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Legal Update
February 17, 2012

FCC Issues Guidance on Telemarketing Rules

On February 15, 2012, the US Federal Communications Commission (FCC) released its Report and Order stemming from its January 20, 2010, Notice of Proposed Rulemaking (NPRM).[1] The NPRM proposed changes to the FCC's regulations under the Telephone Consumer Protection Act (TCPA) in order to bring those regulations in line with the FTC's Telemarketing Sales Rule (TSR).[2] Under the TSR, the FTC generally imposed tougher restrictions on autodialed and prerecorded telemarketing calls. With a few key exceptions, the Report and Order adopts the NPRM's proposals in their entirety.

The Report and Order contains new provisions relating to (i) the requirement that a telemarketer obtain the recipient's prior express *written* consent, (ii) electronic opt-out mechanisms for prerecorded telemarketing calls, (iii) abandoned telemarketing call rate calculations and (iv) calls subject to HIPAA. However, the Report and Order does not change the existing consent regime that applies to non-telemarketing (informational) calls under the TCPA.

Prior Express Consent

Broadly speaking, the TCPA requires that companies making autodialed or prerecorded calls to wireless phone numbers, and prerecorded calls to wireline numbers, obtain a recipient's prior express consent before placing the call. Under the Report and Order, telemarketers must now obtain *written* consent before placing such calls. Previously, a telemarketer could rely on a recipient's oral consent, provided that the recipient was not on the National Do-Not-Call List.

As support for this new requirement, the FCC cited the large number of complaints it receives with respect to telemarketing, as well as the large number of comments the FTC received when considering its parallel rule. The written consent must be obtained without requiring, directly or indirectly, that it be given as a condition of a purchase. Consistent with the FTC's rules, this written consent may take the form of an E-SIGN Act compliant signature—a measure aimed at lowering the cost of compliance with the new requirement.

In response to a number of concerns raised by commenters, the FCC concluded that informational calls remain exempt from the written consent requirement. Calls made to a wireless customer by the customer's carrier are exempt if the customer is not charged for the call. In addition, the FCC explicitly clarified that "Recovery Act calls"—statutorily mandated calls regarding home loan modifications—also remain exempt.

Informational calls such as fraud alerts, product recalls, data breach notifications, flight scheduling changes, account updates, appointment reminders, and school closings also remain exempt. The FCC cited the wide variety of positive uses for autodialed informational calls and acknowledged its intent not "to discourage purely informational messages." Specifically, the

FCC noted that imposing prior written consent requirements on such calls "would unnecessarily restrict consumer access to information communicated" through these calls.[3] The FCC concluded that, in doing so, it was "employ[ing] the flexibility Congress afforded to address new and existing technologies." Thus, informational calls do "not require any consent when made to residential wireline customers, but require either written or oral consent if made to wireless customers and other specified recipients."

The FCC abolished the "established business relationship" (EBR) exemption for telemarketing calls to residential phone numbers. Previously, an EBR was considered to be consent for telemarketing calls, unless it had been affirmatively revoked. Thus, prior written consent is also required for telemarketing calls to wireline phone numbers even if the caller has an established business relationship with the called party. In doing so, the FCC rejected arguments that reiterated the FCC's previous justification for allowing such calls: that a call to a customer with an EBR is less intrusive of privacy.

Opt-out Mechanism

With respect to prerecorded telemarketing calls that remain permitted, the Report and Order also requires that all such calls include an interactive opt-out mechanism. Specifically, each such call must announce the presence of such a mechanism at the outset of the prerecorded message, and the interactive feature must be available for the duration of the call. If the call could be answered by an answering machine, the recorded message must also include a toll-free number the recipient can call to automatically opt out of future calls. Previously, the FCC had only required that toll-free opt-out numbers be provided during or after the call.

In support of this decision, the FCC cited a study that noted that consumers were much less likely to use a call-back number for opting out, rather than an interactive system. In addition, the Report and Order brings the FCC's rules into harmony with the TSR, which already required such a system. At the same time, however, the FCC rejected some commenters' request that all prerecorded calls, including informational calls, have an interactive opt-out mechanism because "the record does not reveal a level of consumer frustration with non-telemarketing calls that is equal to that for telemarketing calls."

Abandoned Calls Measurement

Next, the Report and Order creates new standards for measuring "abandoned call rates" for telemarketing campaigns. When a telemarketing campaign uses a predictive dialer, a certain percentage of calls will often be abandoned because a live operator is not available to take the call when it is connected.[4] The FCC and FTC have imposed a 3 percent cap on abandoned calls, measured over a 30-day period. Previously, however, the FCC permitted a telemarketer to average its abandoned call rate across multiple campaigns.

In the Report and Order, the FCC now imposes a "per campaign" rule for measuring abandoned call rates.[5] The change was motivated by a concern that certain telemarketers were targeting abandoned calls at less-desirable consumers, "a form of robocall 'redlining.'" The FCC rejected some commenters' requests for a per-day abandoned call rate calculation. The FCC reasoned that, due to fluctuations in abandoned call rates over time, this measurement would be unduly restrictive. A 30-day period allows for unusual days to average out, lowering the burden on smaller companies engaging in smaller campaigns. This change brings the FCC's measurement rules in line with those the FTC began imposing in 2008.

HIPAA Exemption

The FTC already exempts from its telemarketing rules health-care related calls covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). In the NPRM, the FCC announced its consideration of a similar

exemption, and the Report and Order contains just that. The FCC's "consent, identification, time-of-day, opt-out, and abandoned call requirements" are all eliminated for calls that are subject to HIPAA. The FCC reasoned that HIPAA already contains sufficient rules to protect a call recipient's privacy, and thus it was not necessary to also subject these calls to the TCPA's requirements. The FCC rejected some commenters' concerns about abuse of the definition of "marketing" in HIPAA, noting the Department of Health and Human Services's enforcement powers to discourage such abuse.

Endnotes

[1] *In re Rules and Regulations Implementing the TCPA*, 25 F.C.C.R. 1501 (Jan. 20, 2010).

[2] *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164 (2008).

[3] The FCC noted that consumers use informational calls to learn, among other things, "bank account balance, credit card fraud alert, package delivery, and school closing information." Report and Order ¶ 21.

[4] A call is deemed "abandoned" if it is not answered by a live operator within two seconds of the recipient's greeting.

[5] A "campaign" is defined as "the offer of the same good or service for the same seller." Rule ¶ 56.

For more information about the Report and Order, or any other matter raised in this Legal Update, please contact your regular Mayer Brown lawyer or the author of this update.

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