

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



[Caren Enloe](#) leads Smith Debnam's consumer financial services litigation and compliance group. In her practice, she defends consumer financial service providers and members of the collection industry in state and federal court, as well as in regulatory matters involving a variety of consumer protection laws. Caren also advises fintech companies, law firms, and collection agencies regarding an array of consumer finance issues. An active writer and speaker, Caren currently serves as chair of the Debt Collection Practices and Bankruptcy subcommittee for the American Bar Association's Consumer Financial Services Committee. She is also a member of the Defense Bar for the National Creditors Bar Association, the North Carolina State Chair for ACA International's Member Attorney Program and a member of the Bank Counsel Committee of the North Carolina Bankers Association. Most recently, she was elected to the Governing Committee for the Conference on Consumer Finance Law. In 2018, Caren was named one of the "20 Most Powerful Women in Collections" by *Collection Advisor*, a national trade publication. Caren oversees a blog titled: [Consumer Financial Services Litigation and Compliance](#) dedicated to consumer

The FCC TCPA Ruling: What Healthcare Providers Need to Know

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The Federal Communications Commission (the "FCC") recently released its Declaratory Ruling and Order regarding the requirements of the Telephone Consumer Protection Act of 1991 (the "TCPA"). The FCC Order provides some good news for the healthcare industry, clarifying the TCPA's application regarding calls to patients by healthcare providers, and granting an exemption from the TCPA's prior express consent requirement for certain healthcare calls that are not charged to the end recipient.

Here's what you need to know:

PRIOR EXPRESS CONSENT:

- **The General Rule.** The Ruling clarifies that when a patient provides his telephone number to a healthcare provider, such provision constitutes prior express consent for healthcare calls subject to HIPAA. The express consent only extends to HIPAA covered entities and business associates acting on their behalf as defined in the HIPAA privacy rules and only to calls made within the scope of the consent given, and absent contrary instructions.
- **Incapacitated Third Parties.** The FCC Order additionally addressed the issue of whether a third party may provide a telephone number and prior express consent for incapacitated patients. In doing so, the FCC recognized that in certain situations, it may be impossible for a caller to provide prior express consent due to incapacity. The Order, therefore, allows for a third party to provide prior express consent to make healthcare calls subject to HIPAA where a party is unable to consent because of medical incapacity. In those situations, prior express consent to make healthcare calls subject to HIPAA may be obtained from a third party. As such, healthcare providers may make healthcare calls subject to HIPAA, to an incapacitated patient based on the prior express consent of a third party. At the time the patient is considered capable of granting consent on his behalf, the third party consent is no longer valid. At that point, the healthcare provider must obtain prior express

financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

consent from the patient himself.

FREE TO END USER CALLS:

The Order also provides a limited exemption from the TCPA's prior express consent requirement for certain non-telemarketing, healthcare calls that are not charged to the receiving party.

What Calls are Exempt?

- Calls have a healthcare treatment purpose
- Appointment and exam confirmations and reminders
- Wellness checkups
- Hospital pre-registration instructions
- Preoperative instructions
- Lab results
- Post-discharge follow-up intended to prevent readmission
- Prescription notifications
- Home healthcare instructions

What Calls are Not Exempt?

- Calls regarding accounting, debt collections, payment notifications, Social Security disability eligibility or other financial content.

Requirements for Exempted Calls:

- Voice calls and text messages must be free to the end user and not counted against any plan limits to the recipient;
- Voice calls and text messages may be sent only to the wireless telephone number provided by the patient;
- Voice calls and text messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures must be provided at the beginning of the call);
- Voice calls and text messages are strictly limited to the purpose permitted in the FCC's ruling;
- Voice calls and text messages must not include any telemarketing, solicitation, or advertising;
- All communications must comply with HIPAA privacy rules;
- Voice calls and text messages must be concise
 - *one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions)*

- *160 characters or less in length for text messages;*
 - A healthcare provider may initiate only one (1) message per day, up to a maximum of three (3) voice calls or text messages combined per week from a specific healthcare provider;
 - A healthcare provider must offer recipients within each message an easy means to opt out of future such messages;
 - *voice calls that could be answered by a live person must include an automated, interactive voice and key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call,*
 - *voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future healthcare calls*
 - *text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,*
 - *A healthcare provider must honor the opt-out requests immediately.*
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