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FTC Requires Companies to Develop Privacy Policies and Procedures: FACTA Amended

By Michele Shuster

The Federal Trade Commission announced last week that it has sent for publication in the Federal Register the final rules on identity theft "red flags" and address discrepancies. The final rules implement sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003. The new rules require most companies to develop and implement customer privacy protection policies and procedures.

Financial institutions and creditors that hold any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, must develop and implement an Identity Theft Prevention Program (Program) designed to combat identity theft in connection with new and existing accounts. The Program must:

1. Identify relevant patterns, practices, and specific forms of activity that are "red flags" signaling possible identity theft and incorporate those red flags into the Program;
2. Detect red flags that have been incorporated into the Program;
3. Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
4. Ensure the Program is updated periodically to reflect changes in risks from identity theft.

Guidelines have been issued to assist companies in developing and implementing a Program, including a supplement that provides examples of red flags. The FTC guidance document and supplement can be found at: http://www.ftc.gov/os/2007/10/r611019redflagsfrn.pdf

Lastly, the final rules require users of consumer reports to develop reasonable policies and procedures to apply when they receive a notice of address discrepancy from a consumer reporting agency.

Mortgage Brokers and Prepayment Penalties: If consumers prepay now, you may pay later

By Shaun K. Petersen

As mortgage brokers implement the provisions of Ohio's Homebuyers' Protection Act, some wonder whether the prepayment penalty provisions apply to loans arranged by brokers with nationally chartered or state chartered banks. Those provisions prohibit mortgage brokers, loan officers, and nonbank mortgage lenders from:

1) charging prepayment penalties after 5 years from the date the loan was executed;
2) charging a prepayment penalty of more than 1% of the original principal amount of the loan;
3) assessing prepayment penalties on first mortgage loans that are less than $75,000;
4) attempting to enforce a prepayment penalty provision on mortgage loans that are less than $75,000.

Even though these prepayment provisions do not apply to loans originated by national or state chartered banks, mortgage brokers may be liable for consumer damages or civil penalties if they arrange for loans between their customers and banks if those loans contain prepayment penalties provisions in violation of these prohibitions.

Through the Consumer Sales Practices Act (CSPA), the Ohio Attorney General has the authority to seek a declaration from a court that acts or practices are unfair or deceptive. Previous Attorneys General have utilized the CSPA as a mechanism to seek a declaration that a violation of another law also constitutes an unfair or deceptive practice in violation of the CSPA. Private consumers have also utilized the CSPA in such a manner. Once the Attorney General or a private consumer has obtained a declaration that an act or practice violates the CSPA and the Attorney General makes that declaration available, future violators are subject to civil penalties in actions brought by the Attorney General and treble damages in actions brought by consumers.

Because mortgage brokers are now subject to the CSPA, the Attorney General or a private consumer may seek a declaration that a mortgage broker who arranges for a mortgage loan that includes prepayment penalties provisions in violation of the prohibitions listed above, regardless of whether the lender is a bank or not, violates the CSPA. The safest and surest way to avoid this potential liability is to ensure all prepayment penalties comply with these provisions.

Federal and State Consent to Record Laws

By Brian Cook

Does your business record telephone conversations with customers or potential customers? If so, do you comply with state–specific consent to record laws? With the increased focus on privacy protection in recent years, it is important to adopt business practices designed to ensure compliance with both the federal and state recording laws. For example, when an outbound telephone call is made, businesses must simultaneously follow federal law, laws of the state where the call is initiated, and laws of the state where the call is received.

With respect to recording phone conversations, thirty-eight states and the federal government have a one-party consent rule, meaning that only one party is required to have knowledge that a call is being intercepted or recorded. In those thirty-eight states, it is sufficient to have the agents making outbound calls consent to the interception or recording.

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The remaining twelve states have all-party consent requirements, with several distinctions between them. It is important to understand how each state defines the term "consent." Some states require the recipient to provide verbal consent to intercept or record. Other states maintain that when a recipient continues speaking after receiving notice that a call is being intercepted or recorded, that constitutes implied consent and meets the consent requirement. Another thing to keep in mind is that two of the all-party consent states, Illinois and Pennsylvania, provide specific exemptions allowing the interception and recording of calls for business quality control purposes with the consent of only one party.

By understanding the laws of each state, businesses can successfully implement procedures designed to minimize potential liability for breach of privacy.

Maine Eliminates Telemarketing Established Business Relationship Exemption ?

By Michele Shuster

With the recent passage of Senate Bill 655 (2007), the State of Maine has significantly changed its Do-Not-Call (DNC) laws. Notable changes include the elimination of the established business relationship (EBR) exemption, and the apparent adoption of the Federal Trade Commission's (FTC) National DNC Registry as the official Maine DNC list. According to the Maine Attorney General's office, the implementation date of this law is September 20, 2007.

Currently, there are only two states, Indiana and Wisconsin, which do not have an EBR exemption to state DNC laws. With the passage of Senate Bill 655, it appears Maine will become the third state without a standard EBR exemption. Specifically, the language of the bill limits any EBR exemption to calls "made primarily in connection with an existing debt or contract for which payment or performances has not been completed at the time of the call." This exemption is significantly narrower than a standard EBR exemption, which permits calls to consumers for other purposes as long as the caller has conducted a business transaction with that consumer in the past 18 months.

Senate Bill 655 also suggests that Maine may be adopting the FTC's National Registry as its own state DNC list. The use of the word "may" in the language of the bill, however, does create some confusion as to whether Maine is officially switching its state list from the Direct Marketing Association's list (currently being used) to the FTC's National Registry.

State DNC updates

By Michele Shuster

Oregon has designated the FTC's National Registry as Oregon's DNC list. In addition, Oregon has enacted new rules for use of ADADs (OR S.B. 863) used within Oregon to call wireless and residential numbers. The new rules allow calls from 9am to 9pm, with a 10 second "disconnect" rule; and the use of ADADs to dial randomly and/or sequentially, with exception, including to DNC list numbers; and prohibit the making of certain misrepresentations when ADADs are used.

South Dakota has changed its definition of established business relationships to the one used by FTC/FCC 18 month (transaction) and 3 month (inquiry) EBR rules; SB23 drops the "face to face" exemption for DNC purposes, as well as registration.

Kentucky will use the federal DNC list; merchants are no longer required to register, though telemarketing companies are.

New York's DNC laws now comply with the FTC's "31-day" rule for national DNC registry downloads. Texas passed House Bill 143, which applies the Texas no call list to "other transmission of a text or graphic message or of an image, to a mobile telephone number".

Stalling of Canada's National Do Not Call List

By Brian Cook

With Parliament's passage of legislation in November 2005, Canada was poised to establish a national Do Not Call List to reduce the volume of unwanted telemarketing calls Canadians receive at home. However, efforts to set up the registry have recently hit a brick wall because of controversies among government officials on how to pay for it.

Canada's Do Not Call bill was first introduced in Parliament on December 13, 2004 and passed in the House of Commons on November 25, 2005. The law gives the Canadian Radio-television and Telecommunications Commission (CRTC) the authority to establish a national Do Not Call List and the power to levy substantial penalties against telemarketers who do not follow the rules. The law is modeled after the United States Do Not Call law. The legislation exempts charities, political parties, polling companies and companies with existing business relationships (within an 18-month period). The law also exempts companies who have received a business inquiry within a six-month period (as opposed to 90 days in the United States). A penalty of up to $15,000 per offending call would be imposed for telemarketers who violate the law.

The law also gives the CRTC the option to contract with a third party to operate and maintain the list. Disagreements among stakeholders and government officials over the third-party contracting provision, and the status and availability of government funding, have caused significant delays. A private-sector committee, made up of members representing consumers and the marketing and teleservices professions, were given a mandate by the CRTC to identify a third party to operate the program without government funding. Their efforts failed and the group disbanded last summer without issuing a report for recommendation.

The CRTC now plans to issue a Request for Proposal (RFP) to identify and secure a private vendor to operate the program through fees charged to marketing companies and businesses—again with no government funding. Projections of an implementation date range from July 2008 to sometime in 2010. Some insiders are skeptical that a third party vendor will emerge unless the Canadian government changes its position and provokes some level of funding.

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