



Submitted electronically via <http://apps.fcc.gov/ecfs/>

October 26, 2020

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Proposed Rule on Exemptions Implemented Under the Telephone Consumer Protection Act of 1991 (CG Docket No. 02–278)

Dear Chairman Pai:

The Confidentiality Coalition appreciates the opportunity to submit comments on the Federal Communications Commission (FCC)'s proposed rule to implement section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) with respect to exemptions under the Telephone Consumer Protection Act (TCPA).

The Confidentiality Coalition is composed of a broad group of hospitals, medical teaching colleges, health plans, pharmaceutical companies, medical device manufacturers, vendors of electronic health records, biotech firms, employers, health product distributors, pharmacies and pharmacy benefit managers, health information technology and research organizations, patient groups, and others founded to advance effective patient confidentiality protections.

The COVID-19 health pandemic has highlighted the need for flexible regulations regarding telephone communications with patients. We appreciate the FCC's March 20, 2020 Declaratory Ruling confirming that the COVID-19 pandemic constitutes an "emergency" under the TCPA, thereby allowing certain calls relating to the pandemic to be exempt from the TCPA's requirements so that patients can receive important information to protect their health and safety. This exemption, however, is limited to emergency calls during and about the current pandemic, and the current requirements and conditions for health-related calls to wireless numbers put healthcare organizations at risk for significant penalties under the TCPA, making them less likely to make beneficial and important patient calls.

We oppose a numerical limit on the number of HIPAA-related calls to residential lines and strongly support the FCC specifying in regulation that the calling party should not be limited in the number of calls it makes under this exemption. Similarly, we respectfully request that the FCC reconsider the extremely limiting conditions currently imposed under the exemption for healthcare provider calls to wireless numbers. These restrictions limit the ability of patients to receive regular, up-to-date information about their care, such as regular check-ins for patients

suffering from mental illness, information regarding the status of medication refill requests, appointment reminders and test results. The purpose of the TCPA was not to limit these important communications, but to reduce the number of unwanted telemarketing calls consumers receive. Provided the calls are limited to informational calls related to a patient's healthcare, including access to and coverage of healthcare services, they should be permitted without undue limitations, such as numerical limits, message length and the many other limits in the healthcare provider exemption. For example, healthcare entities should be able to notify patients about the status of prior authorization requests and coverage determinations and appeals, since this information is critical and time-sensitive information that patients need to obtain needed medications and schedule healthcare services, such as imaging studies and surgical procedures. Placing a limit on the number of such informational healthcare communications or restricting healthcare provider calls to only the narrow set of callers and subjects as currently allowed harms patients without any countervailing benefit.

Each patient's situation is different, and imposing arbitrary limits, such as numerical limits on the number of calls, would limit the ability of healthcare providers and health plans to transmit important and needed healthcare-related information to patients, which could adversely affect their care. This is the case not only now during the COVID-19 health pandemic, but also after the public health emergency, to promote good public health practices, such as reminding patients of the need to obtain screenings, vaccinations and other critical preventive services which are essential to improving health outcomes. This type of outreach is especially important for disadvantaged communities, whose care and outcomes have already been more adversely affected by the pandemic due to the many hurdles they face in accessing healthcare services.

While we support allowing consumers to opt-out of receiving certain types of calls if they so choose, we are concerned that patients may opt-out of calls that are important for their ongoing care, and therefore, that such opt-outs could put their health at risk. We therefore recommend that the FCC not require healthcare organizations to provide an opt-out for calls directly related to their care or access to healthcare services. We support efforts to strengthen patient choice, but we encourage the FCC to work with stakeholders in determining best steps to balance choice and access in a way that will not have a detrimental impact on patient care and health outcomes.

The stringent requirements and restrictions within the TCPA have led to increasing litigation that has become a significant deterrent to providing important services. From 2010-2016, TCPA-related class action lawsuits increased by 1,273% and individual lawsuits increased by 948%.¹ While abusive practices should be punished, many TCPA lawsuits are not well-founded and are targeted at those with the deepest pockets rather than the bad actors. This has a chilling effect on legitimate callers such as healthcare organizations, and serves merely to limit the ability of these callers to provide important services to patients.

Finally, the lack of regulatory alignment between the TCPA and HIPAA regulations has created uncertainty for HIPAA entities, making them less likely to deliver important communications to patients. For example, the TCPA regulations exempt calls by HIPAA covered entities and business associates that "deliver a 'healthcare' message" from certain TCPA requirements.² However, the HIPAA regulations do not define or reference a "healthcare message." Instead, we

¹ *TCPA Class Action Statistics*, The Blacklist Institute, <https://www.blacklistalliance.com/works/tcpa-class-action-statistics/>.

² See 47 CFR 64.1200(a)(2) and 47 CFR 64.1200(a)(3)(v).

recommend that the exemption apply to calls by such entities that do not constitute “marketing” as that term is defined in HIPAA. This will allow HIPAA entities to know with certainty which calls fall within the exemption since the HIPAA regulations define the term “marketing” and there is extensive guidance under HIPAA concerning the types of communications that are considered “marketing” and those that are not. Similarly, we recommend that the healthcare provider exemption for certain calls to wireless numbers align with HIPAA. This can be done by clarifying in regulation that it applies to HIPAA covered entities and their business associates and for calls related to the care of the patient.

The current health-related exemptions under the TCPA are necessary to deliver important care, but as indicated above, we believe they are currently too limiting, particularly in the case of calls to wireless numbers. Any future rulemaking should not further restrict the current exemptions for healthcare calls but should instead expand the exemption for healthcare provider calls to wireless numbers, and reduce the many restrictive conditions that make it of limited practical value. Specifically, the exemption should allow healthcare providers and health plans to make any calls directly related to a patient’s health care and access to healthcare services, without limitations on the number of calls, length of message or, in this era of unlimited calling plans, fear of punitive penalties in the unlikely event that there is a nominal charge to the consumer for a call. These steps are especially critical now to ensure that patient care during and after the health pandemic is not further adversely affected at a time when patients are already reticent to seek the healthcare services they need.

We appreciate your work on this important issue. Please feel free to contact Tina Grande at tgrande@hlc.org or 202-449-3433 with any questions.

Sincerely,

A handwritten signature in black ink, reading "Tina O. Grande", enclosed in a thin black rectangular border.

Tina Olson Grande
Chair, Confidentiality Coalition and
Executive VP, Policy, Healthcare Leadership Council