

Health Law Navigator

# Can I Text/Email/Call You?

Risks and Strategies for Navigating Communications  
Laws for Health Care

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# Agenda

- Laws Governing Types of Communications
- TCPA
- TSR
- CAN-SPAM
- Additional Considerations

# Introduction

Name of Law	Enforcement Agency	Types of Communication Covered
Telephone Consumer Protection Act (TCPA)	Federal Communications Commission (FCC)	Live Phone Call Recorded Message Artificial Voice Call Text Message (if phone-to-phone)
Telemarketing Sales Rule (TSR)	Federal Trade Commission (FTC)	Live Phone Call Recorded Message Artificial Voice Call Text Message
Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)	Federal Trade Commission (FTC)	Email Text Message (if internet-to-phone via SMS)

# TCPA – Overview

- Passed in 1991 to address telemarketing, “robocalls,” and vendors using up calling minutes and text messaging allocations
  - Included a private right of action
  - Included statutory penalties per violation
- Led to a very active plaintiff’s bar in class actions
- Led to settlements for millions of dollars, including in health care
  - *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015)
- Led to updates to better protect certain health care communications
  - A 2015 amendment added a Health Care Treatment Purpose Exception

# TCPA – Key Definitions

- **Prior Express Written Consent:** agreement in writing (can be electronic), that clearly authorizes the seller to deliver or cause to be delivered telemarketing or advertising content using artificial or pre-recorded voice or ATDS, and does not condition purchasing any property, goods, or services on the consent.
- **Prior Express Consent** is used but undefined in TCPA, generally accepted as similar to Prior Express Written Consent, but without the writing requirement.
- **Health Care Message:** communication made by or on behalf of a HIPAA covered entity or a HIPAA business associate for the purpose of relaying a message about care, services, or supplies related to an individual's health. Scrutinized under a three-part test:
  - The call concerns a product or service that is inarguably health-related.
  - The call was made to a patient with whom the health care provider has an established healthcare relationship.
  - The call concerns the individual health care needs of the patient recipient.
- **Artificial or Pre-recorded Voice:** computer generated voice, pre-recorded message, or AI generated voice. No live caller. Robocall.
- **ATDS** (automatic telephone dialing system/autodialer): equipment with the capacity to store, produce, and/or contact telephone numbers using a random sequential number generator.
- **Telemarketing:** phone call or text message encouraging the purchase of, rental of, or investment in property, goods, or services.

# TCPA – Consent Requirements (conditions and exceptions apply)

- **Prior Express Written Consent:**
  - Telemarketing calls to landlines if using artificial or pre-recorded voice.
  - Telemarketing calls or text messages to cell phones if using artificial or pre-recorded voice or an ATDS for random or sequential number generation.
- **Prior Express Consent:**
  - Health care message calls or text messages to cell phones if using artificial or pre-recorded voice or an ATDS for random or sequential number generation.
  - Telemarketing calls or text messages to cell phones that do not use artificial or pre-recorded voice or an ATDS for random or sequential number generation.
- **No Consent:**
  - Health care message calls to landlines
  - Health care treatment purpose calls or text messages
  - Health care message calls or text messages to cell phones if not using artificial or pre-recorded voice OR an ATDS for random or sequential number generation
    - *By Implication after Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021)

# TCPA – Health Care Treatment Purpose

- The following types of communications on behalf of providers:
  - Appointment and exam confirmations or reminders
  - Wellness checkups
  - Hospital pre-registration instructions
  - Pre-operative instructions
  - Lab results
  - Post-discharge follow-up instructions (intended to prevent readmission)
  - Prescription notifications
  - Home health care instructions

# TCPA – Health Care Treatment Purpose

- Must be HIPAA-compliant communication
- Cannot involve telemarketing, solicitation, or advertising content or any accounting, billing, debt-collection, or other financial content
- Must be “free to end user,” meaning not charged to the called person or counted against their plan limits on minutes or texts
- If to a wireless number, must be the number provided by the patient
- Must provide name and contact information for the health care provider
- Limited to one message (voice or call) per day, up to three per week to each patient
- Must offer an easy means to opt out and immediately honor opt-outs

# TCPA – Policy

- Address maintaining an internal Do-Not-Call List
- Address additions to, and removals from, the internal Do-Not-Call List
  - Express revocation of previous consent (opt-out)
  - Failure to opt-in to receiving communications
  - Re-authorization of communication
- Individuals may opt-out of receiving communications/be placed on the internal Do-Not-Call List at any time.
- Ensure that telephone numbers on the internal Do-Not-Call List are not contacted except for emergencies.
- Honor reasonable attempt by an individual to opt-out or revoke consent.
- Review numbers against ported number list.
- Include training requirements and documentation requirements for training personnel engaged in telemarketing.

# TCPA – Policy

- National Do-Not-Call Registry
  - Telephone numbers registered on the National Do-Not-Call Registry may not be contacted for any telemarketing purpose unless the person who is contacted at that telephone number has given the required consent.
  - Entities contacting individuals by call or text message can mitigate risk by regularly checking numbers against the National Do-Not-Call Registry.
- Identification and Timing
  - Communications should include the name of the entity contacting the individual.
  - Communications should include a toll-free phone number for the entity.
  - Avoid calling or texting outside 8:00 a.m.-9:00 p.m. locally (some states have variations, especially for telemarketing communications).

# TSR – Overview

- Enacted in 1995 to curb deceptive practices by telemarketers
- Included a private right of action\*
  - But, only for consumers who suffer \$50,000+ in actual damages
- Included statutory penalties
- Created the National Do-Not-Call Registry
- Where the TCPA focuses on process, the TSR focuses on content
- Has led to judgments of \$100 million+

# TSR – Key Definitions

- **Customer:** any person who is or may be required to pay for goods or services offered through telemarketing.
- **Material Information:** information that is likely to affect a person's choice of, or conduct regarding, goods, or services.
- **Seller:** any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.
- **Telemarketer:** any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.
- **Telemarketing:** a plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

# TSR – Key Requirements

- **Material Information Disclosure:** sellers and telemarketers must provide consumers all information about the good or service being sold that the consumer needs to make a purchasing decision in a clear and conspicuous manner prior to the actual sale/receiving payment from the customer.
  - Cost and Quantity
  - Material Limitations, Restrictions, or Conditions
  - No-Refund Policy
  - Sweepstakes and Prizes
  - Credit Card Loss Protection
  - Negative Option Features
- **Time Limits:** can only make a telemarketing call between 8:00 a.m. and 9:00 p.m. consumer local time (unless consumer has consented).

# TSR – Key Requirements

- **Prohibition on False or Misleading Statements:** applies to statements about the goods or services themselves as well as about the telemarketing transaction
- **Express Informed Consent:** in every telemarketing transaction, the seller or telemarketer must receive express, unequivocal consent from the consumer to proceed with the transaction
- **Pre-Recorded Message:** must have consumer's express written agreement to receive such a call and must provide an interactive opt-out mechanism

# TSR – Pre-Recorded Call Health Care Exemption

- 2008 amendment to the TSR exempted “health care-related calls” from the pre-recorded calls requirements of the TSR
  - Only health care-related calls made by or on behalf of a HIPAA covered entity or business associate are exempt.
- The exemption is limited to the following health care-related calls:
  - Calls to describe a health-related product or service that is provided by, or included in a plan of benefits of, the covered entity making the communication
  - Calls for treatment of the individual
  - Calls for case management or care coordination for the individual

# CAN-SPAM – Overview

- Enacted in 2004 to prevent deceptive emails and protect consumers
- Included statutory civil penalties
- Included criminal penalties
- Included only a semi-private right of action
- Only for “internet access services”
- Both companies and individuals can face civil and criminal liability.

# CAN-SPAM – Key Definitions

- **Commercial Message:** any email message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).
- **Sender:** a person who initiates a commercial message **and** whose product, service, or internet web site is advertised or promoted by the message.
- **Transactional or Relationship Message:** any email message that facilitates an already-agreed upon transaction or updates a customer about an ongoing transaction. Transactional or relationship messages are not commercial messages.

# CAN-SPAM – Key Requirements

- CAN-SPAM only applies to emails that have the primary purpose of a commercial message.
- **Accurate Information:** the “From,” “To,” “Reply-To,” and routing information cannot be false or misleading and the subject line must accurately reflect the content of the message.
- **Unsubscribe:** must include a clear and easily identifiable explanation of how the recipient can opt-out of future emails.
  - This applies to commercial messages to members and subscribers as well as to the general public.
  - Unsubscribe requests must be honored within 10 business days.
  - Should maintain an internal “do-not-email” list

# Summary

Type of Communication	Type of Communication Laws to Consider
Face-to-Face	NA
Mailed Letter	NA
Static Website Content – Behind Login	NA
Static Website or Social Media – Public Facing	NA
Interactive Website Content	NA
Live Phone Call	TCPA, TSR
Phone Call with Recorded Message/Artificial Voice Call/AI Call	TCPA, TSR
Text Message (Phone-to-Phone)	TCPA, TSR
Text Message (Internet-to-Phone via SMS)	TCPA, TSR, CAN-SPAM
Email	CAN-SPAM

# Additional Considerations – Content

Name of Law	Enforcement Agency	Types of Communication Covered
Medicare Marketing Rule (MMR)	Centers for Medicare and Medicaid Services (CMS)	All Types – By Medicare Plans, Including MA and Part D
The Health Insurance Portability and Accountability Act (HIPAA)	U.S. Department of Health and Human Services, Office of Civil Rights (OCR)	All Types – Using PHI
The Americans with Disabilities Act (ADA)	U.S. Equal Employment Opportunity Commission (EEOC)	All Types
State Laws	State Agencies	All Types

# Additional Considerations – Professional

- Records Retention
- Liability for Shorthand
- Unlicensed Practice by AI, Chatbots, Automated Responses

# Additional Considerations – Vendors

- Clear Permission
- Compliance with Law
- Content Oversight
- Communication Cadence Oversight
- Operationalizing “Do Not Call” and “Unsubscribe”
- Liability Limitations
- Indemnification

# Questions