



# Robocalls A Weapon For Good And Evil In Coronavirus Fight

By [Kelcee Griffis](#)

Law360 (March 24, 2020, 8:58 PM EDT) -- As people scramble for information about the global coronavirus pandemic, lawmakers and regulators are trying to make sure automated phone calls and texts are used to help, not hurt.

The [Federal Communications Commission](#) affirmed Friday that health care institutions as well as state and local governments may use robocalls to communicate about COVID-19 without running afoul of federal consumer protection and privacy laws. Meanwhile, the agency also warned that scammers are trying to use robocalls to sell "bogus cures."

"There are two strands" running through the FCC's regulatory strategy right now, said Bradley J. Andreozzi, a partner in [Faegre Drinker Biddle & Reath LLP's Chicago](#) office. "One is to promote genuine emergency-purposes communications ... and the other is to issue a warning shot across the bow to would-be scammers who are looking to exploit the pandemic."

In a public notice Friday, the FCC said it's aware of the "proliferation of scam phone calls and texts related to the coronavirus pandemic," that are "generally preying on virus-related fears."

According to audio clips provided by the agency, some robocallers are offering free at-home testing kits that would supposedly be delivered overnight, purportedly made possible by a fictitious coronavirus "Response Act." Others are advertising phony \$79 HVAC cleanings "to make sure that the air you breathe is free of bacteria," and diabetic monitors that come with

a "complimentary testing kit for coronavirus."

While the FCC does have rules in place to punish bad actors who abuse automated messages, it can only hold such callers accountable if they're identified. To that end, phone providers that participate in [USTelecom](#)'s so-called industry traceback group are trying to follow the illicit phone traffic back to its source.

USTelecom CEO Jonathan Spalter wrote in a Monday op-ed that the group is "tracing the origin of millions of suspicious robocalls using the Covid-19 public health emergency to prey on consumers, including a dangerous scam pushing an at-home coronavirus testing kit."

Unmasking the source of a single, harmful robocall can reveal the actor behind thousands of scam calls and lead to agency enforcement actions and fines, said [Wiley Rein LLP](#) partner Kevin Rupy, a former USTelecom policy executive.

"Those calls are going to and do harm consumers," he said. "The more that can be done to suppress those calls [and] identify the origin of those calls, the better."

Lawmakers, too, are attempting to crack down on these unsavory solicitations. Sens. John Thune, R-S.D., and Ed Markey, D-Mass., sent a letter Monday to the FCC and the U.S. Attorney General, appealing to the watchdogs' joint authority to fine and prosecute illegal robocallers.

The senators specifically invoked the [recently enacted](#) TRACED Act, which lets the FCC levy penalties of up to \$10,000 per call on anyone who intentionally flouts telemarketing restrictions and extends the window for the agency to take enforcement action to up to four years.

"We call on you to use this authority, and to take any other steps within your power, to meet the emerging threats that fraudulent robocalls pose during the current public health crisis," the senators said, requesting details from the FCC and the [U.S. Department of Justice](#) by the beginning of April.

As the number of coronavirus-related scams proliferate over phone lines, the FCC is also trying to strike a balance between making sure that legitimate institutions are able to use automated calls and texts to reach consumers with important information.

The commission's Friday declaratory ruling emphasized that a carveout for "emergency" situations under the Telephone Consumer Protection Act applies to "hospitals, health care providers, state and local health officials, and other government officials." That means these parties "may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law," according to the FCC.

Although the action appeared to embolden the health care and government sectors to communicate freely about the coronavirus, some members of the TCPA defense bar are questioning the wisdom of the order's wording, saying it may dissuade business and other entities not specifically mentioned from issuing valuable emergency communications.

"The FCC's order doesn't add anything new," [Hogan Lovells](#) partner Mark Brennan said. "Curiously, there was no need for the FCC to issue this decision — the TCPA already provides a clear exemption for emergency calls."

Indeed, some experts worry that the clarification potentially raises more questions than it answers. For example, it's unclear whether an office building would run afoul of the TCPA's emergency exception if it mass-notified employees that a coworker was infected, Faegre Drinker's Andreozzi said.

"By stating that the protected calls must be from hospitals or other health care providers, government officials, or their agents, did the Commission intend to suggest that calls from others would not be considered 'emergency purposes' calls?" Andreozzi said. "I don't think that conclusion would make sense."

Mark S. Eisen, a Chicago-based associate in [Benesch Friedlander Coplan & Aronoff's](#) litigation group, said he's concerned the guidance could discourage parties like airlines and grocery stores from blasting out texts to inform customers that they may have been exposed to someone who tested positive for COVID-19.

"The FCC was, I assume, looking to address a problem before it arose but didn't necessarily take into account the full scope of companies that may need to communicate about the coronavirus, even outside of the health care context," he said.

Companies looking to avoid lawsuits over extraneous robocalling might be forced to use

clunkier alternatives to communicate with customers, he added.

"It seems almost comical to think of [an] airline devoting personnel to manually calling every passenger because they're afraid of the TCPA," Eisen said. "To me, that's an emergency."

According to a person familiar with the matter, several stakeholders are likely to seek clarification from the FCC to make sure it didn't intentionally omit other companies or groups that could benefit from communicating via robocalls.

Still, regulators see a hard-line stance against illegal robocalls as a way to protect consumers as well as to unburden phone and internet networks under emergency conditions. Already, both the FCC and telecom carriers are [taking steps](#) to ensure networks can hold up under the strain of increased online traffic from Americans working, learning and being entertained exclusively at home.

New York State emphasized Monday that, thanks to a state law enacted in December, all unsolicited telemarketing calls are illegal during a state of emergency, which Gov. Andrew Cuomo declared March 7.

"The intent of the statute is to make sure that, in a time when people are subject to a state of emergency and need to rely on their phones ... that phone lines and telecom capacity is not overburdened," Andreozzi said. "In other states as well, there's going to be a concern that phone capacity not be overtaxed when it's needed most."

--Editing by Breda Lund.