

## DC Circuit Affirms Exemption for Certain Commercial Non-Telemarketing Calls

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently [denied a petition to review](#) a 2020 Federal Communications Commission (FCC) [order](#) that permitted callers to place commercial non-telemarketing robocalls to residential phone numbers and that established uniform call limits for such calls. The D.C. Circuit's decision ensures that consumers will continue to receive calls for important services, such as prescription refill reminders, power outage updates, and data security breach notifications.

### Background

In 1991, the U.S. Congress passed the [Telephone Consumer Protection Act \(TCPA\)](#), which prohibits the placement of robocalls to residential phone numbers "without the express consent of the called party." The FCC later exempted from the TCPA's requirements certain commercial non-telemarketing calls, which are commercial calls that do not contain advertising or solicit the purchase of goods or services, such as debt collection calls, informational calls from broadcasters, and HIPAA-related calls to residential numbers.

In 2019, Congress passed the [Telephone Robocall Abuse Criminal Enforcement and Deterrence \(TRACED\) Act](#), which directed the FCC to issue rules setting clear parameters for TCPA exemptions, including (1) the parties that may make exempt calls, (2) the parties that may be called, and (3) the number of exempted calls that a party can make per month. A year later, the FCC issued an order (FCC Order) that amended the exemption for commercial non-telemarketing calls to incorporate the three TRACED Act parameters. In so doing, the FCC established a uniform monthly call limit of three commercial non-telemarketing robocalls per caller to any residential number and provided consumers the option to opt out of receiving unwanted commercial non-telemarketing robocalls.

### DC Circuit Decision

Shortly after the adoption of the FCC Order, a petitioner sued the FCC in the D.C. Circuit, alleging that (1) the FCC acted arbitrarily and capriciously in creating an overly broad TCPA exemption for all commercial non-telemarketing calls, and (2) debt collection calls and calls from broadcasters notifying the call recipient of a free broadcast should not be exempt from the TCPA as commercial non-telemarketing calls. The D.C. Circuit rejected these arguments.

According to the D.C. Circuit, the FCC's retention of the commercial non-telemarketing robocall exemption was not arbitrary and capricious because the FCC opted to preserve this exemption only after concluding that it reflects the public interest by "enabling businesses to communicate with their customers on important matters." The D.C. Circuit further asserted that the FCC's decision was particularly reasonable in light of the privacy-protective safeguards contained in the FCC Order, namely, (1) setting a limit on the number of commercial non-telemarketing robocalls that an entity can make and (2) enabling consumers to opt out of such calls. These safeguards enabled the FCC to strike a balance between consumers' desire for privacy and their interest in obtaining important information.

The D.C. Circuit also concluded that the petitioner was time barred from arguing that debt collection and broadcaster calls should not be exempt from the TCPA because these exemptions were codified in 1992 and 2003, respectively. Although individuals can petition for review 60 days after the FCC publishes an order if an agency reopens and reexamines a previously decided issue, the D.C. Circuit found that the FCC Order did not reopen the issue of exemptions for subcategories of commercial non-telemarketing robocalls and, instead, only considered amendments to all commercial non-telemarketing robocalls generally.

## **Industry Impact**

The D.C. Circuit's decision ensures that the FCC's exemption for commercial non-telemarketing robocalls remains undisturbed. In practice, this means that robocalls to residences that provide important information regarding healthcare, power outages, and data security breaches remain exempt from the TCPA so long as the calls do not contain an advertisement or constitute telemarketing.

The decision also affirmed the FCC's uniform approach to call limits for commercial non-telemarketing robocalls. By setting a three-calls-per-month limit for all types of commercial non-telemarketing robocalls, the FCC elected to apply the same numerical limit for debt collection calls to, for example, HIPAA-related calls or any other subcategory of commercial non-telemarketing robocall. The FCC's three-calls limit is also per caller (and not per subcategory of commercial non-telemarketing robocall), which means that an entity can only make three commercial non-telemarketing robocalls per month to a particular residence regardless of the purpose(s) for which it is placing the commercial non-telemarketing robocalls. And if even three such calls are too many, the FCC's requirement that callers honor recipients' opt-out requests means that consumers have more control than ever over the information they receive from commercial entities.

*The authors wish to acknowledge Summer Associate Courtney Otto's contributions to this Update.*

© 2022 Perkins Coie LLP

## **Authors**



### **Marc S. Martin**

Partner

[MMartin@perkinscoie.com](mailto:MMartin@perkinscoie.com) [202.654.6351](tel:202.654.6351)



## **Brandon R. Thompson**

Associate

[BThompson@perkinscoie.com](mailto:BThompson@perkinscoie.com) [202.661.5861](tel:202.661.5861)

### **Explore more in**

[Technology Transactions & Privacy Law](#) [Privacy & Security](#) [Communications](#) [Advertising, Marketing & Promotions](#)

### **Related insights**

Update

#### **Employers and Immigration Under Trump: What You Need To Know**

Update

#### **'Tis the Season... for Cybercriminals: A Holiday Reminder for Retailers**