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CLIENT ALERT

COVID-19 is having a widespread impact on our communities and businesses, including the ability to place telephone calls under the federal Telephone Consumer Protection Act (TCPA) and state law equivalents. Many states have declared states of emergency, and the President has declared a national emergency over the coronavirus outbreak. In this current environment, companies should be aware of how the TCPA and state laws may impact their calling practices. More specifically, standard telemarketing calling practices may be impacted by declared states of emergency while certain coronavirus-related “emergency” messages may be exempt from the TCPA’s purview. This article provides a summary of the TCPA and certain state law requirements, discusses possible exemptions, and offers suggestions on how to mitigate risk during this period of uncertainty.

This alert addresses:

What are the TCPA’s consent requirements?

The TCPA consent requirements regulate automated informational or transactional calls and text messages. They also regulate automated calls or texts that constitute “telemarketing” or include an “advertisement” as these terms are defined by the TCPA (collectively referred to herein as “marketing”). The type of automation varies by phone type. For residential landlines, the TCPA’s automated calling restrictions apply to artificial voices and prerecorded voice messages only. For mobile phones, the restrictions apply to artificial voices, prerecorded voice messages or calls made with an “automatic telephone dialing system” (also known as an autodialer).

The purpose of the call is also important. Autodialed or prerecorded informational or transactional calls and texts to mobile phones (e.g., debt collection calls, appointment reminders, survey calls and payment reminders) generally require prior express consent. By contrast, informational or transactional calls to residential landlines using artificial voices or prerecorded voice messages are generally exempt. Automated marketing calls to residential landlines and mobile phones require prior express written consent, a higher standard of consent. Dual-purpose calls—those with both an informational and marketing purpose—are generally considered to be marketing and thus require prior express written consent.

What is the emergency purposes exemption under the TCPA?

The TCPA contains few exemptions from its consent requirements for automated calls, but one notable exemption is the emergency purposes exemption. Calls that are made for emergency purposes to residential landlines and mobile phones do not require any form of consent under the TCPA. “Emergency purposes” is defined as “calls made necessary in any situation affecting the health and safety of consumers.”¹ Not all healthcare calls qualify for the emergency purposes exemption. In the ACA International decision issued by the D.C. Circuit in 2018, the court clarified that a billing communication, for example, would not be considered an emergency purpose, as the

timely delivery of medical bills is not critical. In contrast, many courts have held that prescription reminders fall within the TCPA's emergency purposes exemption, as health and safety could be threatened without access to prescribed medication. Given the novelty of the issue, courts have yet to consider whether automated telephone calls about the coronavirus will be subject to the emergency purposes exemption, though as discussed below, it seems likely that at least certain calls would qualify.

Are automated calls or texts about coronavirus subject to the emergency purposes exemption?

The answer may be yes, under most circumstances. If there was ever a time when the emergency purposes exemption should apply, the time appears to be now, when companies are implementing safeguards to help protect employees and consumers from the spread of the potentially life-threatening coronavirus. Thus, if your company is considering the initiation of automated calls or text messages with public health announcements and safety information about the coronavirus, these calls may fall within the emergency purposes exemption. If the exemption applies, consent under the TCPA's automated calling restrictions would not be required.

Federal Communications Commission (FCC) guidance on the exemption with respect to schools makes clear that "calls or messages [from schools] relating to weather closures, incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks (e.g., toxic spills), and unexcused absences" fall within the emergency purposes exemption.² Also, courts have found that the exemption is not limited to large-scale emergencies such as power outages, extreme weather, AMBER alerts or terrorist attacks in finding that prescription refill reminders may fall within this exemption.³ It seems evident that the coronavirus constitutes a large-scale emergency of national importance.

But a word of caution: The exemption **may not** apply in all circumstances. The emergency purposes exemption is not a license to make calls or send messages that are otherwise marketing in nature. For example, if your company is considering the initiation of a text message campaign about products that can help reduce the risk of contracting the coronavirus, such as special face masks or bacterial hand wipes, these messages may not be covered under the exemption. If the emergency purposes exemption does not apply, your company will need to secure proper consent under the TCPA. That is, if the message is informational in nature, then prior express consent will be required for automated calls to mobile phones. If the message is marketing in nature, then prior express written consent may be required for automated calls to residential landlines and mobiles.

If you are not sure what level of consent, if any, your telephonic communication about coronavirus may require, please consult your legal counsel.

I want to send text messages to employees or consumers about the coronavirus. How can I mitigate the risk of being sued in a TCPA class action?

Text messages are an excellent means of communicating with employees or consumers, as they are cost-effective, immediate and the method of communication most likely to be viewed by the recipient. Statistics say that 95% of text messages are opened within minutes of receipt. But text messages are also a popular subject of TCPA class action lawsuits and can result in settlements or catastrophic judgments in the millions of dollars.

In assessing your risk and determining whether you should send text messages about the coronavirus, consider the following: (1) the purpose of your message; (2) the source of subscriber telephone numbers; (3) whether subscriber phone numbers are current; (4) any contractual agreements with subscribers; (5) any disclosures provided to subscribers on how the company might use their telephone numbers, including any limitations; (5) whether the subscriber provided consent to receive messages and the scope of consent; and (6) whether the subscriber has already expressed a desire not to be called.

Risk mitigation is encouraged. For example, if you are not sure whether the emergency purposes exemption applies and/or whether you have the requisite consent for your telephonic outreach, consider an opt-in text message program. Throughout the past week, we have seen text message alert programs providing updates on the quickly spreading coronavirus and public health announcements. New York City, for example, invites users to text a short code in order to opt in to receive coronavirus updates.

What does a declared state of emergency mean for telemarketers?

As of today's date, at least 40 states and territories have declared states of emergency in response to the coronavirus outbreak. Many states have telemarketing laws that may be more restrictive than the federal TCPA and may include provisions specifically relating to telemarketing during states of emergency.

In New York, for example, Governor Andrew Cuomo declared a state of emergency on March 7, 2020, which triggered recently enacted legislation that prohibits **unsolicited** telemarketing during a state of emergency. The legislation impacts two provisions of the New York General Business Law, including the Telemarketing and Consumer Fraud and Abuse Prevention Act. See N.Y. Gen. Bus. Law § 399-z(5-a) ("It shall be unlawful for any telemarketer doing business in this state to knowingly make an **unsolicited** telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law."); N.Y. Gen. Bus. Law § 399-pp(7)(f) ("It shall be unlawful for any telemarketer to: . . . knowingly make an **unsolicited** telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law."). The state of emergency in New York currently extends to September 20, 2020.

The telemarketing ban is broad and is not limited to automated calls, unlike the federal TCPA. Importantly, the ban only applies to **unsolicited** telemarketing sales calls. Specifically, under Section 399-z, "unsolicited telemarketing sales calls" do not include calls made in response to an express request by the customer or in connection with an existing established business relationship. Section 399-pp does not define "unsolicited telemarketing sales call," but exempts (1) certain telephone calls for the purposes of debt collection in accordance with the Federal Fair Debt Collection Practices Act (15 U.S.C. § 1692 et. seq.); (2) telephone calls where a sale is not complete until a face-to-face sales presentation or a meeting between the telemarketer and customer occurs; (3) customer calls to a telemarketer (as long as they are not the result of a solicitation by the telemarketer); and (4) calls between a telemarketer and any for-profit business (except calls involving the retail sale of nondurable office or cleaning supplies). In addition, both provisions require knowing violations.

Importantly, business-to-business calls do not appear to be prohibited under either section. Section 399-pp specifically exempts calls to for-profit businesses, except those selling nondurable office or cleaning supplies. Section 399-z's telemarketing ban does not explicitly exempt B2B calls, but telemarketing sales calls, by definition, apply to only to "customers," which are defined as "natural persons." Businesses engaging in B2B calls might consider using discretion.

While the amendments described above do not detail specific financial penalties associated with violations of the state of emergency telemarketing ban, a violation of the New York telemarketing ban under the recently enacted Nuisance Call Act (amending N.Y. Gen. Bus. Law § 399-z) carries high penalties of up to \$11,000 per violation. Further, Section 399-pp deems every violation of this section a "deceptive act and practice" subject to enforcement by the state attorney general and by private right of action. Plaintiffs can recover damages of \$50 or actual damages, whichever is greater, and up to \$1,000 for willful violations. As is the case with the TCPA, the lack of a statutory cap on damages makes violations of these laws prime targets to be brought in the form of class actions by plaintiffs' lawyers. These penalties may be in addition to violations of the federal TCPA.

If you have questions, please contact me at 954-343-6959 or Robby.Birnbaum@gmlaw.com.

Thanks,

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