What We Know

ARTICLES & INSIGHTS

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The FCC TCPA Ruling: What Financial Institutions Need to Know

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The Federal Communications Commission (the "FCC") recently released its Declaratory Ruling and Order regarding the requirements of the Telephone Consumer Protection Act of 1991 (the "TCPA"). The FCC Order provides some good news for financial institutions, exempting certain automated calls to cell phones and text messages from the prior express consent requirement.

Here's what you need to know:

PRIOR EXPRESS CONSENT EXEMPTION:

Under the TCPA, the general rule is that calls made with an automated telephone dialing system to cell phones, automated messages to cell phones and text messages all require the recipient's prior express consent. The FCC Order exempts from the consumer consent requirements certain pro-consumer calls which are made about time sensitive financial matters *so long as they are made free to the end user and do not count against the recipient's plan minutes or texts*. Specifically, the exemption applies to:

- **Calls or texts for the purpose of notifying the customer of transactions and events that suggest a risk of fraud or identity theft.**

Recognizing that such situations require immediate attention and it may be damaging to the customer if the financial institution is prohibited from contacting the customer for lack of prior express consent, the FCC concluded that financial institutions may call or text a customer's cellular phone number to notify him of possible fraudulent activity on his account.

- **Call or texts for the purpose of notifying the customer of a possible breach of the security of the customer's personal information.**

Recognizing the need for expediency in the event of a data breach, the FCC held that it is financial services and has been published in a number of publications including the Journal of Taxation and Regulation of Financial Institutions, California State Bar Business Law News, Banking and Financial Services Policy Report and Carolina Banker.

in the best interest of consumers to receive immediate notification of such an occurrence regardless of whether the consumer provided prior express consent.

- **Calls or texts for the purpose of conveying measures consumers may take to prevent identity theft following a data breach.**

When a customer's personal and financial account information is at risk following a data breach, financial institutions seek to inform the customer of measures he can take to prevent identity theft. Thus, the FCC exempted such calls from the express consent requirement. The FCC, however, cautioned financial institutions that informing a customer of an instance of identity theft or measures to prevent identity theft *does not include* marketing products a customer may use to prevent or remedy identity theft.

- **Calls or texts regarding actions needed to arrange for a receipt of pending money transfers.**

Financial institutions want to have the ability to notify the recipient of a money transfer of steps to be taken in order to receive the transferred funds; however, money transfers must often be delivered to individuals who do not have a relationship with the transferring institution and, therefore, have not even had the opportunity to consent to calls or text messages from the financial institution. Based on the fact that both the transferring and receiving party have an interest in the details and status of the money transfer, combined with the time-sensitive nature of money transfers, the FCC granted the exemption to notifications regarding actions needed to arrange for receipt of a money transfer.

REQUIREMENTS FOR EXEMPTED CALLS

The FCC's exemption is not unfettered, and financial institutions seeking to take advantage of the exemption must comply with the limitations imposed by the FCC Order:

General Requirements:

- All calls and texts must be free to the end user and not count against the recipient's plan minutes or texts.
- Calls and texts may only be sent to the wireless telephone number provided by the customer of the financial institution;
- Calls and texts are strictly limited to purposes specified above and must not include any telemarketing, cross-marketing, solicitation, or advertising content; and
- Calls for debt collection purposes still require prior express consent.

Frequency of Calls:

The FCC ruling provides that a single financial institution may call or message a customer, who has not given their prior express consent, no more than three (3) times over a three-day (3) period. These limits apply per event warranting the exempted calls, regardless of which exemption is triggered. Any contact beyond the limited number of three (3) calls or messages per event, over a three-day period, is not exempt and requires the express consent of the consumer.

Opt-out Requirements

Financial institutions must include in their message a method for recipients to easily opt out of future calls and messages. Voice calls that could be answered by a live person must include an automated, interactive voice and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future financial calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages

If the customer chooses to opt out of future calls, the opt-out request should not opt the customer out of receiving all financial calls for that account. As such, the financial institution should customize the opt-out provision so that a customer is aware that a decision to opt out of future calls from the financial institution is specific only to the category of exemption referenced in that message or call. Financial institutions are required to honor opt-out requests immediately.

Call Content Requirements:

- Voice calls and text messages must state the name and contact information of the financial institution (for voice calls, these disclosures must occur at the beginning of the call); and
- Voice calls and text messages must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) and 160 characters or less in length for text messages.

The FCC ruling provides much needed exemptions related to urgent financial matters, but caution should be used by financial institutions seeking to take advantage of the exemptions. First and foremost, financial institutions needs to keep in mind that this is not a blanket exemption. All calls and texts must be free to the end user and not count against the recipient's plan minutes or texts. The ability to use the exemption, therefore, will require financial institutions to work closely with wireless carriers and third party servicers to insure the messages and notices do not result in a charge to the recipient. Secondly, content and frequency of calls must likewise be closely monitored as the exemption will be tightly enforced. Failure to strictly comply, therefore could result in costly litigation.

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