CHAPMAN AND CUTLER LLP

To the Point!

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Using Customer Cell Phone Numbers

Over 80% of consumers use cell phones and a large percentage of households are "wireless only households." This creates unique compliance issues for companies when they communicate with their customers via phone. The federal Telephone Consumer Protection Act ("TCPA") prohibits companies including financial institutions (subject to certain exceptions) from (i) contacting a customer using a cell phone number; and (ii) using automatic dialing devices including predictive dialers to contact a customer using a cell phone number or at a residential number without the customer's prior express consent. Litigation under the TCPA is increasing and a plaintiff can receive statutory penalties of $500 per call or actual damages, whichever is greater, and three times the actual monetary loss or statutory damages for a willful or knowing violation, with no cap. A number of class action lawsuits have been filed asserting that text messages confirming a consumer's message to "unsubscribe" from receiving additional text messages violate the TCPA. A federal district court in California recently dismissed one such class action. While potentially helpful, this decision does not alleviate the need to obtain authorization to contact consumers using a cell phone number. In addition state laws further restrict telephone calls to customers. Obtaining appropriate and clear consumer consent to use cell phone numbers is essential to continued business operations.

Collection

Several significant developments regarding collection of consumer debts have occurred recently and should be evaluated in managing your company's collection activities. The CFPB has included debt collection activities on its list of priorities and recently published a notice indicating its plans to supervise certain larger participants conducting debt collection activities. Claims under the federal Fair Debt Collection Act alleging false representation of the character of a debt and deceptive means to collect a debt, including forged, fraudulent or inaccurate documents used in collection litigation, are being actively pursued by state Attorneys General and consumers. State debt collection laws are not preempted by the National Bank Act and may contain substantive limitations and require licensing for non-bank entities. Banks should ensure that their collection procedures are compliant with applicable state law requirements and to the extent they engage service providers to perform debt collection activities that the contracts with those third parties adequately protect the bank.

Payments Using Mobile Devices

Mobile payment systems that allow consumers to purchase products and services or transfer money to other consumers using a mobile device are increasing as is the call to examine whether further consumer protection laws and regulations are necessary. The substantive legal requirements and protections afforded consumers regarding dispute resolution currently varies based on the entity providing the service and the funding source used by the consumer--credit card, debit card, bank account, stored value card or wireless carrier account. Other legal requirements to consider are those licensing requirements, disclosure, privacy and data security obligations that will apply. Client agreements should be examined to make certain they clearly address the service terms and applicable disclosures and provide protection to the financial institution within the existing regulatory requirements.

Arbitration

Businesses generally prefer arbitration because they can prohibit class actions, settlements are limited and professional arbitrators rather than juries decide disputes. The Supreme Court has ruled that businesses can include arbitration clauses in their contracts with consumers. However, this decision has not resolved the issue of whether arbitration clauses will ultimately be permitted in financial service contracts with consumers, or if so, in what form. In the Dodd-Frank Act, Congress authorized the "CFPB" to study arbitration clauses and, if the CFPB determines it is in the "public interest and for the protection of consumers," the CFPB can limit or prohibit arbitration clauses in contracts for financial products or services. The CFPB issued a notice and request for information on the use of arbitration clauses which closed on at the end of June 2012. The CFPB will study the comments received and ultimately follow with rule making on the issue. While this process continues businesses can enhance the enforceability of their arbitration clauses by drafting them to avoid claims of unconscionability and lack of mutuality based on existing case law.

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To the Point! is a summary of items of interest and current issues for financial institutions with primary focus on regulatory, consumer, and corporate issues. Chapman and Cutler LLP maintains a dedicated practice group with expertise to counsel on these issues and other enterprise risk management matters facing financial institutions. If you would like to discuss any of the items contained in these briefings or other legal, regulatory, or compliance issues facing your institution, please contact one of the partners in our Bank Regulatory Group:

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