KING & SPALDING

HEALTH LAW AND HIPAA HELP

TEXT MESSAGING PATIENTS

This guidance is based on generally accepted legal principals and authorities as of May, 2021, but must not be considered comprehensive legal advice or a legal opinion. Unique facts and circumstances and applicable state law must be considered.

The Telephone Consumer Protection Act of 1991 ("TCPA") does not apply to healthcare provider and health plan calls and text messages, including appointment reminders, fitness tips, information on wellness campaigns, and invitations to participate in population health initiatives, to the extent identified persons are called or messaged without the use of a random or sequential number generator.

In general, the TCPA prohibits making any call using any **automatic telephone dialing system** or an artificial or prerecorded **voice** to any telephone number assigned to a cellular telephone service and/or text messaging* **unless**

- the call is for emergency purposes; or
- is made with the **prior express consent** of the individual called.

For many years, providers and health plans understood "automatic telephone dialing system," or "autodialer," to mean any equipment that was **capable** of storing and/or randomly dialing patients' and members' last known phone numbers. But on April 1, 2021, the U.S. Supreme Court ruled:

> "In sum, Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator."

***Facebook v. Dubuid*, 592 U.S. ____ (2021)**.**

In other words, the TCPA does not apply where healthcare providers, payors, and those involved in the promotion of wellness and population health management send text messages to identified persons using numbers that are not randomly generated and dialed.

Federal Communications Commission (FCC) decisions have created confusion for providers and health plans. Many plans and providers have mistakenly assumed the TCPA applied where technology permitted mass distribution of text messages, and some plans have interpreted the FCC to say that consent is required for calls and/or text messages subject to HIPAA. **However, the FCC has long acknowledged that health care-related calls subject to HIPAA do not require consent under the TCPA*** and HHS has been clear that health plans and healthcare providers may communicate through business associates with enrollees and patients by phone and/or electronic means for treatment, payment, or health care operations purposes.****

So to be clear, if a health plan wanted to advertise a wellness program using technology that sent text messages to randomly generated cell phone numbers, the TCPA would apply and consent would be required, among other things. But FCC rulings can no longer be interpreted to say that the TCPA applies to text messages sent to patients or subscribers or plan members using equipment that automatically dials numbers belonging to those identified individuals if those messages are for treatment, payment, or operations under HIPAA – including population health management and even marketing of a provider's own services and products, absent a state law prohibition.

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Endnotes

*47 U.S.C. § 227(b)(1); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1832 (2012), https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls ("2012 FCC Order").

**In this case, Facebook's technology automatically sent login-notification text messages when someone attempted to access an account associated with a mobile number from an unknown browser. Mr. Duguid never had a Facebook account and never gave Facebook his phone number, but apparently the person to whom his number was previously assigned did, so he received multiple unwanted text messages from Facebook about attempts to access another individual's account. He sued Facebook under the TCPA and lost in this important ruling. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjY6vTtvtbwAhWnJzQIHfCjBgkQFjACegQIBRAD&url=https%3A%2F%2Fwww.supremecourt.gov%2Fopinions%2F20pdf%2F19-511_p86b.pdf&usg=AOvVaw2mKcc7H16wkfmoSmUti9Cg

***In 2012, the FCC exempted from the "consent, identification, time-of-day, opt-out, and abandoned call requirements applicable to prerecorded calls all health care-related calls to residential lines subject to HIPAA." 2012 FCC Order. In 2015 the FCC stated:

> We clarify, therefore, that provision of a phone number to a healthcare provider [or health plan] constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 American Association of Healthcare Administrative Management Petition for Expedited Declaratory Ruling and Exemption, et al., (2015), https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order, at ¶ 141. The FCC has stated that provision of a phone number to a health plan satisfies the express consent requirement, and where covered entities and business associates make calls or send text messages that are covered by HIPAA. *Id.*, n. 19. *See also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992). Federal courts have also held hospital admission forms containing patient phone numbers were sufficient to provide consent where the form noted that the hospital may use any provided telephone number for billing and collection purposes. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1122-25 (11th Cir. 2014); *Vanover v. NCO Fin. Sys., Inc.*, 2015 WL 12696108, at *3 (M.D. Fla. Nov. 17, 2015); *Penn v. NRA Group LLC, et al,* 2014 WL 2986787 (D. Md. July 1, 2014); *Hudson v. Sharp Healthcare*, 2014 WL 2892290 (S.D. Cal. June 25, 2014).

****See* 45 C.F.R. § 164.502(a)(1)(i) & (ii). *See also* 45 C.F.R. § 164.501 (defining "treatment" and "health care operations" exceptions); https://www.hhs.gov/hipaa/for-professionals/faq/198/may-health-care-providers-leave-messages/index.html; https://www.hhs.gov/hipaa/for-professionals/faq/570/does-hipaa-permit-health-care-providers-to-use-email-to-discuss-health-issues-with-patients/index.html.*; see also* 45 C.F.R. § 164.530(c).

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