Advertising and Marketing: Trick or treat

Leah M. Hamilton, Chief Compliance Officer
What you will learn

- Advertising and Marketing
  - Regulations
  - New interpretations
- Examiner efforts
What is an Advertisement?

A notice designed to attract public attention or patronage.
# Advertising Rules, Regulations and Guidance

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<td>• Regulatory agency bulletins, FILs, etc.</td>
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Advertisement Possibilities

- Newsprint
- Radio
- Social media
- Periodic statements
- Welcome to your New Home letters
- Thank you letters
- Rate sheets
- Institution newsletters
- Voice response systems
- Telemarketing
- Rewards programs
- Refer a friend programs
Emerging risks: Deposits

- The minimum balance required to obtain the advertised APY
  - Although you pay interest on any balance, what is the minimum amount necessary to earn the advertised interest rate

- Deceptive marketing

- Failure to disclose fees
  - Check cashing

- Promised benefits (add-on products)
  - Insurance
  - Identity theft protection

- Rewards programs
Emerging Risks: Lending

- Deceptive marketing
- Failure to disclose fees
  - Credit cards
  - Misrepresentation of finance charges and APR
    - Finance charges tied to auto sales not disclosed in APR
- Promised benefits (add on products)
  - Debt protection
- Rewards programs
Emerging risks: Rewards Programs

- Programs that require consumers to take specific steps to earn a reward, if the steps are unreasonably burdensome or if few consumers actually complete the steps
- Redemption requirements that make it unreasonably difficult for consumers to redeem their rewards, such as reward minimums, blackout periods, and redemption fees
- Unilateral changes to the rewards program after enrollment that are detrimental to consumers
- Failure to adequately disclose all features of a rewards program, including when rewards may be forfeited or reinstated from other sources
- Failure to keep adequate records regarding rewards earned and redeemed by consumers
Rewards Programs

- Effectively manage the UDAAP risk associated with rewards programs
  - Carefully evaluate all rewards program materials and determine whether advertisements and disclosures are clear, accurate and create reasonably attainable expectations on the part of the consumer
  - Thoroughly review and monitor any rewards programs offered to customers by third party vendors, including any “add on” rewards programs offered in connection with credit or prepaid card programs, as these programs often draw regulatory scrutiny
  - Actual practices of the institution or its vendor in administering the rewards program must be consistent with the disclosures provided to consumers
  - Closely monitor all rewards-related complaints to assess whether any aspect of the program is consistently problematic for consumers
The Bancorp Bank, Wilmington, DE

- Issued prepaid cards on behalf of numerous non-bank entities
- FDIC determined bank violated FTC Section 5 in various ways with respect to these programs, such as:
  - failing to provide promised protections to consumers in the resolution of account errors;
  - failing to provide promised benefits for a debit card rewards program that the bank offered with a third-party services provider; and
  - charging deceptive debit decline fees on a general purpose reloadable prepaid card
Comenity Bank

- Deceptive practices related to the marketing and servicing of credit card "add-on products" in violation of FTC Section 5
- Collection activities that included calls to work numbers, the disclosure of consumer debts to non-liable third parties and calls to consumers after being notified they were represented by legal counsel
T3 Leads

- Failed to vet or monitor its lead generators and lead purchasers, exposing consumers to the risk of having their information purchased by actors who would use it for illegal purposes
- Allowed its lead generators to attract consumers with misleading statements
- Took unreasonable advantage of consumers’ lack of understanding of the material risks, costs, or conditions of the loan products for which they applied
Want to see the consent orders issued for UDAP and UDAAP located in one place?

http://www.paymentlawadvisor.com/udaap/
TCPA prohibits certain fax and automated dialing practices and authorizes recovery of up to $1,500 per call, text message, or fax sent in willful violation of TCPA restrictions

- Has led to a tidal wave of class-action litigation

FCC’s Declaratory Ruling and Order, issued July 10, 2015
Compliance Services

FCC’s Declaratory Ruling and Order, issued July 10, 2015

- Confirms that, for certain kinds of calls or text messages that are subject to the FCC’s “prior express written consent” rule that became effective in October 2013, companies cannot rely on consents given before October 2013 that do not meet the “prior express written consent” standard, although—for certain companies—the “prior express written consent” rule is waived until October 9, 2015;

- Clarifies that consumers may revoke consent to receive regulated calls or text messages through any reasonable means, and that companies cannot limit those means;

- Imposes liability for autodialed calls to reassigned or wrong numbers;

- Requires consent for Internet-to-phone text messages;

- Clarifies when providers of calling or texting platforms might be liable for unsolicited calls and messages sent by users;

- Exempts certain free, one-time text messages sent in response to a request for information from liability;

- Exempts from liability certain free, time sensitive financial- and healthcare related messages;

- Permits carriers and Voice over Internet Protocol (VOIP) providers to adopt call blocking technology
TCPA Consent issues

- $75.5 million settlement
  - Capital One and 3 collection agencies
  - Consolidated class action lawsuit alleging companies used an automated dialer to call customers’ cell phones without consent
  - Does not constitute full measure of statutory damages potentially available to the class
  - Capital One litigation was filed prior to adoption of October 2013 TCPA
    - Now in effect, for profit-businesses must acquire “prior express written consent” before making any type of telemarketing call or sending any text message using auto-dialers or prerecorded voices to cell phones

- TCPA provides redress for those who receive unsolicited telephone calls, texts or faxes
  - Statutory penalties of $500 per violation and $1,500 for willful violations
Chase Bank USA NA and JPMorgan Chase Bank NA Settled class action lawsuit alleging violations of TCPA

- Automated telephone calls and sending text messages to cell phones in connection with Chase credit card and bank accounts without the prior express consent of the people contacted
- Denies any wrongdoing but agreed to settle to avoid expense and distraction of litigation
- Settlement: approximately $50 million
Recent consent issues

**PayPal**
- Consent to receive automated marketing calls was a condition of purchase and company must give consumers notice of their right to refuse such consent
- Written agreement must identify the specific telephone number(s) for which consent is being given
- Blanket statement on numbers “otherwise obtained” is not specific enough

**Lyft**
- Unlawfully conditioned consumers’ ability to use Lyft’s services on their agreement to receive marketing text messages
- Did not provide clear unsubscribe options for consumers, and as a result, failed to provide clear and conspicuous disclosures

**A national bank was cited for similar reasons**
Compliance notes

- Must have consent when dialing mobile phones using prerecorded messages or an auto-dialer
  - Only call mobile numbers for which you have appropriate consent
- Conduct due diligence when using an outsourced contact center vendor
  - If it sounds too good to be true … “100% compliant”
- Consult with a technical expert to evaluate your current configuration
  - Create separate systems for dialing landline vs. mobile phones
Is Prior Express Written Consent Required?

- A Step-by-Step Analysis

**Residential**

- Are calls initiated using a prerecorded message?
  - Yes
  - TCPA consent rules do not apply.
  - PEWC required unless an exemption applies.
  - Yes

- No
  - TCPA consent rules do not apply.

**Mobile**

- Are calls made using a prerecorded message OR an autodialer?
  - Yes
  - TCPA consent rules do not apply.
  - PEWC not required (but PEC required for mobile calls.)

- No
  - TCPA consent rules do not apply.

Avoiding TCPA Pitfalls: Essential Guidance for Retailers | Manatt, Phelps & Phillips, LLP
Questions?