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Lead Generation through Mobile Marketing: Legal and Regulatory Realities

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A recent enforcement action taken by the Federal Trade Commission ("FTC") to shut down a marketer using text messages highlights the need to be mindful of the law and regulations that govern mobile marketing. On February, 23, 2011, the FTC asked a federal judge to shut down an operation that allegedly blasted consumers with millions of illegal spam text messages. Although the case is many respects a "run of the mill" spam case, what makes this case unique is the services promoted were not those of the sender. Rather, the messages were sent by a lead generator and offered loan modification assistance, debt relief, and other services. The FTC is asking the court to freeze the defendant's assets with charges that he violated the FTC Act and the CAN-SPAM Act – a law that sets the rules for commercial email.

With the rapid proliferation and use of mobile communication devices, mobile marketing is an effective means of capturing the eyes and ears of the consuming public; however, it is a regulated media and has come under scrutiny. Mobile marketing has at times outpaced regulation, but lawmakers have enacted laws to keep pace with innovation, and federal and state consumer protection agencies and private plaintiffs have stepped-up enforcement. Companies seeking to generate or purchase leads from mobile devices must be cognizant of the regulatory – and self-regulatory – landscape governing mobile marketing.

The lead generation industry has always been on the cutting edge of marketing and promotional strategies and practices. Here are some tips on legal considerations for lead generators using mobile marketing to help avoid the issues in the enforcement action discussed above:

Federal Laws

The FTC and the Federal Communications Commission ("FCC") are the primary federal agencies regulating mobile marketing. Like any advertising and marketing, mobile marketing is subject to the FTC Act and its prohibition on unfair and deceptive advertising and marketing.

The FTC's Telemarketing Sales Rule ("TSR") prohibits prerecorded marketing calls to consumers without the call recipients' prior express written agreement. Under the TSR, prerecorded marketing calls must make certain disclosures and provide a specific type of opt-out mechanism that the call recipient can use to be placed on the marketer's internal do-not-call list. These consent, disclosure, and opt-out requirements apply regardless of whether a marketer has an existing business relationship with the called party.

FCC regulations under the Telephone Consumer Protection Act prohibit all calls to wireless devices made using an automatic telephone dialing system or an artificial or prerecorded voice, unless the caller has obtained the called party's prior express consent or there is an emergency situation. The FCC has proposed to harmonize its regulations regarding prerecorded calls with the FTC's rules.

The FCC and courts have stated that the FCC's rules regarding calls to wireless devices apply to both voice and text calls, including short message service ("SMS") calls and text messages sent internet-to-phone or internet-to-phone. FCC regulations also apply to Mobile Service Commercial Messages (MSCMs) – which essentially are email messages sent to an email address on an Internet domain of a wireless carrier. Most wireless carriers maintain an Internet domain name that can be used to send MSCMs to the wireless devices of users on their networks. MSCMs that are ultimately delivered to wireless devices may be considered "calls" under applicable FCC regulations restricting calls to wireless devices when the calls are sent using an automated system or prerecorded or artificial voice.

FTC and FCC Do Not Call Rules prohibit marketers from making telephone solicitation calls to any

residential telephone number, including any non-business wireless number, that is registered on the National Do Not Call ("DNC") Registry, unless the consumer has provided express written consent to be called or the marketer has an established business relationship with the call recipient. To help avoid placing a marketing call to numbers listed in the national DNC Registry, marketers should first "scrub" their outbound calling lists against the national DNC Registry to remove any names that appear on the list. Marketers can access the DNC Registry, for a fee, through the FTC. In fact, federal DNC rules require that marketers check the DNC Registry for updates once every 30 days and that marketers scrub their lists against the list within 31 days of making any solicitation. Companies marketing by phone must also maintain a company-specific DNC list, which must include consumers who requested not to receive future marketing calls from the company.

Identifying wireless numbers can be difficult. Local number portability ("LNP") allows subscribers to transfer (i.e., "port") their wireline numbers to wireless devices and vice versa, which can make it difficult for marketers to identify recently ported numbers. The FCC has created a safe harbor for marketers who unknowingly call a wireless number that has been ported from a wireline service within 15 days prior to the date of the call. Moreover, a division of the Direct Marketing Association offers the Wireless-Ported Numbers File, which updates the list of ported numbers on a daily basis. Marketers can use the Wireless-Ported Numbers File on a regular basis so that, in the event the marketer has taken appropriate steps to avoid calling wireless numbers but inadvertently places calls to one or more wireless numbers, the marketer can take advantage of the FCC's safe harbor.

In addition, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act ("CAN-SPAM Act") applies to commercial email messages, including text messages, SMS, and MSCMs, sent to an address that includes a domain name posted on the FCC's wireless domain list for at least 30 days before the message is sent. This list is available on the FCC's website. The CAN-SPAM Act prohibits sending commercial email messages to wireless devices unless the recipient has provided prior express authorization to receive such messages from the sender. This authorization may be obtained orally or in writing. Any prior express authorization given by consumer will be interpreted narrowly. It will not necessarily be extended to affiliates or partners, and authorization given to the sender of a message does not entitle the sender to disseminate messages on behalf of third parties. Further, a consumer's prior express authorization for one type of email/text message does not necessarily provide consent for other types – for example, consenting to news updates is not the same as consenting to receiving electronic coupons. The CAN-SPAM Act also requires that all commercial emails include certain specific disclosures and provide a mechanism by which consumers can opt out of receiving future commercial emails from the marketer. The statute also prohibits commercial emails that contain false or misleading subject lines or "header" information; header information includes the source, destination, and routing information attached to an email, as well as the originating domain name and originating email address, and the "from" line.

In addition to federal laws that specifically regulate mobile marketing, lead generators should be aware of broader advertising and marketing laws, including the Federal Trade Commission Act – which prohibits deceptive or unfair commercial acts and practices – and the FTC's Mortgage Assistance Relief Services Rule – which applies to those who offer mortgage relief services, including lead generators in that space.

State Laws

States have various laws applicable to mobile marketing, including laws governing telemarketing, email marketing, and advertising generally. States have brought enforcement actions against companies engaging in mobile marketing for alleged violations of applicable laws. The Florida Attorney General's Office in particular has been very active in the mobile marketing area. In May 2008, the Florida Attorney General's Office announced that it was developing a "zone system" intended to dictate where material terms should be disclosed in an advertisement sent to mobile devices. In addition, many state laws may be enforced by individual consumers and through class-action litigation, which for some plaintiff's attorneys has created an entire cottage industry.

Industry Standards

Several industry groups have adopted guidelines for mobile marketing that require compliance with the applicable federal laws and recommend standards for mobile marketing practices in specific areas. The main principle among industry standards, as well as pertinent laws, is that consumers should have choice as to the marketing content that they receive. In other words, marketing messages generally should be delivered to consumers only if they have consented to receiving such communications.

Among the industry organizations that have established standards for mobile marketing is the Mobile Marketing Association, whose *Consumer Best Practices Guidelines* and other guidance documents set forth both best practices for a wide range of mobile marketing activities, including, among other things, obtaining consumer consent, disclosing terms and conditions of an offer, and sweepstakes and contests offered through mobile ads. The Direct Marketing Association's *Guidelines for Ethical Business Practice* provide comprehensive guidelines for ethical and legal conduct for various types of direct marketing, including mobile marketing. The CTIA – The Wireless Association also has guidelines relating to mobile marketing, although its guidelines primarily address the obligations of wireless carriers.

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Mobile marketing presents lead generators and lead purchasers with opportunities to directly reach consumers wherever they may be – on the go, at home, at the office, etc. As such, marketing to mobile devices can help a company accumulate leads at profitable conversion rates. But mobile marketing is not without legal risks. Lead generators should be mindful of the regulatory "lay of the land" to help effectively mitigate such risks and protect their business interests.

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