

## COVID-19: UPDATED EMERGENCY AND HEALTHCARE CALLS AND TEXTS

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*UPDATE: Since our original publication, the Federal Communication Commission issued interpretive guidance on applicability of the emergency purpose exclusion, discussed below.*

In the current environment, companies face a need to communicate with customers and patients about the impact that coronavirus ("COVID-19") will have on their ability to provide goods and services. Companies should be aware of how the Telephone Consumer Protection Act, 42 U.S.C. §. 447 *et seq.* (the "TCPA") may impact their calling and texting practices. This alert discusses certain exemptions to the TCPA that may allow companies to continue to contact clients and customers through automated and prerecorded phone calls and texts regarding the COVID-19 outbreak. Businesses can and should continue to contact clients as needed, with carefully tailored messages, to provide necessary updates regarding the COVID-19 pandemic.

### EMERGENCY PURPOSE MESSAGES

The TCPA expressly excludes from liability calls made for "emergency purposes," and regulations promulgated thereunder define the term to include "calls made necessary in any situation affecting the health and safety of consumers." [1] While case law and guidance from the Federal Communications Commission ("FCC") on what does or does not constitute an "emergency purpose" is sparse, the FCC has made it clear that "the legislative history of the TCPA indicates a congressional intent to interpret the term 'emergency' broadly rather than narrowly." [2] For example, the FCC has previously determined that "autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose," while other informational calls (such as reminders of parent-teacher conferences) would not fall under the emergency purpose TCPA exception. [3] The Ninth Circuit has held that unsolicited text messages from Facebook, Inc. alerting a consumer that his account was accessed from an unrecognized device fell outside of the emergency purpose exception where the consumer allegedly did not have a social media account and therefore could not have faced a security issue. [4]

On March 20, 2020, the FCC issued a new declaratory ruling adopting a narrow view of what COVID-19-related messages qualify for the emergency purposes exclusion. [5] In relevant part, the 2020 Ruling provides that

We find that the current pandemic constitutes such an imminent health risk to the public. In determining whether a call relating to the COVID-19 pandemic qualifies as a call made for an emergency purpose, we look to the identity of the caller and content of the call. First, the caller must be from a hospital, or be a health care provider, state or local health official, or other government official as well as a person under

the express direction of such an organization and acting on its behalf. Second, the content of the call must be 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. [6]

Most significantly, the FCC interpretation takes a very narrow view of which callers may avail themselves of the exclusion for COVID-19-related messages.

## HEALTHCARE MESSAGES

### Residential Landlines

Calls to residential landlines that deliver a healthcare message from an entity covered by the Healthcare Insurance Portability and Accountability Act ("HIPAA") are completely exempt and can be made without the consent of the called party. [7]

### Cell Phones

Calls to mobile phones using an auto dialer or an artificial or prerecorded message that deliver a healthcare message from a HIPAA-covered entity are still subject to TCPA liability but only require prior express consent, rather than prior express *written* consent. [8] Such consent may be shown by the call recipient having provided his or her mobile number at the time of treatment. [9] In order to qualify as a "healthcare message," it must "deliver a health care message" as that term is defined under HIPAA ("care, services, or supplies related to the health of an individual"). [10]

## THE FCC'S 2015 ORDER

In 2015, the FCC issued an omnibus Declaratory Ruling and Order, which, among other things, clarified the TCPA exclusions for certain time-sensitive healthcare-related calls from the TCPA's prior consent requirements. [11] Under the 2015 Order, calls for which an exigency exists and that have a healthcare treatment purpose are exempt from prior-consent requirements.

In order to fall within the exclusion, these calls must relate to one or more of the following:

- Appointments & exams
- Confirmations & reminders
- Wellness checkups
- Hospital pre-registration instructions
- Pre-operative instruction
- Lab results
- Post-discharge follow-up
- Prescription notifications
- Home healthcare instructions

The Order identified other conditions that must be met in order to qualify as a "Healthcare Message":

- Call must be sent only to the mobile number provided by the patient
- Call or text cannot be charged or counted against the limits of the mobile plan
- Name and contact information of healthcare provider must be stated at the beginning of the call or included in the text message
- Message must be concise (one minute or less for calls; 160 characters or less for text messages)
- Only one call or text message may be made per day and no more than three per week
- Message must offer recipients an easy way to opt-out of future messages and such requests must be honored immediately
- Call must comply with HIPAA privacy rules

Although certain other provisions in the 2015 Order have been vacated, the 2015 Order's mandates regarding emergency healthcare messages were upheld by the United States Circuit Court of Appeals for the D.C. Circuit in *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).

As with the emergency purposes exception, there is a lack of guidance on application of this exception. However, at least one court has ruled that flu shot reminders can fall under this exclusion when properly made. [12] This exclusion does *not* apply to certain types of messages, such as marketing-related messages and calls relating to accounting, billing, debt-collection, or other financial content.

Companies should keep in mind that unless the emergency or healthcare exceptions apply, they still need to ensure that their calls and texts comply with the TCPA and similar state statutes.

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## NOTES

[1] 47 C.F.R. § 64.1200(f)(4).

[2] *In the Matter of the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 2736 (1992).

[3] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, FCC 16-88 (adopted July 8, 2016; released Aug. 4, 2016).

[4] *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019).

[5] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, FCC 20-318 (adopted and released March 20, 2020) (the "2020 Ruling").

[6] *Id.* at ¶ 7.

[7] 47 C.F.R. § 64.1200(a)(3)(v).

[8] 47 C.F.R. § 64.1200(a)(2).

[9] See *In re Rules Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd. 559, 564 (adopted Dec. 28, 2007; released Jan. 4, 2008) ("the provision of a cell phone number to a creditor, e.g. as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt"); see also *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72, at ¶ 141 (July 10, 2015).

[10] 45 C.F.R. § 160.103.

[11] *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72, at ¶ 141 (July 10, 2015) (the "2015 Order").

[12] See, e.g., *Zani v. Rite Aid Headquarters Corp.*, 246 F. Supp. 3d 835 (S.D.N.Y. 2017), *aff'd sub nom. Zani v. Rite Aid Hdqtrs. Corp.*, 725 F. App'x 41 (2d Cir. 2018) (flu shot reminder calls concerned the availability of a prescription medication at pharmacies, were made within an established treatment relationship, and concerned the individual health care needs of the calls' respondents, and thus, they were health care messages, within the meaning of the TCPA).

## KEY CONTACTS



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