



HEALTH INFORMATION AND DATA SHARING

**Fact Sheet**

# Texting to Promote Public Health: What Health Departments Should Know About the Telephone Consumer Protection Act

## Background


Text messaging can provide health departments with an efficient means of sharing timely public health information such as guidance, announcements, and emergency alerts.<sup>1</sup> For example, a health department may use texting to send real-time information on vaccination sites, health insurance enrollment deadlines, availability of HIV testing, and water quality, among a range of other topics.<sup>2</sup> Health departments may also use texting to gather information for the purposes of surveillance, contact tracing, and symptom monitoring.<sup>3</sup> While texting can be an effective tool for protecting the public's health, it raises important privacy issues that health departments must consider when developing texting initiatives.<sup>4</sup> Indeed, texting in public health is subject to a number of privacy laws and regulations at the federal and state levels. This fact sheet examines one piece of that legal framework: the Telephone Consumer Protection Act (TCPA) and regulations implemented by the Federal Communications Commission (FCC) that govern certain kinds of texting.

## Telephone Consumer Protection Act – Prior Express Consent Requirement

The Telephone Consumer Protection Act, 47 U.S.C. § 227, was enacted by Congress in 1991 in an effort to restrict telemarketing and robocalls.<sup>5</sup> Although the TCPA's enactment preceded the widespread use of text messaging, the FCC, which implements the TCPA, has clarified that the TCPA restricts certain text messages as well as telephone calls.<sup>6</sup>

Under § 227(b)(1)(A) of the TCPA, it is unlawful “for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) [to a wireless number] using any automatic telephone dialing system or an artificial or prerecorded voice.”<sup>7</sup> With respect to texting, this provision means that, absent an emergency, covered persons must obtain a recipient's prior express consent before sending them a text message via an automatic telephone dialing system.<sup>8</sup>

There are three limitations on the applicability of the § 227(b)(1)(A) prior express consent requirement that may be relevant to health departments implementing public health texting. First, § 227(b)(1)(A) does not apply when



the sender of the text message is a federal or state governmental agency. Second, § 227(b)(1)(A) only applies to text messages sent using an automatic telephone dialing system. Third, § 227(b)(1)(A) does not require prior express consent when a text message is sent for an emergency purpose. Each of these limitations is further examined below.

### **Sender of the Text Message is a Federal or State Governmental Agency**


Section 227(b)(1)(A)'s reach extends to “any person within the United States” and “any person outside the United States if the recipient is within the United States.”<sup>9</sup> The FCC has clarified, however, that federal and state governmental agencies are not considered “persons” under the TCPA.<sup>10</sup> Therefore, federal and state governmental agencies sending texts in the conduct of official government business are not subject to § 227(b)(1)(A) and are not required to obtain prior express consent.<sup>11</sup> Governmental contractors and local governmental agencies, on the other hand, are considered “persons” under the TCPA and thus are subject to the prior express consent requirement.<sup>12</sup> Accordingly, local health departments implementing public health texting initiatives that use an automatic telephone dialing system must generally obtain recipients’ consent to be texted. The same is generally true for federal, state, and local governmental health departments that outsource public health texting to contractors.

In a December 2020 order, the FCC identified an exception to the general rule that § 227(b)(1)(A) covers local governmental agencies and governmental contractors.<sup>13</sup> According to this order, § 227(b)(1)(A) does not apply to texts sent by local governmental agencies or governmental contractors if a federal or state government is so involved in sending the text message as to be deemed to have initiated it.<sup>14</sup> The federal or state government’s level of involvement is assessed based on the totality of the circumstances, including who determines the content of the message, the recipients of the message, and the timing of when the message is sent.<sup>15</sup> Put otherwise, if a state governmental agency uses a governmental contractor to send text messages but still determines the content, recipients, and timing of the messages and is otherwise sufficiently involved, then the state governmental agency may be deemed to have initiated the texting, and § 227(b)(1)(A) may not apply.

The FCC applied this standard in the public health context in a January 2023 declaratory ruling addressing whether federal, state, and local health departments and their contractors would need to obtain prior express consent before sending text messages to assist with enrollment in governmental health insurance programs.<sup>16</sup> The declaratory ruling responded to a letter from the United States Department of Health and Human Services (HHS) explaining that, upon expiration of the COVID-19 public health emergency, many individuals whose insurance coverage had been safeguarded by the COVID-19 continuous enrollment requirement could be unenrolled from Medicaid and other governmental benefits.<sup>17</sup> Sending text messages informing individuals of the steps required to retain enrollment could help prevent millions of vulnerable individuals from losing coverage.<sup>18</sup>

In its declaratory ruling, the FCC reiterated that federal and state governmental agencies that “take the physical steps” to send text messages using an autodialer “are not ‘persons’ subject to the TCPA and their [] texts do not, therefore, require prior express consent.”<sup>19</sup> The FCC additionally confirmed that local governments and contractors would not be covered if a federal or state agency was “so involved” in the sending of a text as to be deemed to have initiated it.<sup>20</sup> However, the FCC concluded that it lacked sufficient factual information to determine whether this standard was met under the circumstances.<sup>21</sup>

As this example illustrates, texting can serve as a powerful tool for communicating health-related information to large audiences. But health departments must be cognizant of the kinds of entities initiating



the texting, particularly where local agencies and contractors are involved, if they wish to proceed without obtaining prior express consent.

### Use of Automatic Telephone Dialing System

The definition of “automatic telephone dialing system” provides another important limitation on the scope of § 227(b)(1)(A). The prior express consent requirement in § 227(b)(1)(A) only applies to texts sent using an “automatic telephone dialing system.”<sup>22</sup> As the systems used to send communications have continued to evolve beyond the technology available when the TCPA was enacted, the meaning of “automatic telephone dialing system,” or “autodialer,” has been the subject of much debate.


Under the TCPA, “automatic telephone dialing system” is defined as equipment which has the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator; and [] to dial such numbers.”<sup>23</sup> In a 2021 decision, *Facebook v. Duguid*, the United States Supreme Court clarified the definition, holding that the equipment must have the capacity either to store a telephone number using a random or sequential number generator or to produce a telephone number using a random or sequential number generator.<sup>24</sup> In that case, the technology used did not qualify because it sent automatic texts to numbers linked to specific Facebook accounts and thus did not use a random or sequential number generator to store or produce numbers.<sup>25</sup> This decision represents a departure from the definition of autodialer previously used by the FCC, as it generally excludes from the scope of § 227(b)(1)(A) automated texts sent to phone numbers that have not been randomly or sequentially generated.<sup>26</sup> The FCC has requested that Congress amend the TCPA to expand the definition of autodialer, but for now the narrow *Facebook* definition stands.<sup>27</sup>

In short, the prior express consent requirement in § 227(b)(1)(A) only applies if the texting technology used has the capacity to randomly or sequentially generate phone numbers—either to be stored or produced—as opposed to technology that texts phone numbers stored and produced in a different manner. A system that sends texts to a list of numbers pulled from patient referrals, for example, would likely not be using an “autodialer” because those numbers were not randomly or sequentially generated. Accordingly, health departments implementing texting initiatives should consider how numbers would be stored and produced. If the technology used randomly or sequentially generates numbers, and § 227(b)(1)(A) is otherwise applicable, the department would need to obtain prior express consent.

### Texts Sent for an Emergency Purpose

Under § 227(b)(1)(A), covered persons may send texts using an autodialer without prior express consent if the text is sent for an emergency purpose.<sup>28</sup> The FCC regulations implementing the TCPA define “emergency purposes” as texts or calls “made necessary in any situation affecting the health and safety of consumers.”<sup>29</sup> According to the FCC, the emergency purposes exception applies to “instances [that] pose significant risks to public health and safety” where the use of autodialed or prerecorded messages “could speed the dissemination of information regarding . . . potentially hazardous conditions to the public.”<sup>30</sup>

This exception may provide an avenue for disseminating guidance during a public health emergency. In March 2020, for example, the FCC issued a declaratory ruling finding that the COVID-19 pandemic, at that time, constituted “an imminent health risk to the public.”<sup>31</sup> To determine whether a communication related to the pandemic fell under the emergency purposes definition, the FCC looked to the identity of the party making the communication and the communication’s content.<sup>32</sup> Specifically, the FCC explained that, to fall under the exception, the communications must be from a hospital, health care provider, state or local



health official, or other government official, or a person expressly directed to act on such entity's behalf.<sup>33</sup> And the content of the communication “must be solely informational, made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak.”<sup>34</sup>

Applying these criteria, the FCC concluded that certain public health communications would “fall squarely” under the “emergency purposes” exception to the prior express consent requirement.<sup>35</sup> These include informational communications “designed to inform and update the public regarding measures to address the current pandemic made on behalf of, and at the express direction of, a health care provider.”<sup>36</sup> Similarly, a communication would fall under the exception if “made by a county official to inform citizens of shelter-in-place requirements, quarantines, medically administered testing information, or school closures necessitated by the national emergency.”<sup>37</sup>

The determination of whether a text falls under the “emergency purposes” exception is fact specific, so not all texts containing public health guidance would necessarily be made for an emergency purpose. Before sending texts without prior express consent, health departments should therefore consider whether the circumstances pose a significant risk to public health and whether autodialed texts could speed the dissemination of information on potentially hazardous conditions.

### Obtaining Prior Express Consent

In the event that a health department qualifies as a “person” under the TCPA and uses an autodialer to send text messages outside of an emergency, it must obtain a recipient’s prior express consent to be texted before texting them. Health departments in this position are thus faced with the question of what constitutes prior express consent.

The FCC does not require that covered persons use any specific method to obtain prior express consent for texts that do not involve an advertisement or telemarketing.<sup>38</sup> “The clearest way to obtain consent is for a [texter] to be explicit about the types of [texts] he or she wishes to have consent for.”<sup>39</sup> Under some circumstances, however, simply providing a phone number can qualify as sufficient consent as long as the text is “closely related to the purpose for which the [individual] gave the number.”<sup>40</sup> The scope of a given consent is a fact-specific inquiry.<sup>41</sup>

For example, in its declaratory ruling in response to the HHS letter, the FCC concluded that a individual “who provides their telephone number in an application form used to determine eligibility or seek benefits from Medicaid[ and other] health care coverage has given their prior express consent to be called or texted at that number . . . regarding eligibility for and ongoing enrollment in those programs.”<sup>42</sup> In another example, the FCC concluded that a parent or student who provides their number to a school consents to receive communications “closely related to the educational mission of the school or to official school activities absent instructions to the contrary.”<sup>43</sup> Health departments should thus ensure that any communications individuals consented to receive are sufficiently related to the purpose of the texts to be sent.

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In sum, health departments implementing public health texting initiatives must obtain a recipient’s prior express consent to be texted unless (1) a federal or state agency sends the text or is sufficiently involved to be deemed to have initiated it; (2) the technology used does not qualify as an autodialer; or (3) the text is sent for an emergency purpose. If any one or more of these three conditions are met, then the prior express consent requirement does not apply. In the event that a health department must



obtain prior express consent, the health department should ensure that the text it intends to send falls within the scope of the recipient's prior consent.

## Conclusion

Texting can serve as a powerful tool for disseminating public health information to a large audience. However, health departments implementing texting initiatives must be cognizant of the TCPA and FCC regulations governing texting, especially when sending text messages without prior express consent. Importantly, health departments may be subject to other consent requirements and additional rules not addressed in this fact sheet. For health departments that are covered by the Health Insurance Portability and Accountability Act ("HIPAA") and that send texts containing protected health information, the requirements of HIPAA's Security and Privacy Rules would apply.<sup>44</sup> Successful navigation of these privacy laws and regulations is essential for health departments relying on technology to promote the public's health.

**This document was developed by Emma Kaeser. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.**

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<sup>1</sup> Hilary Karasz & Lindsay Bosslet, Texting for Public Health: Emergency Communication, Health Promotion, and Beyond Toolkit, University of Washington Northwest Center for Public Health Practice, <https://www.nwcp.org/docs/sms-toolkit/index.htm>. (Last visited February 14, 2024).

<sup>2</sup> See, e.g., New York City Department of Health, Texting, <https://www.nyc.gov/site/doh/services/texting.page>. (Last visited February 14, 2024).

<sup>3</sup> Karasz & Bosslet, *supra* note 1.

<sup>4</sup> *Id.*; Hilary N. Karasz, et al., Text Messaging to Communicate with Public Health Audiences: How the HIPAA Security Rule Affects Practice, *Am. J. Public Health*, 103(4), 617-622 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673236/>.

<sup>5</sup> FCC Actions on Robocalls, Telemarketing, <https://www.fcc.gov/general/telemarketing-and-robocalls>. (Last visited February 14, 2024).

<sup>6</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

<sup>7</sup> 47 U.S.C. § 227(b)(1)(A). The TCPA and its implementing regulations establish additional restrictions for other kinds of communications, such as telemarketing calls and advertisements. See 47 U.S.C. § 227(b). Because public health texts from health departments generally do not serve a commercial purpose, those restrictions are not addressed here.

<sup>8</sup> This fact sheet does not address the TCPA's regulation of communications with "an artificial or prerecorded voice" because texts generally do not contain voice messages. See *Trim v. Reward Zone USA*, 76 F.4th 1157, 1158 (9th Cir. 2023).

<sup>9</sup> 47 U.S.C. § 227(b)(1).

<sup>10</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling, National Consumer Law Center Petition for Reconsideration and Request for Stay Pending Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling, Professional Services Council Petition for Reconsideration of Broadnet Teleservices LLC Petition for Declaratory Ruling, CG Docket No. 02-278, Order on Reconsideration, 35 FCC Rcd 15052 (2020).

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<sup>11</sup> *Id.* at 15055-56, paras. 9, 13.

<sup>12</sup> *Id.* at 15056, para. 13.

<sup>13</sup> *Id.* at 15059, paras. 19-20.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 15059, para. 19.

<sup>16</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, U.S. Department of Health and Human Services Petition for Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 38 FCC Rcd 404 (2023) (hereinafter "HHS 2023 Declaratory Ruling").

<sup>17</sup> *Id.* at 406, para. 5.

<sup>18</sup> *Id.* at 407-08, paras. 9, 11.

<sup>19</sup> *Id.* at 410-11, para. 18.

<sup>20</sup> *Id.* at 411, paras. 19-20.

<sup>21</sup> *Id.* at 411, para. 20.

<sup>22</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>23</sup> 47 U.S.C. § 227(a)(1).

<sup>24</sup> *Facebook v. Duguid*, 592 U.S. 395, 399 (2021).

<sup>25</sup> *Id.* at 404.

<sup>26</sup> Letter from Jessica Rosenworcel, Chairwoman, FCC, to Members of Congress (December 19, 2023) at 2. <https://docs.fcc.gov/public/attachments/DOC-399800A1.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>29</sup> 47 C.F.R. § 64.1200(f)(4).

<sup>30</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840, 2840-41, para. 4 (2020).

<sup>31</sup> *Id.* at 2841, para. 7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2842, para. 8.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054, 9061-62, para. 19 (2016) (hereinafter "Blackboard 2016 Declaratory Ruling").

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> HHS 2023 Declaratory Ruling at 409, para. 13.

<sup>43</sup> Blackboard 2016 Declaratory Ruling at 9064, para. 23.

<sup>44</sup> Karasz, et al., *supra* note 4.