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FCC Grants Narrow Exemption to Robocall and Text Rules for COVID-19 Information

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In response to the COVID-19 pandemic, the FCC has issued a narrow order exempting healthcare providers and certain government entities from the prohibitions on autodialed and prerecorded telephone calls and automated text messages under the Telephone Consumer Protection Act for emergency communications providing information related to the COVID-19 outbreak. The order narrowly limits both the types of entities that can make calls and send texts and the purposes of those communications. It does not cover most sectors of the economy affected by the response to the pandemic, and therefore leaves open questions about the messaging activities most businesses can pursue without violating the TCPA. The TCPA generally requires the "prior express consent" of the recipient for most non-emergency autodialed calls to cell phones, including automated text messages. When initiated for an advertising or marketing purpose, autodialed calls to cell phones (including text messages) and prerecorded or artificial voice calls to cell phones or residential lines generally require the "prior express written consent" of the recipients documented in a form that includes several disclosures required by FCC rules. TCPA violations can result in enormous civil penalties as well as private lawsuits, including class actions, to recover up to $1,500 per illegal call or text message.

The order is based on a provision of the TCPA that allows autodialed and prerecorded voice calls to be made for "emergency purposes" without the prior consent of recipients and an FCC rule that interprets that provision to cover "calls made necessary in any situation affecting the health and safety of consumers." In light of the federal declaration that the COVID-19 outbreak is a national emergency, the FCC concluded the emergency exemption applies to certain types of calls and text messages related to the pandemic.

The order applies the exemption to calls that meet two requirements: (1) The caller must be a hospital, healthcare provider, state or local healthcare official or another government official, or someone acting under the express direction of one of those permitted categories of callers; and (2) the content of the call must be solely informative, "made necessary" by the outbreak and "directly related to the imminent health or safety risk" caused by the outbreak. The order exempts autodialed calls to mobile numbers, text messages and artificial and prerecorded voice calls.

The order does not grant a blanket exemption from the TCPA for healthcare providers and government officials. Calls that are not related to the pandemic, calls that include any advertising or other marketing and calls that are made to collect debts are not covered by the ruling. The FCC anticipates that calls covered by the exemption will include calls "designed to inform and update the public regarding measures to address the current pandemic" and calls made "to inform citizens of shelter-in-place requirements, quarantines, medically administered testing information or school closures necessitated by the national emergency." In addition, the FCC has not waived any of its other TCPA rules.

The order does not address any sectors other than healthcare or government, and even in the case of healthcare, covers only healthcare providers, not other businesses (such as insurance companies). As a result, the FCC has left unclear to what extent private schools, businesses and other organizations outside the healthcare sector can rely on the emergency exemption to communicate with their students, customers, tenants, contractors, employees and others about matters related to COVID-19.

What does this mean for entities that want to communicate COVID-19 information?

Healthcare providers (including hospitals) and government entities that want to use autodialed calls or texts to communicate about COVID-19 have assurance that informational calls and texts will be permitted under the FCC's rules. However, the calls or texts must be strictly informational and cannot be used for advertising, marketing or debt collection.

The FCC did not provide any guidance for other businesses or organizations. While the FCC does not have to take action before covered businesses and organizations can invoke the general exemption for emergency communications, there are risks to using autodialers for COVID-19 related calls or texts without specific FCC guidance. To minimize the risks, we recommend that businesses and organizations not covered by the order:

- Use robocalls and texts to communicate COVID-19 related information sparingly, only after consideration of whether email would be an effective means of disseminating the same information
- Limit their reliance on the "emergency exception" to communications that are clearly time-sensitive and directly related to the mitigation of a health and safety risk to the recipient, other individuals or the general public
- Refrain from including any marketing, advertising or commercial offer content in emergency communications
- Where possible, seek the prior consent of the recipients to receive the communications at issue (e.g., via an email or website opt-in form seeking consent to send text updates related to the COVID-19 crisis)
- Include easy-to-use opt out instructions in every robocall or text message, and promptly honor any opt-out requests received through any channel
- For prerecorded or artificial voice calls, include the legal name of the business responsible for initiating the call at the outset of the message and a telephone number for that business at the end of the message (as required by current FCC rules)

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