

FCC Clarifies the Requirements for Sending Wireless Calls and Text Messages to Patients

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The Federal Communications Commission ("FCC") recently clarified questions surrounding wireless patient calls and text messages, and the requirements of the Telephone Consumer Protection Act (TCPA). The TCPA protects consumers from unwanted telephone calls and text messages, but contains an exemption for certain "healthcare" messages. Until recently, the scope of this exemption was unclear, and healthcare providers were uncertain about the type of messages that can be sent and when patient consent is required.

Congress originally enacted the TCPA in 1991 to address consumer privacy concerns. The TCPA generally prohibits automated telemarketing calls to residential phones without prior consent, or any "non-emergency" automated calls to cell phones without prior consent. Aimed primarily at telemarketers, the FCC's enforcement efforts have attempted to protect consumers without inhibiting legitimate business communications. Still, the FCC reports that TCPA complaints are among the largest category of consumer complaints that the FCC receives. The Federal Trade Commission ("FTC") also reports receiving TCPA complaints, sometimes exceeding 60,000 per month. Violations of TCPA requirements can result in statutory penalties of \$500 to \$1,500 per call, private lawsuits and class action litigation. Therefore, it is important for healthcare providers to have a clear understanding of TCPA requirements.

Over the summer, the FCC considered numerous concerns raised by business groups and associations, including the American Association of Healthcare Administrative Management ("AAHAM"), that petitioned the FCC for clearer guidance concerning TCPA requirements. The FCC addressed these concerns in a Declaratory Ruling and Order, which clarified the circumstances when healthcare messages are exempt, and the scope of this exemption.

The AAHAM asked the FCC to clearly exempt prior consent for wireless calls and text messages that provide vital, time-sensitive information to patients. The AAHAM proposed to include, for example: appointment reminders, hospital pre-registration instructions and prescription notifications, -- as well as billing reminders, insurance coverage and account information. The AAHAM noted that these same calls, if made to residential phones, are permitted under HIPAA and already are exempt from the TCPA's consent requirements.

In response to the AAHAM's request, the FCC clarified that the scope of the healthcare exemption extended to "treatment" calls, but not to "billing-related" calls. The FCC stated:

While this second group of calls regarding billing and accounts may convey information, we cannot find that they warrant the same treatment as calls for healthcare treatment purposes. Timely delivery of these types of messages is not critical to a called party's healthcare, and they therefore do not justify setting aside a consumer's privacy interests in favor of an exemption for them.

In essence, the FCC stated that the "exigency" and time-sensitive nature of "treatment" calls justified exempting them

from the prior consent requirement, which is consistent with its prior rulings, but that this same justification did not extend to "billing-related" calls. Additionally, the FCC adopted the following conditions as necessary for an exemption:

- 1) voice calls and text messages must be sent only to the wireless telephone number provided by the patient;
- 2) voice calls and text messages must state the name and contact information of the healthcare provider;
- 3) voice calls and text messages are strictly limited to the purposes permitted; 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;
- 4) voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
- 5) a healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week;
- 6) a healthcare provider must offer recipients within each message, an easy means to opt-out of future messages, as for example including a toll-free number that the patient can call to opt-out of future healthcare calls, or as part of the text message, informing the patient of the ability to opt-out by replying "STOP"; and,
- 7) a healthcare provider must honor the opt-out requests immediately.

The FCC added that HIPAA privacy rules will continue to control the content of healthcare "treatment" calls where applicable, and that the information conveyed should not be so personal that it would violate the privacy of the patient if another person inadvertently received the message.

Finally, the FCC clarified that although healthcare "treatment" calls are exempt from the prior consent requirement, they will be subject to the general requirement that they be "free" to the end-user and not charged against the patient's wireless plan. While this condition was acceptable to AAHAM for its larger members that can work with wireless carriers to employ cost-free solutions, this requirement may be impractical or cost-prohibitive for smaller healthcare providers.

Alternatively, for those wireless calls that do not meet the requirements for TCPA exemption, the calls still may be permissible if the patient consents to the call. On this issue, AAHAM asked the FCC to clarify whether a patient, by voluntarily giving his/her telephone number to a healthcare provider, expressly consents to receiving calls from the provider or its business associate. In response, the FCC confirmed that a patient, by voluntarily giving his/her telephone number to the provider, is expressly consenting to receipt of calls by the provider or its business associate, provided that the calls are reasonably related to the scope of the consent given, and absent instructions to the contrary. The FCC stated:

By "within the scope of consent given, and absent instructions to the contrary," we mean that the call must be closely related to the purpose for which the telephone number was originally provided.

The FCC explained that "consent" requires more than the inclusion of the patient's telephone number on the provider's contact list, which by itself fails to provide any evidence that the patient voluntarily gave the number for the purpose contacted.

The question remains whether a patient, who has provided his/her telephone number for treatment purposes, has also consented to billing reminders or other calls related to this same treatment. Courts previously have wrestled with this issue, and at least one federal court held that a patient who gave his telephone number to the hospital upon admission, did not provide "prior express consent" to receive debt collection calls and messages to his cell phone from a third-party collection agency. The FCC did not address this issue directly, stating only that the scope of consent must be determined by the facts of each situation.

Given the questions that still remain, hospitals and other providers are best advised to adopt documentation policies that clearly confirm a patient's consent to use his/her number for billing and collection purposes. Also, patients may revoke their consent by any reasonable means (orally or written), even if they previously provided their prior express consent to receiving such calls. Therefore, providers should have a process in place to document, and immediately implement, a patient's request to revoke consent and discontinue these calls.

Finally, the FCC acknowledged that the TCPA and its guidance affords greater consumer protection for wireless calls than for residential calls. As the FCC has previously explained, the TCPA contains "unique protections" for wireless consumers because automated calls are more intrusive in the wireless context, especially when the consumer pays for the incoming call, and where the calls are received on a phone that the consumer carries at all times.

Still, the TCPA continues to extend some level of protection to residential calls, and these calls continue to be subject to HIPAA privacy regulations, -- and given general access to a home or residential phone by more than one household member, caution in this area is warranted. For any patient messaging program, whether wireless or residential, a clear understanding of TCPA and HIPAA, as well as applicable state law, is necessary to avoid regulatory penalties, patient complaints and potential liability.

If you have questions concerning the FCC's TCPA Ruling, please call Chris Churchill, Partner and Chair of Barley Snyder's Health Law Subgroup, at 717-399-1571, or contact him at cchurchill@barley.com.

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