

To the Point!

legal, operations, and strategy briefs for financial institutions

May 16, 2013



COPPA FAQs and Effective Date of the Revised COPPA Rule

We wrote about the revised Children's Online Privacy Protection Act ("*COPPA*") rule in our December 28, 2012 issue of *To the Point*. The Federal Trade Commission (*the "FTC"*) recently published COPPA FAQs to provide additional guidance on the revised COPPA rule to operators subject to the rule. The FTC also recently rejected the request by industry organizations to delay the July 1, 2013 effective date of the revised COPPA rule. In its refusal to delay the effective date, the FTC noted that the process to revise the COPPA rule has been ongoing for three years and that com-

panies were allowed six months following publication of the revised COPPA rule to prepare to comply with its terms.

With the effective date in a little over six weeks, all businesses including financial institutions should confirm whether their websites or online services are directed to children under age 13. The FAQs contain the factors used by the FTC to determine whether a website or online service is directed to children, including: (i) the subject matter of the website or service; (ii) its visual content; (iii) the use of animated characters or child-oriented activities and incentives; (iv) music or other audio content; (v) age of models; and (vi) whether advertising promoting or appearing on the website or online service is directed to children.

Banking websites are not generally child-oriented, but they may contain content directed to children which may be considered an online service subject to the COPPA rule. The revised rule and the FAQs provide an exception for a website or online service directed to children that does not target children as its primary audience. If a website or online service promotes itself both to children and their parents, its primary audience may not be children. According to the FAQs, in such circumstances an operator may age-screen its users without first complying with the notice and parental consent provisions; provided, the operator (1) does not collect personal information from any visitor prior to collecting age information, and (2) prevents the collection, use or disclosure of information from visitors who identify themselves as under age 13. The operator must provide notice and obtain parental consent only for those visitors self-identifying as under 13 from whom the operator collects personal information.

In addition to the discussion of websites or online services directed to children, the FAQs provide information on the expanded definition of personal information, including photos, videos, audio recordings and geolocation data, which should be reviewed by any entity that has determined its website or online service is directed to children.



Update on Cell Phone Numbers and the Express Consent Requirement under the TCPA

Under the Telephone Consumer Protection Act ("*TCPA*"), a caller must obtain the prior express consent of the called party before making an autodialed or prerecorded call to a cell phone number. If a caller violates this provision, the caller may be liable for statutory damages of \$500 per call or actual damages, whichever is greater; and three times this amount for willful violations.

The Federal Communications Commission (“*FCC*”) issued a ruling in 2008 that provided guidance on the “prior express consent” requirement when a creditor calls a debtor. The FCC concluded that “the provision of a cell phone number to a creditor e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt...” Recently, a federal district court in Florida narrowly applied this FCC interpretation and determined that a debt collector for a hospital did not have the prior express consent necessary to make collection calls to the debtor’s cell phone number using an autodialer or prerecorded calling device, awarding damages for the 15 calls made to the cell phone number.

The federal district court found no prior express consent for use of the cell phone number, which was provided by the plaintiff’s spouse as part of the hospital admission process. In this case, the court found that statements contained in the hospital’s privacy policy were not sufficient to satisfy the prior express consent requirement, even though the fact that the information provided would be used for payment purposes was referenced in the conditions of admission signed by the plaintiff’s spouse. In analyzing the TCPA requirements, the court found that (i) consent must be clear and unmistakably stated; (ii) consent for one party to use the information will not permit that party’s agent to use the information; and finally, (iii) implied consent or consent imputed from the circumstances is insufficient.

Since the vast majority of customers now use cell phones (in some cases exclusively), it is essential that financial institutions ensure that they obtain the prior express consent required by the TCPA to make an autodialed or prerecorded call to a cell phone number. We recommend that financial institutions not rely on the FCC interpretation that presumes express consent when the cell phone number is provided by the customer on an application for credit, because financial institutions may not always have a creditor relationship with a customer. Instead, we recommend that a financial institution obtain the customer’s affirmative consent for the financial institution, its affiliates and its agents to use the cell phone number as the contact number for the customer’s accounts, for calling or sending text messages and for autodialed or prerecorded calls related to account origination, maintenance and collection.

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