

TCPA UPDATE

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General Rule: Residential Lines

- For calls made using an artificial voice or pre-recorded message, prior express written consent required except if call is any of the following:
 - For emergency purposes
 - Not for commercial purposes
 - For commercial purposes but does not involve advertising or telemarketing
 - Made by or on behalf of a tax exempt nonprofit organization, or
 - A “health care message” delivered by a HIPAA covered entity or its business associate
- No consent (written or otherwise) required if any one of above exceptions is met

General Rule: Mobile Phones

For calls made using an artificial voice, pre-recorded message or automatic telephone dialing system (autodialer):

- No consent required for
 - emergency calls or
 - calls that meet the “exigent” health care treatment purpose exception created by July 2015 FCC Declaratory Ruling and Order
- Prior express consent (which can be inferred for calls closely related to purpose for which mobile number provided) required for
 - calls by or on behalf of a tax-exempt nonprofit organization
 - “health care” messages delivered by a HIPAA covered entity or its business associate
- Prior express written consent required for all other advertising or telemarketing calls

2015 Exigent Health Care Treatment Exception

- Must be for one of the following purposes:
 - Appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions
- Must meet all of the following conditions:
 - Be free to end user (including not counting against plan limits)
 - Only to mobile number provided by patient
 - Provide caller's name and contact information (at the beginning if a voice call)
 - No telemarketing, advertising, billing, debt collection, or other financial content
 - Be concise (one minute or less for voice calls and 160 characters or less for texts)
 - No more than one message per day, maximum of three per week per specific provider
 - Provide an easy means to opt-out
 - Immediately honor opt-out requests

March 2020 FCC COVID-19 Declaratory Order

- Calls relating to COVID-19 pandemic qualify for TCPA “emergency” exception as long as:
 - the caller is from a hospital, a health care provider, state or local health official, other government official, or a person under the express direction of such an organization and acting on its behalf
 - the content of the call is solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.

Anthem 2015 Petition to FCC

- Requests that FCC allow opt-out, rather than opt-in, for calls/texts to mobile phones if:
 - Made by health care plans or providers
 - To existing patients/subscribers, and
 - Purpose is non non-marketing and aimed at improving health outcomes
- Requests that the following specific types of “urgent” call be subject to the opt-out:
 - Case management, preventive medicine, providing information about using and maintaining medical benefits
- Argues that these types of calls (1) have high consumer benefit, (2) are welcomed by most consumers, (3) are already regulated by HIPAA and so will not result in abuse. Also, by requiring an existing relationship and allowing opt-out, it strikes the right balance between legal exposure and stopping unwanted calls

June 2020 FCC Ruling on Anthem Petition

TCPA does not authorize a “broad exception for health care-related calls.”

Specifically:

- Pre-existing relationship does not satisfy prior express consent requirement
- No statutory basis for “urgent call” exemption, and FCC “skeptical” that these types of calls would be considered urgent by consumers
- Whether calls are welcomed is not a basis for exemption, but if they are welcomed, then consumers should be willing to provide prior express consent
- Regulation by HIPAA is not a basis for an exemption and doesn’t assure against abuse because HIPAA regulates the content, not the methodology, for making calls
- To the extent the Anthem calls fall within the parameters of the 2015 exemption for exigent health care calls or the March 2020 COVID-19 Declaratory Ruling , the calls would not need prior express consent

Other TCPA Developments

➤ *Barr v. Political Consultants* (July 6, 2020)

- Supreme Court struck down 2015 statutory exception for calls “made solely to collect a debt owed or guaranteed by the United States” as violation of First Amendment
- Did not invalidate rest of the TCPA

➤ FCC Declaratory Ruling on P2P Alliance Petition (June 25, 2020)

- Definition of an autodialer
 - The fact that equipment is used to make or send a “large volume” of calls or texts is not relevant
 - If equipment is not capable of originating a call or sending a text “without a person actively and affirmatively manually dialing each one,” it is not an autodialer

➤ *Facebook v. Duguid* (pending with Supreme Court)

- On July 9, 2020, Supreme Court granted Facebook’s appeal against 9th Circuit’s decision that its automated text alerts constitute an autodialer under TCPA



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