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To the Point!

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Update on Telephone Consumer Protection Act (the "TCPA") Rules and Recent Cases

Amendments to the Federal Communications Commission (the "FCC") Rules Requiring Consent to Receive Autodialed or Prerecorded Calls (the "Rules")

Effective October 16, 2013, all sellers and telemarketers will need to comply with the Rules on autodialed or prerecorded calls first published in June 2012. The Rules require sellers and telemarketers to obtain prior express ***written*** consent for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines. To satisfy this requirement, the written agreement: (1) must be signed by the person called, (2) clearly authorizes the seller to make autodialed or prerecorded telemarketing calls or messages, and (3) must contain the number to which the signatory authorizes such calls or messages. The Rules further require the written agreement to include a clear and conspicuous disclosure to the signatory that: (1) by signing the agreement, the signatory authorizes autodialed or prerecorded telemarketing calls, and (2) signing the agreement is not a condition of purchasing any property, goods or services. Such consent may be obtained pursuant to the E-SIGN Act. The FCC recommends that records of each consumer's consent be kept for at least four (4) years - the default statute of limitations to bring an action under the TCPA.

In addition, the Rules also: (1) eliminate the "established business relationship" exemption as it previously applied to prerecorded telemarketing calls to residential lines, (2) require telemarketers to implement an automated, interactive opt-out mechanism for autodialed or prerecorded telemarketing calls to wireless numbers and for prerecorded telemarketing calls to residential lines, which would allow a consumer to opt out of receiving additional calls immediately during a telemarketing robocall, and (3) require that the permissible 3% call abandonment rate be calculated for each calling campaign, so that telemarketers cannot shift more abandoned calls to certain campaigns, as is possible if calculation is made across multiple calling campaigns. Penalties under the TCPA include actual damages and statutory damages that range from $500 to $1,500 per call.

Cases

The recent holdings of *Roberts v. PayPal, Inc.* and *Gager* v. *Dell Financial Services, LLC* on the TCPA provide guidance on obtaining valid express prior consent.

At the end of May 2013, the U.S. District Court for the Northern District of California held in *PayPal* that providing a mobile phone number as part of online account information by a user is valid express consent to receive text messages. However, the court was hesitant to find that the user provided consent through a revised user agreement with terms on text messaging that the user was not aware of because the TCPA requires "prior express consent."

More recently, on August 23, 2013, the U.S. Court of Appeals for the Third Circuit held in *Dell* that the TCPA permits a consumer to revoke consent given for autodialed or prerecorded calls to the consumer's mobile phone number and does not limit the timing of the revocation.

The *PayPal* holding supports that banks may continue to rely on a consumer's mobile number obtained during online account opening as express prior consent. Because the *PayPal* court was hesitant in relying on a revised user agreement with new terms that the user was not aware of as the basis for express prior consent, it may be good practice to make users aware of changes to terms of the user agreement and provide customers the ability to opt out if the current customer agreement was amended after the mobile number was initially obtained.

The *Dell* holding suggests that a mechanism that allows users to revoke their consent in writing at any time should be implemented. Such a system may utilize technology and procedures similar to the opt-out requirements of other privacy laws.

Institutions that utilize or plan to utilize text messaging, autodialed or prerecorded calls should review their agreements and procedures in light of these holdings and their compliance with the amended Rules. The systems and procedures used to obtain and document prior express consent must comply with the Rules' new written disclosure requirements outlined above. Institutions should further ensure that they have or that their third-party service providers have implemented and tested systems and procedures that will comply with any changes as the effective date of the Rules approaches.

Update on Fair Lending and Indirect Auto Lending

As previously reported in *To the Point!* in March 2013, the Consumer Financial Protection Bureau (the *"CFPB"*) issued a bulletin stating that indirect auto lenders are "creditors" subject to the Equal Credit Opportunity Act (the *"ECOA"*) and that markup and compensation policies that permit auto dealers to increase consumer interest rates and compensate dealers with a share of the increased interest revenues pose a significant risk that they will result in pricing disparities on the basis of race, national origin, or another prohibited basis. The bulletin emphasized the need for a robust compliance program for indirect auto lending, including self-monitoring to identify possible fair lending violations. The bulletin also suggested that indirect auto lenders should consider imposing controls on dealer markup or eliminate dealer markup and instead compensate dealers using another mechanism, such as a flat fee per transaction, to ensure compliance with fair lending laws.

A letter from 35 members of Congress was subsequently sent to the CFPB questioning the CFPB's bulletin on a number of grounds. On August 2, 2013 the CFPB responded to each of the issues raised in the letter by affirming its bulletin and asserting its authority under the Dodd-Frank Act, its application of the disparate impact doctrine, its authority to issue the bulletin without complying with the notice-and-comment rulemaking process, and its methodology to identify fair lending violations in indirect auto lending.

On August 6, 2013, the CFPB, the Federal Reserve Board (the *"FRB"*) and the Department of Justice (the *"DOJ"*) held a joint webinar on fair lending issues for indirect auto lenders. During the webinar, the CFPB described its enforcement authority and its bulletin, including the broad definition of "creditor" under the ECOA. The FRB described how it will examine for fair lending risk in indirect auto lending where government monitoring information regarding the consumer is not obtained. The FRB will use the 2009 Interagency Fair Lending Examination Procedures, will geo-code loans to determine whether a borrower resides in a minority census tract, and will use census lists of common Hispanic surnames and male and female first names to determine ethnicity and gender that may indicate pricing disparities on a prohibited basis. In addition, the DOJ also discussed recent enforcement actions during the webinar.

On August 21, 2013, the CFPB issued its Supervisory Highlights identifying key findings from its supervisory activities since Fall 2012 to aid the industry in compliance with federal consumer financial laws. The Supervisory Highlights include the CFPB's issuance of new fair lending examination procedures, referred to as the Equal Credit Opportunity Act (ECOA) Baseline Review Module (the *"Module"*), and a discussion of its Fair Lending and Indirect Auto Lending bulletin. The Module includes an analysis of fair lending risks related to both direct and indirect auto lending, and recommends that indirect auto lenders take steps to limit fair lending risk associated with dealer markup.

These actions by the agencies evidence a strong commitment to applying the disparate impact doctrine to fair lending compliance. The CFPB and the FRB acknowledge that lack of government monitoring information for non-mortgage loans makes a fair lending review more difficult. The agencies have suggested how they will make their compliance determinations and have urged lenders to apply a similar analysis to their lending practices to ensure compliance with fair lending laws. We recommend that lenders consider their compliance review processes for indirect auto lending and non-mortgage lending generally and determine whether such processes merit additional analysis to ensure fair lending compliance.

Mortgage Rules Update

Commercial Lending and Mortgage Rule Appraisal Requirements

On July 19, 2013, the American Bankers Association and the Mortgage Bankers Association (collectively, the *"Associations"*) issued a letter asking the Consumer Financial Protection Bureau *("CFPB"*) to affirmatively exempt certain business credit from the requirement that a lender provide an appraisal to an applicant for a loan secured by a first lien on a dwelling. The rule, part of the Equal Credit Opportunity Act, also requires that a disclosure be provided to the applicant within three business days of the lender receiving an application. Although the appraisal rule does not expressly apply to business credit, the term "applicant" is not defined in a way that it applies only to consumer borrowers. Without further clarification, the Associations believe that lenders that provide financing to developers and home builders will be required to comply with these appraisal requirements because, unlike the Truth in Lending Act, the ECOA applies to business credit. We recommend that lenders monitor the CFPB's website for additional guidance on this topic. The rule is set to become effective January 18, 2014.

Fannie Mae and Freddie Mac Update on Mortgage Loans Eligible for Purchase

On August 20, 2013, Fannie Mae and Freddie Mac (collectively, the *"GSEs"*) issued bulletins announcing changes to product eligibility guidelines for applications taken on and after January 10, 2014, the effective date of the Ability To Repay rule. Fannie Mae and Freddie Mac are instituting a delivery flow cut-off for loans with a retired feature of June 30, 2014, and loans with a required purchase date on or before July 31, 2014. Both GSEs indicated that the enhancements to delivery data points in the Uniform Loan Delivery Dataset (*"ULDD"*) requirements will not be implemented in Phase 2 ULDD and affirmed their commitment to provide lenders with sufficient lead time to update their systems. Both GSEs also promised to provide new procedures for testing of compliance with the mortgage rules in September 2013.

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