

FCC Announces TCPA Exception for Health-Related Calls and Text Messages During COVID-19 Pandemic

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On March 20, 2020, the Federal Communications Commission (“FCC”) published a [Declaratory Ruling](#) that confirms the COVID-19 pandemic is an “emergency” that qualifies for the Telephone Consumer Protection Act’s (“TCPA”)^[1] emergency purposes exception to its stringent consent requirements. As written, the emergency purposes exception purports to allow “calls” (which, for TCPA purposes, also includes text messages) made necessary in any situation affecting the health and safety of consumers.” 47 C.F.R. § 64.1200(f)(4); 47 U.S.C. § 227(b)(1)(A)-(B). The FCC’s March 2020 Declaratory Ruling specifies that for the current health crisis, the emergency exception applies only to calls and texts that are (1) made by a hospital or health care provider, and (2) solely informational, necessary because of the COVID-19 outbreak, and directly related to threat or safety arising out of the COVID-19 outbreak. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278, DA 20-318, Mar. 20, 2020, at ¶ 7 (the [March 2020 COVID-19 Ruling](#)). This narrow interpretation is not surprising given a prior FCC Declaratory Ruling and federal district court opinions on this topic. Companies should carefully review the March 2020 Declaratory Ruling and consider consulting with counsel before sending COVID-19-related alerts to consumers.

I. Prior TCPA Emergency Exception Rulings

In 2016, the FCC issued a Declaratory Ruling that narrowly construed the TCPA’s emergency purposes exception. The Ruling allowed schools to send certain messages, such as during “threat situations,” and allowed utility companies to reach out to consumers in some circumstances, including during severe weather conditions. [See In re Blackboard, Inc. Petition for Expedited Declaratory Ruling, CG Dkt. No. 02-278, FCC 16-88, July 8, 2016](#). In that Ruling, the FCC specifically noted that it was “tailoring relief to the narrow circumstances presented in the[] petitions.”

Federal courts have also interpreted the emergency purposes exception narrowly, though generally in the context of prescription drug notifications. In 2016, for example, an Eastern District of Missouri court held that pharmacy calls confirming or refilling prescription orders were specifically sent for an “emergency purpose,” because such reminders could prevent “a major health emergency.” *Roberts v. Medco Health Sols.*, 2016 U.S. Dist. LEXIS 97177, at *8 (E.D. Mo. July 26, 2016); see also *Lindenbaum v. CVS Health Corp.*, 2018 U.S. Dist. LEXIS 10052 (N.D. Ohio Jan. 22, 2018) (finding that the emergency purposes exception applied because the ability to receive timely prescription medication is sometimes critical in preventing a health emergency). Other courts have not applied the emergency

purposes exception to similar medication reminders where the plaintiffs at issue specifically told the pharmacies that the calls were being placed to the wrong person and/or that the medication at issue was not theirs. See *Coleman v. Rite Aid of Ga., Inc.*, 284 F.Supp.3d 1343, 1346 (N.D. Ga. 2018); *St. Clair v. CVS Pharmacy, Inc.*, 222 F.Supp.3d 779 (N.D. Cal. 2016). Since the pharmacies were put on notice that there was no actual emergency, the pharmacies were not able to take advantage of the blanket emergency purposes exception. These rulings show how narrowly the emergency exception has been interpreted.

Prior to the March 2020 COVID-19 Ruling, these pharmacy-related court decisions and the FCC's Blackboard Declaratory Ruling were the only guiding lights for companies, leaving some to wonder what types of COVID-19-related texts and calls would be allowed as relating to "health and safety of consumers."

II. *The COVID-19 Declaratory Ruling*

The March 2020 COVID-19 Ruling, issued shortly after the President's March 13, 2020 declaration of a national emergency, makes clear that the floodgates are not open for unwanted "emergency" calls. Besides requiring that the COVID-19-related calls come only from health care providers or hospitals, the Ruling also noted that "[u]nscrupulous callers should not view the relief we provide here as a retreat from our aggressive work to combat illegal robocalls." The Ruling stated: "As the COVID-19 pandemic continues to impact the United States, phone scammers have seized the opportunity to prey upon consumers We will be vigilant in monitoring complaints about [COVID-19-related robo] calls and will not hesitate to enforce our rules where appropriate." March 2020 COVID-19 Ruling, at ¶ 10.

The Ruling also gives examples of inappropriate uses of the emergency purposes exception for COVID-19, such as "calls that contain advertising or telemarketing of services" like "advertising a commercial grocery delivery service, or selling or promoting health insurance, cleaning services, or home test kits." *Id.* at ¶ 9. Debt collection calls, which require prior express consent of the called party, are also specifically mentioned as an inappropriate use of the COVID-19 emergency exception. *Id.*

In its Ruling, the FCC emphasized the value to call recipients of "vital and time-sensitive health and safety information" that may be provided by such an entity during this pandemic. *Id.* at ¶ 8. As such, hospitals and health care providers should feel confident in sending COVID-19-related content to consumers concerning imminent health or safety risks. By contrast, messages that may be construed as "advertising or telemarketing" content do not qualify for the FCC's exception and companies sending such calls and text messages should continue to secure appropriate prior consent from the intended recipient as required under the TCPA.

Notably, many of the calls and messages now covered by the Ruling were already independently covered by the "health care" exemption, which always allows HIPAA-covered entities to send certain "health care" messages without running afoul of the TCPA. That exemption allows HIPAA-covered entities to make calls concerning health care products to patients that already have an established healthcare relationship, so long as the calls also concern the individual healthcare needs of the patient-recipient. 47 C.F.R. § 64.1200(a)(3)(v); 47 C.F.R. § 64.1200(a)(2); 45 CFR § 160.103.

III. *Continuing Developments*

On March 30, 2020, a group of consumer banking industry associations filed a joint petition requesting that the FCC issue declaratory clarification on finance-related COVID-19 calls and texts. In re the Petition for Expedited Declaratory Ruling, Clarification, or Waiver of the American Bankers Ass'n, et al., CG Dkt. No. 02-278, filed Mar. 30, 2020. In their Petition, the Associations ask the FCC to apply the emergency purposes exception to financial institutions that send essential communications on matters related to the COVID-19 pandemic, including deferrals, extensions, or other mortgage or loan payment modifications; information about bank closings, reduced hours, or remote account options; and calls to warn about fraud on individuals' accounts.

Given the unprecedented environment created by COVID-19, the FCC's typical multiple-month review period to address Expedited Relief is expected to be much shorter.

For further information or questions about the FCC-announced TCPA Exception for health-related calls and text messages, please contact one of the authors of this alert, or your usual Winston contact.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

▮ [The TCPA](#) restricts telemarketing calls, texts messages, and facsimiles. It also places restrictions on the use of automatic dialing systems and artificial or prerecorded voice messages.

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