

To the Point!



Telephone Consumer Protection Act Declaratory Ruling

In its July 10th Declaratory Ruling (the “*Order*”), the FCC affirmed its position that text messages are subject to the same consumer protections under the TCPA as voice calls and require consumer consent if made using an automatic telephone dialing system (“*ATDS*”). Text messages that begin as emails and are sent to an email address that includes the consumer’s mobile number are also covered by the TCPA. The Order supports a broad definition of an ATDS that the FCC has asserted as being consistent with Congressional intent, finding equipment that can be modified to dial randomly or sequentially as subject to the consumer consent requirement under the TCPA.

The Order also discussed a consumer’s ability to revoke consent, concluding that the TCPA’s overall purpose is consumer protection and consumers can thus revoke consent “in any manner that clearly expresses a desire not to receive further messages.” The FCC specifically noted that revocation can be made “using any reasonable method including orally or in writing” and that businesses cannot designate an exclusive means to revoke consent.

In response to a request by the American Bankers Association, the FCC granted financial institutions exemptions for calls about (1) potential fraud or identity theft, (2) data security breaches, (3) steps to take to prevent identity theft following a data breach, and (4) money transfers. However, the FCC placed restrictions on these exempt calls. First, such calls may not include telemarketing, advertising, or debt collection content and they must be free to the consumer. Second, all such calls must (a) be sent only to the phone number provided by the consumer to the financial institution; (b) state the name and contact information for the financial institution; (c) be concise (for calls, generally one minute or less and for texts, 160 characters or less); (d) be limited to three per event over a three-day period for an affected account; and (e) include easy means to opt out with opt-out requests to be honored immediately. In addition to calls related to these four exempt purposes, one-time text messages sent immediately in response to a consumer request and containing only the information requested by the consumer are also exempt.

Financial institutions should ensure that telephone, internet and branch channels are adequately trained to recognize a customer’s revocation of consent to receive ATDS calls when given, and that a mechanism is in place to forward the information to the appropriate department to ensure that no further ATDS calls are made. Policies should be adopted related to calls made pursuant to an exemption, identifying when a call is permitted and ensuring that the requirements related to content, length, number of calls, and opt-out procedures are met.



CFPB First Monthly Complaint Report

This month, the CFPB has issued its first Monthly Complaint Report (the “*Report*”). In announcing this new initiative, the CFPB emphasized the importance of consumer complaints that it uses to “identify and prioritize problems for potential action.” Each monthly report will be based on data derived from consumer complaints submitted to the CFPB and will include categories of complaints, volume of complaints by company, state and local information, and product trends. Each month the CFPB will highlight a particular product and geographic location.

The Report identified by name the “Top 10 Most-Complained-About Companies” using a three-month rolling average of complaints sent by the CFPB to companies for response. In addition, the Report spotlighted debt collection complaints and identified by name the top thirty “Most Complained About Companies for Debt Collection.” The companies with the highest and lowest rates of untimely responses to debt collection

complaints were also identified. Finally, the Report also highlighted Milwaukee, Wisconsin consumer complaints. Future reports will follow the same format.

The CFPB reminded financial institutions that it expects them to respond to complaints within 15 days and resolve most complaints within 60 days, and cautioned that complaints “feed into the Bureau’s supervision and enforcement prioritization process.” We encourage financial institutions to take the information contained in this Report and future complaint reports into consideration when developing customer service training materials and performance metrics and in monitoring customer service performance.



Treasury Department Inquires about Marketplace Lending

On July 16, 2015, the US Treasury Department (the “*Treasury*”) issued a request for information (“*RFI*”) on online marketplace lending. The Treasury seeks to understand the various business models and products offered in the industry, the potential for online marketplace lending to expand access to credit, and how the financial regulatory framework should evolve to support this industry. This RFI will be open for public comment until August 31, 2015. In addition, the Treasury will also conduct roundtable discussions this summer with the public and the industry.

The RFI includes 14 questions on various aspects of the online marketplace lending industry. Aside from the questions posed to gain a better understanding of the business models, underwriting models, and segmentation within the market, the questions reveal the Treasury’s concerns about the marketplace lending industry. The Treasury seeks to understand the additional risks related to identity verification, fraud and credit risk, and consumer interactions in servicing, debt collection and credit reporting, as well as privacy considerations and cyber security threats.

While exploratory in nature, the RFI is another indication that the regulators are taking a closer look at the online marketplace lending industry and whether consumer protection concerns are addressed appropriately under the existing regulatory framework or if new rules may be necessary. We expect the results of this RFI will be shared by the Treasury with other regulators such as the CFPB, the FTC, and state-level regulators that also have rulemaking or supervisory authority over participants in the online marketplace lending space. We encourage participants in the online marketplace lending industry to comment on the RFI and attend the upcoming roundtable discussions to present their views and help to shape and guide the direction of this fast-growing industry.

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