FCC Signals Enforcement of TCPA
“Prior Express Written Consent” Rules

June 16, 2015

In a letter published on June 11, 2015, the Federal Communications Commission’s (FCC) Enforcement Bureau expressed “serious concern” about PayPal’s use of a website user agreement to obtain prior express written consent to make telemarketing calls and send SMS text messages. 1 Consent for these calls and messages must meet the requirements of the Telephone Consumer Protection Act of 1991 (TCPA) and its implementing regulations. The Enforcement Bureau’s letter provides insight into the FCC’s interpretation of its updated consent rules that became effective on October 16, 2013 (hereinafter, the TCPA Consent Rules), and signals that enforcement of the updated rules is on the horizon.

Background

Among other things, the TCPA prohibits certain calls to wireless and residential numbers unless the caller has the prior express consent of the called party. 2 The FCC has interpreted “calls” to include SMS text messages. 3 Under the TCPA Consent Rules, some types of calls require prior express written consent, while other types of calls do not require that the consent be in writing. “Prior express written consent” is required for:

• all telemarketing/promotional calls/texts made using an automatic telephone dialing system placed to wireless numbers, and
• all artificial or prerecorded telemarketing/promotional voice calls to wireless and residential numbers. 4

Companies may obtain oral consent for non-telemarketing voice and text calls to wireless numbers made using an automatic telephone dialing system. 5

“Prior Express Written Consent”

The TCPA Consent Rules define “prior express written consent” as “an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” 6 The rules further state that this consent may not be a required condition of purchasing any property, goods, or services. 7

“Serious Concern” Over User Agreements to Obtain Express Written Consent

The FCC Enforcement Bureau’s letter expresses concerns about meeting the requirements of the TCPA Consent Rules by way of an online user agreement. The letter first summarizes the FCC’s view on what is required to satisfy the rules:

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2 § 227(b)(1)(A).
4 47 C.F.R. §§ 64.1200(a)(2), (a)(3).
5 In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, FCC 12-21, ¶ 28 (February 15, 2012); § 64.1200(a)(3).
6 47 C.F.R. § 64.1200(f)(8).
7 § 64.1200(f)(8)(i).
The agreement must be in writing;

The agreement must bear the signature of the person who will receive the advertisement/telemarketing calls/texts;

The language of the agreement must clearly authorize the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts;

The written agreement must include the telephone number to which the person signing authorizes advertisements or telemarketing messages to be delivered; and

The written agreement must include a clear and conspicuous disclosure informing the person signing that:

- By executing the agreement, the person signing authorizes the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts; and

- The person signing the agreement is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

The letter then goes on to assert three reasons for the FCC's concerns about PayPal's proposed amendments to its terms of use. First, it states that the TCPA Consent Rules “directly prohibit requiring a consumer to consent to receive autodialed or prerecorded telemarketing or advertising calls as a condition of purchasing any property, good, or service, and the company must give consumers notice of their right to refuse to give such consent.” Where a website operator does not provide this notice and/or fails to allow users to use the website after refusing such consent, any such consent may actually be a condition of use of the service, which the FCC stated would violate the TCPA Consent Rules.

Second, the letter states that a written consent agreement that complies with the TCPA Consent Rules must “identify the specific telephone number to which the consenting consumer gives his or her consent to be called or texted.” A website user agreement usually is not personalized to contain the specific telephone number to which calls or messages may be made. According to the Enforcement Bureau, a user agreement may not meet the TCPA's requirements when it does not contain the specific telephone number subject to the consent.

Third, the letter states that the FCC has ruled that “should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.” Although the letter did explicitly state it, the implication is that consent provided within an online terms of use may not satisfy the “clear and conspicuous disclosure” requirement.

Implications

The Enforcement Bureau’s letter is significant because it reflects that the FCC intends to strictly enforce its TCPA Consent Rules. For example, there is some ambiguity in the regulations as to whether the written consent agreement needs to include specific disclosures that the calls or texts will be made using an autodialer, and that consent is not a condition of purchase or use of a service. The letter sets forth the FCC’s view that such disclosures are required. It also suggests that consent provided via a terms of use may not suffice, and that the FCC will begin to take enforcement actions against companies that have not obtained prior written consent in accordance with the specific requirements of the TCPA Consent Rule.

Businesses face risks when making commercial telephone calls or sending commercial messages, and can easily trip over the requirements set by the multitude of federal and state laws that may apply to them. Before implementing telephone-based marketing programs, businesses may wish to review and update their compliance policies and programs to ensure that they do not run afoul of the ever-changing landscape of federal and state law.

\(^{8}\) PayPal Letter, at 2.
Wilson Sonsini Goodrich & Rosati routinely helps clients with all aspects of their marketing communications, including compliance with the TCPA and state laws regarding marketing communications. For more information, please contact Tonia Klausner or another member of the firm’s privacy and data protection practice.

Wendell Bartnick contributed to the preparation of this WSGR Alert.