federal Communications Commission rules already defined “emergency purposes” to mean “calls made necessary in any situation affecting the health and safety of consumers.” This exception is intended to apply in instances that pose significant risks to public health and safety and where the use of automated or prerecorded calls could disseminate information regarding hazardous conditions.

Unfortunately, it is unclear whether calls placed by financial institutions relating to the pandemic would qualify under the emergency purposes exception. For example, calls notifying customers of service limitations, availability of remote options, deferral opportunities, or loan modification options may not be covered by this exception. The need to obtain consent for such calls may prevent some financial institutions from providing needed relief to their customers, if those institutions are forced to weigh the benefit of communicating that information against risking exposure to a TCPA class action.

Limited Expansion of Emergency Exception

On March 20, 2020, the Federal Communications Commission issued a declaratory [ruling](#) confirming that the Covid-19 pandemic qualifies as an “emergency,” and that certain calls placed concerning Covid-19 may fall under the “emergency purposes” exception. The ruling reaffirms the FCC’s prior Blackboard-Edison declaratory [ruling](#), where the FCC “made clear that automated calls to wireless numbers made necessary by incidents of imminent danger including ‘health risks’ affecting health and safety are made for an emergency purpose and do not require prior express consent to be lawful.”

In determining whether a call concerning Covid-19 qualifies under the emergency exception, the FCC emphasized that the identity of the caller and the content of the call are what matters:

- First, the caller must be from a hospital, or be a health care provider, state or local health official, or other government official as well as a person under the express direction of such an organization and acting on its behalf.
- Second, the content of the call must be solely informational, made necessary because of the Covid-19 outbreak, and directly related to the imminent health or safety risk arising out of the pandemic.

The FCC provides several illustrations of calls that qualify under this expanded definition:

- A call from a hospital providing time-sensitive health and safety information to slow the spread of Covid-19
- An informational call designed to update the public regarding measures to address the current pandemic on behalf of a health care provider

- A call made by a county official to inform citizens of shelter-in-place requirements, quarantines, school closures, or the like

Not all calls concerning Covid-19 will fall under this expanded definition. The FCC cautions that calls containing advertising or telemarketing of services, or calls made to collect debt, even if such debt arises from related health care treatment, are not considered a call made for an “emergency purpose.” Such calls require the prior express consent of the called party.

The FCC has yet to directly address whether calls placed by financial institutions fall under the emergency exception.

Financial Institutions Ask FCC for Relief

On March 30, 2020, the American Bankers Association, along with a number of banking and financial services associations, filed a [petition](#) asking the FCC to issue an expedited declaratory ruling, clarification, or waiver finding that phone calls and text messages placed by banks, credit unions, and other customer-facing financial services providers using an autodialer or prerecorded or artificial voice on matters related to the Covid-19 pandemic qualify as “call[s] made for emergency purposes.” The petition identifies the following types of calls that would fall under this category:

- Calls to offer deferrals, extensions or other modifications to mortgage or other loan payments
- Calls and text messages to advise consumers of branch closing, service limitations, reduced hours, or the availability of remote account options
- Calls and text messages to warn consumers of potential fraud on the consumer's account

On April 6, 2020, the FCC sought [public comment](#) on the petition, imposing a comment deadline of May 6, 2020, and a reply comment deadline of May 21, 2020.

By the close of the May 6 comment period, nearly 20 submissions were received and reported publicly by individuals in addition to consumer groups and financial trade associations, including those from the National Consumer Law Center (NCLC), American Bankers Association, Credit Union National Association, U.S. Chamber of Commerce, Capital One Services, LLC, Visa Inc., and the Consumer Financial Protection Bureau.

The opinions of consumer groups and financial trade associations varied, but the majority speak in favor of expanding the TCPA emergency exception.

For example, the U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, the U.S. Chamber Technology Engagement Center, and the U.S. Chamber Center for Capital Market Competitiveness, collectively, the Chambers, [advocate](#) for even broader relief than requested by the petition, and ask the FCC to expand the emergency exception to cover “all businesses seeking to communicate in good faith with their customers on matters related to the Covid-19 pandemic.” The Chambers argue a broad expansion is necessary to ensure financial institutions may properly advise consumers of any modification to services that protect their health and safety (e.g., prescription and grocery deliveries, specific hours of operation only available to the elderly and other at-risk populations, loan forgiveness programs, enhanced telecommunications and internet services as well as remote accessibility).

The CFPB similarly [advocates](#) for a “limited number of automated calls from financial institutions to their customers alerting them to offers of forbearance; payment deferrals; fee waivers; extension or relaxation of repayment terms; loan modifications; and other programs, relief and resources relating to loans secured by homes or vehicles.” The CFPB said that while it continues to actively work to provide consumers with timely, accurate information regarding relief options available in the consumer financial marketplace, it argues these automated calls are necessary to accurately and quickly inform consumers of available options. The type of relief available is changing rapidly, according to the CFPB. Further, there is a record number of consumers approaching financial service entities, particularly mortgage servicers and banks, who seek immediate relief during this period of financial hardship or who simply want to understand available options during these unprecedented times.

The NCLC [supports](#) the petition to the extent such Covid-19-related calls concern relief for loans secured by homes or vehicles. The NCLC reiterates, however, that should the FCC expand the emergency exception to include any form of communications related to Covid-19, that it should explicitly prohibit any debt collection or telemarketing communication as part of the calls (other than to answer questions from the call recipient about the amount and terms of the debt that is

the subject of the calls); apply appropriate limits on the number of calls and require that prerecorded or artificial voice calls be concise; and specify that these calls can only be made during the pendency of the federal emergency order.

That said, some individual commenters opposed the petition. Some [argue](#) that communications concerning “matters of finance” are not the type of “emergency” communications contemplated by Congress in enacting the TCPA.

Conclusion

While the FCC deliberates on further action, the ongoing threat of TCPA litigation may greatly reduce the likelihood that financial institutions will send such messages to their customers through automated means. This point is addressed by several trade associations and financial institutions, including, among others, the [American Financial Services Association](#), the [American Bankers Association](#), and [Visa](#), that submitted comments. They ask the FCC to issue an interim declaratory permitting an expansion of the emergency exception without delay, or otherwise grant the petition on an expedited basis. The FCC has not responded to these requests.