Reed Smith Thursday, April 29, 2010

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fig Financial Industry Group Alert

FCC Proposes to Shackle Robocalls

Contact between banks and their customers could potentially become more expensive and burdensome under recently proposed Federal Communications Commission ("FCC") rule changes. These rules apply to banks, despite the traditional rule that banks are subject only to bank regulators' jurisdiction. *See Office of the Comptroller of the Currency, OCC Bulletin* 2007-30 (reminding bank CEOs and compliance officers that banks must comply with the FCC's telemarketing rules).[1] The proposals seek to limit how prerecorded and automated phone messages (i.e., "robocalls") may be made to existing and prospective customers. *See Telephone Consumer Protection Proposed Rule Changes*, 75 Fed. Reg. 13,471 (March 22, 2010) (to be codified at 47 CFR pts. 64 and 68). Under the rule changes, robocalls will be subject to heightened regulatory burdens when those calls are made to residential and cellular numbers, including calls made to existing customers. With respect to residential numbers, these burdens apply only to telemarketing calls. However, the burdens apply to both telemarketing and non-commercial calls made to cellular numbers.[2] As a result, robocalls made without prior written consent to cell phones for customer service or late payment reasons will be limited by the new regulations.

When does the comment period end?

The initial comment period lasts 60 days from March 21, 2010, ending and including May 21, 2010. Following the initial comment period is the reply comment period, which lasts 30 days and runs to and includes June 21, 2010.

Who do the proposed rules affect and why are the proposed rules important?

The FCC proposed rules will primarily affect entities not already subject to nearly identical Federal Trade Commission ("FTC") rules. Certain entities are specifically exempt from FTC jurisdiction: banks, savings & loan institutions, federal credit unions, airlines, and telephone companies.[3] Instead, the FCC regulates these entities in matters of telemarketing, including use of robocalls. The new FCC rules will mirror the current FTC rules, effectively applying the FTC's rule regime to entities outside its jurisdiction.[4] As under the current rules, the new rules will permit civil causes of action to be filed against covered entities for violations.[5]

What are the proposed rule changes?

The proposed rules will:

- Require prior written consent from a customer receiving telemarketing robocalls on a residential line or receiving either telemarketing or non-commercial robocalls on a cellular number
- Remove an exemption for robocalls where an established business relationship exists between the caller and the recipient

- Change the opt-out procedures for robocalls by requiring an automated opt-out mechanism that remains available throughout the call, and requiring a robocall to include a toll-free number through which a call recipient can access an automatic opt-out mechanism

Details of the Proposed Rule Changes

The FCC promulgated the proposed rules under the authority of the Telephone Consumer Protection Act ("TCPA"), which generally prohibits delivery of artificial or prerecorded voice messages to residential telephone lines absent "prior express consent."[6] The FCC issued the proposed changes to harmonize its rules with the existing FTC rules.[7] If finalized, three components of the rules will require specific changes as to how banks and other entities subject to the rules contact customers[8]:

(1) Prior Written Consent to Automated or Prerecorded Calls

The proposed rules require prior written consent to receive automated or prerecorded calls[9]: (i) to residential lines, for telemarketing robocalls, and (ii) to cellular lines, for all robocalls.[10] The consent must indicate that the customer has received "clear and conspicuous disclosure" that consenting means receiving prerecorded or automated calls. And the consent provided must designate a number where the customer consents to receive such calls and include her signature. However, both the consent and signature may be obtained by electronic or digital means to the extent recognized by the E-SIGN Act and other applicable federal or state laws.[11] For example, email, websites, telephone key press, or voice recordings could be used to obtain the necessary consent.[12] Consent cannot be obtained as a direct or indirect condition of purchasing any goods or services.[13] Consent to receive robocalls given in existing sales or service agreements will no longer be valid if the consent can be construed as a condition of the sale or service.

The same prior written consent rule also covers calls to cellular numbers, regardless of the nature of the call.[14] In other words, calls to cell phones need not be commercial in nature to require prior written consent. The prior written consent requirement will therefore apply, among others, to automated or prerecorded calls to cellular numbers regarding late credit card payments or other customer service issues.[15]

(2) Elimination of Established Business Relationship Exemption

The exemption for "established business relationships" will be eliminated under the proposed rules, meaning that all of the rules' requirements apply to current customers, too. Essentially, the proposed rule will eliminate the presumed consent of an existing customer to receive telemarketing calls that are automated or prerecorded. However, live telemarketing calls will continue to fall within the established business relationship exemption.

(3) Automated, Interactive Opt-Out Mechanism

Automated or prerecorded calls must offer recipients an opt-out mechanism from the current call and future calls. In particular, automated or prerecorded calls that could be answered by a live recipient must provide an automated interactive opt-out mechanism at the outset that remains available throughout the call's duration. If activated, this mechanism must automatically add the recipient's number to the caller's do-not-call list and immediately disconnect the call. Where a call could be answered by an answering machine or voicemail service, it must include a toll-free number that enables the consumer to call back and connect directly to an automated opt-out mechanism.

Likelihood that the Proposed Rules Become Final

Some form of the proposed rules likely will become final because nearly identical rules have already been promulgated by the FTC, and the FCC is mandated by the Do-Not-Call

Improvement Act of 2007 to "maximize consistency" with the do-not-call rules promulgated by the FTC.[16]

Recommendations

Since the new FCC rules are proposed to mirror the existing FTC rules, we think it likely that they will be adopted essentially as proposed. The following recommendations should aid transition to the recently proposed FCC rules:

- Verify whether client contact numbers are residential or cellular
- Review existing customer agreements to determine compliance with proposed rules
- Evaluate current policies governing automated and prerecorded calls

Consider commenting on the FCC's proposed rule changes, particularly with respect to how the proposed rules will affect your business.

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1. Office of the Comptroller of the Currency, OCC 2007-30, Aug. 24, 2007, www.occ.treas.gov/ftp/bulletin/2007-30.html
2. Text messages were held to be "calls" in a recent Northern District of Illinois decision. ___F.Supp.2d ___, 2010 WL 1197884, *8 (N.D. Ill. March 23, 2010). The FCC's proposals may therefore apply to automated text messages sent to cellular phones. *Cf. id.* If so, automated texts would also require prior written consent. *Cf. id.*
3. 47 U.S.C. § 153(32) (West 2010) (defining scope of FCC jurisdiction to include any "person," which means "an individual, partnership, association, joint-stock company, trust, or corporation"); 15 U.S.C. § 45(a)(2) (exempting banks, savings & loan institutions, federal credit unions, and common carriers, including airlines and long-distance telephone companies, from FTC's jurisdiction).
4. *Id.*
5. *See* 47 U.S.C. §§ 227(b)(3), (c)(5) (West 2010) (establishing private right of action for violations of rules or regulations under subsection).
6. 47 U.S.C. §§ 227(b)(1)(A)(i)-(iii), (B).
7. *Telemarketing Sales Rule Final Rule Amendments*, 16 CFR pt. 310.
8. The proposed rules also adjust how abandoned calls are calculated for compliance with regulations establishing a maximum rate of abandoned telemarketing calls. Specifically, the proposed rules will measure the abandonment rate over a 30-day period for the duration of a single calling campaign, if that campaign is less than 30 days long, or over each successive 30-day period, if the campaign lasts more than 30 days. *Telephone Consumer Protection Proposed Rule Changes*, 75 Fed. Reg. 13,471, 13478. The effect of this rule will be to allow telemarketers to conduct smaller campaigns in a more cost-effective manner.
9. Existing FCC rules require "prior express invitation" for calls made to recipients who have registered their number on the national do-not-call list. 47 CFR pt. 64.1200(c)(2)(ii).
10. The proposed rules create an exemption for health care-related calls that are subject to the Health Insurance Portability and Accountability Act (HIPAA) from the TCPA's general ban on automated or prerecorded calls. Telephone *Consumer Protection Proposed Rule Changes*, 75 Fed. Reg. 13,471, 13476 (March 22, 2010) (to be codified 47 CFR pts. at 64 and 68). Examples of calls that would satisfy a health care exception include those regarding flu shots, prescription refill reminders, health screening reminders, calls to obtain permission to contact doctors for renewal of medication, and calls to obtain information needed for billing health plans. *Id.*
11. E-SIGN Act, 15 U.S.C. § 7001 *et seq.* (generally confirming validity of signatures and contracts that exist exclusively in electronic form).
12. *Telephone Consumer Protection Proposed Rule Changes*, 75 Fed. Reg. at 13,474.
13. *Id.* at 13,473.
14. The rule also would include emergency lines and health care facilities.
15. The American Bankers Association has also raised similar concerns about the effect on communications with customers. *See* http://www.aba.com/Issues/Issues_ElectronicCommunications.htm
16. 15 U.S.C. § 6153 (West 2010).

Timothy L. Moore
Associate
Pittsburgh
+1 412 288 3528

Michael E. Bleier
Partner
Pittsburgh
+1 412 288 3604

Robert M. Jaworski
Partner
Princeton
+1 609 520 6003

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