Client Alert.

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Proposed Rule Could Limit Service and Collections Calls to Cell Phones

By Andrew Smith, Julie O'Neill and James McGuire

This morning the Federal Communications Commission published in the Federal Register a proposed rule that would limit the ability of banks, lenders, utilities, debt collectors and others to make calls to their customers' cell phones. Although it probably comes as no surprise that marketing calls to cell phones are restricted, for example by the do-not-call rules, these new restrictions would apply to *any* call to a cell phone, including calls to collect a debt, notify a customer of a payment due, or request additional information to complete an application. The proposal, if made final, would undo an FCC interpretation permitting calls to cell phones where the cell phone number is provided "to a creditor, e.g., as part of a credit application," and would expose creditors and collectors to private liability and statutory damages under the Telephone Consumer Protection Act ("TCPA"). Comments on the proposal are due May 21, 2010.

Under the TCPA, 47 U.S.C. § 227(b)(1)(A), it is "unlawful . . . to make any call (other than a call . . . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." This law was passed in 1991 and reflects the now-obsolete notion that some cell phone users must pay for incoming calls, and "automated" calls should therefore be limited. The TCPA defines the term "automatic telephone dialing system" or "ATDS" as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers," 47 U.S.C. § 227(a)(1), and it seems clear that Congress intended the law to apply to random sequential dialers and similar devices that dial numbers continuously until they obtain an answer. *See* S. Rep. 102-178, 1991 U.S.C.C.A.N. 1968, 1969 (legislative history, stating that "automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls").

In 2003, the FCC interpreted the term ATDS to include a predictive dialer, where the dialer has the capacity to randomly generate and dial sequential telephone numbers, even if that capacity has not been enabled: "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Report and Order, at 77, para. 131 (2003).

Many financial institutions and others use telephone systems to contact their customers that, if paired with certain software, are *capable* of generating and dialing sequential numbers at random. In fact, given the breadth of the FCC's interpretation, some observers believe that even a standard telephone equipped with a speed dial could be considered to be an ATDS. As a result, this 2003 FCC interpretation exposed financial institutions and other companies to potential liability under the TCPA, which allows private actions and provides for between $500 and $1,500 in statutory damages for each violation. 47 U.S.C. § 227(b)(3).

The credit and collections community brought this issue to the FCC's attention, and in late 2007, the agency issued a declaratory ruling that a creditor had the requisite "prior express consent" to call a consumer's cell phone using an ATDS, as long as the consumer provided the creditor with the number directly, such as in connection with her application for credit. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, at 6, para. 9 (2007) ("We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.") Because most creditors have obtained in a credit application a telephone number at which the consumer can be reached, this interpretation has proven to be relatively successful at deterring truly unsolicited ATDS calls to cell phones, while continuing to permit the efficient use of automated telephone equipment to make calls in connection with the collection of delinquent accounts.

This most recent rule proposal from the FCC, however, threatens to undo the compromise reached in 2007. The FCC has proposed a new definition of "prior express consent" in the context of using an ATDS to call a cell phone:

> [A] person or entity shall be deemed to have obtained prior express written consent upon obtaining from the recipient of the call an express agreement, in writing, that: (A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice; (B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature.

54 Fed. Reg. 13,471, 13,481 (Mar. 22, 2010).

Not only would this proposal unwind the careful compromise struck in 2007, but it would read into the law a requirement that prior consent be "written" – the TCPA itself does not specify whether consent must be written or may be verbal. In addition, if a consumer refuses to provide such written consent, thereby making it more difficult and expensive to service or collect the account, the creditor would be prohibited from declining the application or otherwise conditioning the grant of credit on the ability to use an ATDS. (We note that these provisions are consistent with new Federal Trade Commission restrictions on the use of prerecorded marketing calls. *See* 16 C.F.R. § 310.4(b)(1)(v). While these limitations may be appropriate in the context of prerecorded marketing calls, they are less so when an ATDS is being used to make service or collections calls.)

The proposed definition of "prior express consent" is buried in the middle of a larger rulemaking proceeding focused on limiting the use of prerecorded messages in connection with marketing campaigns. The only reference to the broader potential consequences of the rulemaking is an offhanded comment in the preamble to the proposal: "Assuming the Commission has legal authority to adopt a written consent requirement, it seeks comment on whether it should adopt the same requirement both for calls governed by section 227(b)(1)(A) of the Communications Act (generally prohibiting automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services), and for calls governed by section 227(b)(1)(B) of the Communications Act (generally prohibiting prerecorded message calls without prior express consent to residential telephone lines)." 54 Fed. Reg. at 13,474, para. 8.

Comments on the proposal are due on May 21, 2010. Financial institutions and others who may be affected by the proposed revision should consider examining the proposal to determine its effects on their ability to efficiently manage and collect their accounts.

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