

HEALTH CARE ENTITIES GET CLARITY FROM FCC ON TELEPHONE COMMUNICATIONS

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Health Care Alert

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INTRODUCTION

The health care industry is in the midst of rapid change as governments fight rising health care costs, providers look to comply with myriad new regulations, and technology continues to take a more prominent role in the delivery and management of health care services. At the same time, governments are moving away from the traditional "fee-for-service" model to one that reimburses providers based on patient outcomes and quality of care.

For health care providers, successfully navigating this business and policy environment will require greater engagement with patients to coordinate care and lower costs. However, given the potential for regulatory enforcement actions or litigation resulting from non-compliance with various rules governing the health care industry, providers must have a comprehensive understanding of the risks involved with certain activities prior to implementing changes to their business practices.

One area health care providers may not have considered to date is the Telephone Consumer Protection Act ("TCPA"). The Federal Communications Commission's ("FCC") recent Declaratory Ruling and Order on the TCPA (the "Order") clarifies the extent to which the law permits providers and other health care entities to communicate with consumers, particularly involving autodialed and prerecorded/artificial voice calls to wireless numbers. We previously provided an overview of that Order. This alert covers particular provisions of the Order affecting the health care industry.

BACKGROUND ON TCPA

The TCPA is a federal statute regulating telemarketing calls to residential and wireless phones and places particular restrictions on calls and texts to wireless numbers, including to a caller's employees, customers, and prospective customers. The TCPA restricts the type of consent the initiating party must obtain before placing a call or sending a text, prohibits sales and marketing calls or texts to numbers on the federal or caller-specific "do not call" lists, and imposes requirements relating to employee training and recordkeeping, among other things. The requirements differ based on whether the calls are manually dialed or use assistive equipment or software that could be deemed to be an "autodialer," the caller has a marketing- or sales-related reason for making the call or text message, the called number is a mobile phone or a landline, and the call uses a live agent or prerecorded or artificial voice. The requirements are technical and arguably outdated with respect to current technology and practices, but the risk of non-compliance has ensnared many companies in a variety of industry sectors in

expensive regulatory actions and class action lawsuits with potential exposure totaling millions of dollars. The TCPA provides statutory damages of \$500–\$1,500 per call or text, plus attorney fees.

The FCC recently clarified a number of matters about the TCPA in a Declaratory Ruling and Order, which took effect immediately.

GENERAL PROVISIONS OF NOTE FOR HEALTH CARE PROVIDERS

Expanded Definition of Autodialer.

First, the new Order embraces a broad definition of an automatic telephone dialing system ("autodialer" or "ATDS"). In general, calls or texts sent to mobile numbers or to hospital or health care facility patient rooms using an ATDS are prohibited under the TCPA, unless the caller has the "prior express consent" of the called party or in the case of an emergency. The TCPA defines an ATDS as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." The FCC Order clarifies that this definition also includes equipment and technology that does not have the "present capacity" or is not "currently used" to do all of those things, or that requires "human intervention" to do so—rather, equipment or technology can be an ATDS even if used to call pre-set lists of numbers, and even if it would require alteration, reconfiguration, software updates, or other changes in order to be used as an ATDS.

Revoking Consent.

Second, the Order clarifies that callers can revoke consent "through any reasonable means," and callers cannot limit the means that consent can be revoked. As examples, the Order notes that consumers may wish to revoke consent when answering a call, when calling a caller representative, and at in-person bill payment locations. (These broad means of revocation may not need to be honored to the extent that the call fits within the narrow exception for health care related calls, discussed below.)

Reassigned Telephone Numbers.

Third, the Order clarifies obligations for reassigned wireless numbers. In particular, the Order notes that the phone subscriber (i.e., the person assigned the telephone number dialed) or the phone's customary user (i.e., a person on a family or business calling plan) must provide consent for calls or texts to mobile numbers using an ATDS or prerecorded or artificial voice. When wireless numbers are reassigned (e.g., when someone cancels wireless service or changes their phone number), the Order places the burden on the caller to verify that the number is still associated with the person who provided consent and who had the authority to do so. It suggests that callers can do this through a number of technological, policy, and procedural means. Under the Order, callers are permitted only one erroneous call or text, provided that they have a good faith basis for assuming that the number has not been reassigned; subsequent calls can lead to liability.

HEALTH CARE-SPECIFIC CLARIFICATIONS AND A NEW EXEMPTION FROM THE "PRIOR EXPRESS CONSENT" REQUIREMENT

In response to requests from multiple health care industry parties, the Commission clarified when the use of an ATDS to call or text a mobile number can be assumed to have "prior express consent."

HIPAA and Prior Express Consent.

Providing a phone number to a health care provider constitutes "prior express consent" for health care calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf. This clarification only applies to HIPAA-covered entities and their business associations and only to the extent such parties are making calls or sending texts "within the scope of the consent given, and absent instructions to the contrary." This exception only applies for the purposes, and within the guidelines, noted below.

Incapacitated Patients.

If a health care provider is unable to obtain a patient's prior express consent for telephone communications because of medical incapacity, the provider may obtain such consent "from a third party—much as a third party may consent to medical treatment on an incapacitated party's behalf." During the period of incapacity, HIPAA-covered entities and their business associates may make health care-related calls subject to HIPAA; however, the third party's consent on behalf of the patient expires once the period of incapacity ends.

Communications Charged to the Called Party.

TCPA prohibits entities from making a call or sending a text using an autodialer or prerecorded voice if the called party is charged for the call—unless the caller has the called party's prior express consent or is responding to an emergency. According to the Order, this "no charge" requirement prevents the FCC from exempting notifications that count against the recipient's plan minutes or texts. As a practical matter, providers are unlikely to know whether calls or texts count against a patient's plan, making it that much more important to obtain prior express consent as a regular business practice in order to mitigate risk under the TCPA.

Exemption for Certain Health Care Calls.

The Order also grants a limited exemption from the TCPA for specific categories of health care-related calls and texts "for which there is exigency" and are made for a health care treatment purpose. The exemption covers calls and texts relating to:

- 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
- Home health care instructions

Other calls and texts to mobile numbers—even if related to benefits eligibility, insurance, or payments—are not included in the exemption and therefore require the caller to obtain "prior express consent" if they use an ATDS. The Order also places several conditions on the exemption:

- Calls and texts must be sent only to the wireless number provided by the patient.

- Calls and texts must state the name and contact information of the provider.
- Calls and texts must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules.
- Calls and texts must be concise (generally one minute or less in length for voice calls and 160 characters or less in length for texts).
- Providers may initiate only one message per day, up to a maximum of three calls or texts combined per week, to a particular number.
- Providers must offer recipients a particular type of "opt-out" option in the calls and text messages, including an interactive voice or key press-activated mechanism in calls that can be answered by a live person, inclusion of a toll-free number to call and opt-out when a voicemail is left, or instructions in text messages that inform recipients that they can reply with "STOP" in order to opt out.
- Providers must honor opt-out requests immediately.

WHAT DOES IT MEAN?

The health care industry continues to make a strong push to improve the health and well-being of patients through coordinated care and greater engagement, putting pressure on providers, health plans, and others to increase the frequency and types of communication they have with consumers. These efforts require a deep understanding of the overlapping and evolving bodies of laws and regulations governing the health care industry from various agencies.

In light of the Order, health care providers may consider taking several steps to help reduce their risk under TCPA:

- Examine existing policies and procedures for making calls and text messages and evaluate whether they are potentially using an "ATDS" under the Order's broadened description.
- Implement policies and procedures (including employee training) to verify that attempts to revoke consent for calls to mobile numbers or patient rooms using an ATDS are captured and honored.
- Review existing consent forms, agreements, and other policies to verify that the methods by which consent can be revoked are not limited in a way prohibited by the Order.
- Verify that attempts to obtain consent meet the appropriate standard for "prior express consent" or "prior express written consent" depending on the type of calls made or texts sent.
- Consider requiring patients to provide notification when their wireless numbers are reassigned.
- Verify that appropriate policies and procedures are in place to remove reassigned numbers from any ATDS or prerecorded or artificial voice call or text efforts.

- Review calling or texting vendor and service provider arrangements to make sure that the specific obligations are appropriately addressed in contract, which may require more detailed requirements than generic agreements to comply with "applicable law."

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