

CORONAVIRUS

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Beware of Telemarketing Call Limitations during the COVID-19 Public Health Crisis

Within a span of weeks, the coronavirus (“COVID-19”) pandemic has swept across the country, causing unprecedented disruption across all business sectors. In particular, telemarketers now face sizeable legal restrictions on the scope of permissive activities as a result of the current nationwide emergency. Those entities engaging in telemarketing must take immediate, proactive measures to ensure compliance with these new telemarketing rules that will likely remain in place at least for duration of the COVID-19 pandemic.

The TCPA “Emergency Purposes” Exception & Recent FCC Guidance

The Telephone Consumer Protection Act (“TCPA”) is a federal statute that regulates, among other things, automated text messaging, autodialed phone calls and faxes sent for telemarketing purposes. The TCPA generally requires “prior express consent” for such telemarketing activities. But the law also expressly excludes from this requirement calls/messages made “for emergency purposes”—defined as communications “made necessary in any situation affecting the health and safety of consumers.” The Federal Communications Commission (“FCC”) has traditionally interpreted this exception expansively, even going so far as to note that “the legislative history of the TCPA indicates a congressional intent to interpret the term ‘emergency’ broadly rather than narrowly.”

A recent Declaratory Ruling by the FCC, however, has raised some concerns regarding the scope of the emergency purposes exception. The ruling provides that the COVID-19 pandemic constitutes an “emergency” under the TCPA, and consequently, hospitals, health care providers, state/local health officials, and other government officials may lawfully communicate information about COVID-19, as well as mitigation measures, in the absence of prior express consent without violating the TCPA.

In addition, the FCC also articulated a two-part test for determining when a call relating to the COVID-19 pandemic falls under the “emergency purposes” exception: (1) the caller must be from a hospital, or be a health care provider, state/local health official, or other government official, or a person operating under the express direction of such an

organization and acting on its behalf; and (2) the content of the call must be solely informational, made necessary because of the COVID-19 outbreak, and be directly related to the imminent health or safety risk arising out of the COVID-19 outbreak. Conversely, calls involving advertising, the telemarketing of services or calls made to collect a debt fall outside the scope of the exception.

New York

At the state level, the emergency declaration issued by Governor Andrew Cuomo on March 7, 2020 (which extends to September 20) triggered two separate provisions of the New York General Business Law which prohibit telemarketing calls to New York residents during a state of emergency.

First, Section 399-z of the General Business Law makes it unlawful to engage in any unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency. But Section 399-z does not provide an across-the-board ban on telemarketing—and includes some significant limitations. *First*, the ban does not cover any forms of communication other than telephone calls. *Second*, the ban applies only to “unsolicited” calls. *Third*, the ban only applies to calls to “consumers.” *Finally*, the ban does not include either calls made at the request of the recipient or those made in connection with an “established business relationship,” which are both exempted from the law.

In addition, Section 399-pp likewise makes it unlawful to place unsolicited telemarketing sales calls during a declared state of emergency. Like its counterpart, Section 399-pp contains sizable exemptions for a range of categories of calls—including calls for the purpose of debt collection, calls to for-profit businesses, and calls in which a transaction is not consummated.

Non-compliance with the New York telemarketing ban can subject violators to a fine by the New York Secretary of State of up to \$11,000 per violation. Moreover, non-compliance also constitutes a deceptive act/practice subject to enforcement not only by the New York Attorney General, but also by private right of action. Finally, district attorneys, county attorneys, and corporation counsel also possess the ability to levy civil penalties of between \$1,000 and \$2,000 for each violation.

Louisiana

Like New York, Louisiana’s law provides a statutory prohibition that bars telephonic solicitors from engaging in any telephonic solicitation activities during a state of emergency—subject to certain exceptions, including: calls made at the request of the recipient; calls made to recipients with whom the caller has an existing business relationship; and calls relating to an outstanding debt or contract. Louisiana’s law extends to “any voice or data communication made by a telephonic solicitor” but is limited to calls made to “residential” telephonic subscribers.

Importantly, Louisiana’s telemarketing ban is only triggered if a state of emergency is declared *and* the Louisiana Public Service Commission (“LPSC”) is required to report to the Office of Homeland Security and Emergency Preparedness. At the time of this Alert, the second element of this test has not been satisfied and, as such, Louisiana’s telemarketing restrictions may not be in effect at the moment. Certainly, that could change or be an oversight by the legislature, and thus compliance would still be a prudent course of action.

Violations of the Louisiana law are punishable by a fine of up to \$1,500 per call to recipients under the age of 65, and a fine of up to \$3,000 per call to recipients age 65 or older. In addition, entities who violate the ban by placing a call to an individual listed on the Commission’s “Do Not Call” program is also subject to an additional administrative penalty of up to \$10,000.

Compliance Steps

To effectively minimize the risk of potential liability arising from engaging in telemarketing activities during the ongoing COVID-19 public health emergency, telemarketers should consider the following best practices:

- **TCPA Emergency Purposes Exception**

- **Stick Strictly to COVID-19 Informational Content:** Companies should be mindful that what satisfies the “emergency purposes exception” is context-specific and does not apply across the board to all health-related communications. Rather, to fall under the exception, the content must be narrowly crafted to provide only critical and *urgent* COVID-19 information necessary to protect the health and safety of the recipient(s).

– **Avoid Any Type of Marketing or Advertising Content:**

All communications must be devoid of any type of marketing or advertising content, even if that content ostensibly relates to products or services that may aid in mitigating the serious health risks posed by the COVID-19 outbreak.

- **Be Mindful of the Recent FCC Guidance:** While the recent FCC guidance offers an extremely narrow interpretation of the “emergency purposes exception,” prior FCC directives make clear that the exception is broader than indicated in the Declaratory Ruling. As such, the recent guidance should be viewed merely as assurance to hospitals and similar organization that they can freely disseminate necessary COVID-19 emergency health information without having to worry about potential TCPA violations, and that entities operating outside of the healthcare industry can also utilize the exception when the requisite criteria are satisfied, including with respect to business associates.

• **New York**

– **Avoid Phone Communications Not Expressly**

Exempted from the Ban: Telemarketers who operate in New York should avoid making any unsolicited calls to consumers unless they fall under one of the express exemptions provided by the law.

• **Louisiana**

- **Monitor for Change in Telemarketing Ban Status:** As the Louisiana telemarketing ban has yet to be officially or technically triggered, companies should think about making changes to their Louisiana-directed activities as time permits. With that said, companies should regularly monitor the LPSC [webpage](#) for any changes in the status of the state’s telephonic solicitation ban.

- **Avoid Communications Not Expressly Exempted from the Ban:** In the event Louisiana’s ban goes into effect, telemarketers should ensure they avoid placing any unsolicited calls to residents of the state unless they fall under one of the express exemptions provided by the law.

Conclusion

Because recently declared states of emergency are likely to remain in effect for the foreseeable future, telemarketers should review their policies and procedures to confirm they have the necessary practices and protocols in place to maintain compliance with the unique telemarketing restrictions for the duration of the COVID-19 pandemic.

As part of its [COVID-19 Task Force](#), Blank Rome’s experienced, nationwide [Privacy Class Action Defense](#) team can assist with providing key counseling and guidance with respect to any issues or concerns relating to telemarketing call restrictions that apply during the ongoing COVID-19 public health crisis. And if your telemarketing calls or texts result in actual or threatened litigation, the firm’s privacy class action litigators can step in and provide a robust defense to any type of consumer protection claim or action.

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