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**Mobile Marketing for Healthcare Providers**

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The mobile marketing industry is rapidly expanding, allowing marketers to harness consumers' beloved and ubiquitous wireless devices to promote their products and services through direct text messages to potential consumers' mobile phones and other mobile devices. With the explosion of this relatively new area of marketing, healthcare providers are in an ideal position to capitalize on consumers' love of their mobile devices and their obsession with health by providing helpful, relevant, and timely information to these devices. The benefit to healthcare providers is simple: low-cost direct marketing to consumers who need and appreciate what those providers are selling. Effective mobile marketing campaigns can be tailored to address myriad health issues and topics while, at the same time, building brand awareness and customer loyalty. However, health companies seeking to avail themselves of the undeniable benefits of mobile marketing must ensure

that their campaigns are legally compliant.

The federal Telephone Consumer Protection Act (TCPA)<sup>1</sup> was passed in 1991, long before the advent of text messaging. While federal legislation directly regulating unsolicited text messages has yet to be enacted, numerous federal courts have recently held that unsolicited text message advertisements are actionable (much like automated voice calls from telemarketers) under the TCPA, and courts have narrowly construed putative defenses such as prior consent.<sup>2</sup> Notably, the TCPA imposes statutory damages of \$500 per unsolicited call or text (\$1,500 if a willful violation is shown), and its prohibitions apply to all advertisers, aggregators, application providers, carriers, content providers, and publishers.

Given the recent spate of decisions imposing the TCPA limitations on text messages, it is imperative that any company seeking to employ a mobile marketing campaign obtain the explicit consent of all mobile device users that they wish to target through either "single opt-in" or "double opt-in" policies.

Single opt-in policies merely require consumers to express their desire to receive messages once. Marketers use traditional media (such as billboards, signage, other print media, and websites) to direct users to text a pre-specified word to a short code assigned to the marketing campaign. The users decide if they want to participate by texting the pre-specified word to the short code. Once users send such text messages, they have opted in and can begin receiving marketing messages immediately.

Double opt-in policies require consumers to send a secondary confirmation of their initial request before they start receiving mobile marketing messages. After opting in to receive messages through a web form or text, users receive a text message to click on a link or respond by texting a code back indicating their acceptance of the offer. Double opt-in policies provide superior protection against allegations of spamming in violation of the TCPA because such policies secure a record of each user's informed and expressed acceptance of the promotion or offer terms.

Importantly, under any opt-in policy, the advertiser must fully apprise subscribers of their financial obligations, and subscribers must be able to stop participating and receiving messages at any time. Moreover, marketers should resist the urge to short-circuit the (at times, cumbersome) process of obtaining individual opt-ins by purchasing pre-assembled lists of consenting consumers. This practice may appear to be an attractive option for jump-starting a mobile marketing campaign, but it is extremely risky because even consumers who consented to be a part of such a list may not have consented *vis-à-vis* any particular mobile marketing campaign.

Mobile marketing holds untold potential for healthcare providers to generate new, or increase existing, revenue streams as well as to build brand awareness and loyalty. Unfortunately, it also carries substantial risk if it is not done properly. However, with the proper planning and effort in building a consent-based database, and with guidance from competent counsel, these risks can be considerably minimized.