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Life Sciences Health Industry Alert

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FCC Proposes Tougher Rules on Telemarketing

The Federal Communications Commission ("FCC") has released a notice of proposed rulemaking that seeks comments as to whether it should conform its Telephone Consumer Protection Act ("TCPA") rules to the Federal Trade Commission's ("FTC") Telemarketing Sales Rule ("TSR"). The primary change in regulations would affect the sending of prerecorded messages (a/k/a "robocalls").

The TSR prohibits, *inter alia*, prerecorded marketing calls to any consumer, including the seller's existing customers, absent the consumer's prior express permission. On the other hand, the TCPA now permits those same prerecorded marketing calls to be made to any existing customer unless such customer requests that those calls not be made.

The TSR applies only to interstate calls, whereas the FCC's rule applies to both interstate and instate calls, including local calls. The FCC's rule also applies to any seller/telemarketer (except for charities), whereas the FTC's rule does not apply to any business not subject to the jurisdiction of the Federal Trade Commission Act. Thus, telephone companies, airlines, banks, credit unions, nonprofits and most insurance companies are generally not subject to the FTC's rule. Neither agency's prohibitions in this area extend to "calls for political purposes, including political polling calls and other calls made by politicians or political campaigns; and calls for other noncommercial purposes, including those that deliver purely 'informational' messages or emergency calls."

Specifically, the FCC is proposing to:

- Require sellers to obtain consumers' express written consent (which includes electronic consent) to accept prerecorded telemarketing calls "even when there exists an established business relationship between the caller and the consumer"
- Exempt calls that are subject to the Health Insurance Portability and Accountability Act ("HIPAA") from the general prohibition against prerecorded telemarketing calls to residential telephone lines
- Require all prerecorded telemarketing calls to include an "automated, interactive mechanism by which a consumer may 'opt out' of receiving future prerecorded messages"
- Implement a "per campaign" rule for "measuring the maximum percentage of live telemarketing sales calls that a telemarketer lawfully may drop or 'abandon' as a result of the use of automated dialing software or other automated dialing equipment"

The FCC seeks comments on a number of issues, including whether it has the authority, pursuant to section 227(b)(2)(B)(i) or (ii) of the Communications Act, to grant a HIPAA exception, and how long it should give sellers to comply with the automated opt-out and the express written agreement requirements. The FTC allowed three months for the former and 12 months for the latter.

Comments on these proposals must be filed with the FCC no later than 60 days after publication of the notice in the *Federal Register*, which has not yet occurred. Chairman Julius Genachowski indicated that he hoped the rulemaking "can be a reasonably fast proceeding."

Analysis

Given the popularity of the FTC's existing ban on sending prerecorded messages to existing customers without prior permission, it is very unlikely that the FCC would fail to approve a similar rule. Arguing to the contrary is likely to be futile.

It is important to note that the inclusion of any promotion of the availability of a product or service in an otherwise informational message, which would otherwise not be subject to this restriction on prerecorded calls, converts the entire message into a covered call. Thus, if a health care provider were to send a prerecorded message to a patient reminding of the need to take a prescribed pill every morning and evening without fail, and also advising that other prescriptions could be refilled now simply by pushing "3" on the phone's keypad, the entire message would most likely be viewed as a commercial sales message that would be subject to the FCC's and FTC's rules, absent a HIPAA

exemption. Unless the FCC were also to grant an HIPAA exemption, the health care provider would, in this example, be required to obtain the patient's prior written consent before sending this message.

While a similar HIPAA exemption from the FCC is likely, it is not automatic. As noted above, the FCC asks whether it has authority to exempt these calls either under section 227(b)(2)(B)(i) (calls that are not made for a commercial purpose), or section 227(b)(2)(B)(ii) (commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement).

The FCC further notes that, where there is a conflict between the FCC's and the FTC's rules, the stricter ones apply. The FCC requests comments on the application of that principle in the health care context, since one could argue that the FCC's rule, which contains no exception for HIPAA-covered calls, is the stricter rule that should apply. Thus, the FCC makes the following request for comments. "Accordingly, we seek comment on the practical impact of this disparity on regulated entities currently and if the Commission does not adopt a similar exemption in the future." Needless to say, this could be a troubling issue, especially with the plaintiff's bar looking for cases in this area. Health care companies that use or might use prerecorded messages that contain any marketing message should probably consider participating in the rulemaking proceeding.

Also, implementation issues are important and, thus, are appropriate areas for business advocacy. While the FCC proposes to allow sellers three months to comply with the automated opt-out mandate and 12 months to implement the express written agreement requirement, consumer advocates and state consumer protection agencies may well argue for shorter periods, especially as to the latter obligation. They could credibly argue that most businesses have already changed their practices to comply with the FTC's rule, such that compliance could be presumed and no additional time for implementation of the written permission rule would be needed. The FCC makes such assumption itself in footnote 53.

Further, consumer entities could argue that most companies, both big and small, not subject to the FTC's rules (e.g., banks or common carriers), have operations or affiliates that operate outside the exemption (a bank selling non-bank financial products or a telephone company selling Internet access), such that these businesses should already be in compliance or could be in much less than a year. Moreover, given current political winds, this type of argument might well prevail and could, of course, drag along other businesses that might not be so situated. Sellers, therefore, should not presume they would have a full 12 months to solicit and obtain permission from existing customers for prerecorded messages. Affirmative advocacy is warranted.

Moreover, businesses may also wish to consider weighing in on other key questions asked by the FCC. One such question is: In the event the FCC adopts further restrictions on prerecorded calls, should it also permit sellers and telemarketers to continue placing prerecorded telemarketing calls to existing customers during the implementation period for the express written consent requirement? Consumers and their advocates can be expected to argue "no," as robocalls are generally disliked by consumers.

Finally, there is some risk for businesses or business operations that are subject to the FTC's rule and that have already obtained consumer consent for prerecorded messages. Since the FTC's rules cover only interstate calls, plaintiffs' lawyers are likely to take the position that any such consumer consent extends only to interstate prerecorded messages. Under this interpretation of the rules, such businesses would be required to re-solicit customers' permission to send prerecorded messages to customers located in the same state. If the FCC were to address this issue in its final ruling, there is a strong argument that such ruling bars trial courts from even considering the issue. However, in the event that the issue is not raised and, thus, not addressed by the FCC, trial courts are likely not barred from requiring new consent to be obtained. Again, affirmative advocacy may be warranted.

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