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TELEPHONE CONSUMER PROTECTION ACT: Underestimating TCPA Compliance

Saltmarsh Compliance Funnel

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- Provide a brief overview of the TCPA and the FCC's July 2015 Order
- Review conduct that can expose Banks to TCPA liability
- Share examples of TCPA class action lawsuits against Banks
- Discuss recommendations for Banks to mitigate TCPA risk

- Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 to address aggressive telemarketing practices and invasion of consumer privacy
- The TCPA empowers consumers to decide which calls they receive, with heightened protection for wireless numbers
- Consumers may enforce TCPA violations through civil lawsuits
- The Federal Communications Commission (FCC) implements, interprets and may also enforce the TCPA

- The TCPA imposes restrictions on telemarketing and informational calls and texts to wireless and residential numbers
 - Prior consumer consent generally required
 - Opt-out mechanisms may be required
 - Consumers' right to revoke consent cannot be restricted
- Telemarketing calls are more restricted and always require consent
 - Prior express **written** consent required for telemarketing calls or texts to both wireless and residential numbers
- Non-Telemarketing (e.g., informational) calls are less restricted
 - **Oral or written consent** required for non-telemarketing calls or texts to wireless numbers
 - No consent required for informational calls to residential numbers

- The FCC's July 2015 Order broadly interpreted the TCPA
 - Expanded scope through broader definitions of technical terms
 - Allowed consumers to liberally revoke consent by any means (even orally)

 - The American Bankers Association successfully petitioned the FCC to exempt Bank-customer communications for certain time-sensitive financial messages:
 - Suspicious activity alerts (fraud or identity theft)
 - Data security breach notifications
 - Steps consumers can take to prevent or remedy data breaches
 - Money transfers
- *Numerous conditions apply to the above exemptions*

- Telemarketing calling campaigns or programs
- Informational calls (collections and servicing)
- Text messaging: phone-to-phone and internet-to-phone
- Text messaging apps
- Faxes
- Calls using an automatic telephone dialing system or a prerecorded or artificial voice caller

Is the Bank, its employees or vendors doing any of the above?

- The TCPA allows consumers to bring civil lawsuits for violations
 - Minimum statutory damages of \$500 per call
 - Maximum statutory damages of \$1,500 per call for knowing or willful violations
 - Class actions are allowed, with no cap on aggregate damages
- Lawsuits are increasing and targeting different industries, including Banks
- The TCPA is also enforced by the FCC (different penalties) and State Attorney Generals

- Examples:
 - February 2015: Capital One Bank settled TCPA class action for \$75 million (case filed in 2012)
 - February 2015: HSBC Bank settled TCPA class action for almost \$40 million (case filed in 2014)
 - March 2016: Chase Bank settled TCPA class action for \$34 million (case filed in 2012)

- Inform employees and vendors of the TCPA's applicability
 - The Bank is liable for its employees' sales and marketing activities
- Marketing vendor contracts should make vendors responsible for violations and require that the vendor indemnify the Bank and have insurance
- Consider obtaining insurance covering TCPA violations
- Implement policies and procedures governing employees' conduct (e.g., prohibiting mass texts to customers by individual employee)
- Bank-customer documents should maximize protections and possibly provide for consent

- The TCPA defines “automatic telephone dialing system” (“autodialer”) 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”
- FCC’s July 2015 Order interpreted the definition of autodialer broadly
- Do not rely on vendors’ statements that they do not use an “autodialer”

Mitigate TCPA Risk (Even if you are not “telemarketing”)

- Don't ignore the TCPA simply because the Bank is “not telemarketing”
- Understand whether the Bank's employees and vendors engage in conduct covered by the TCPA
- Maximize vendor liability and indemnity for TCPA violations
- Train employees in the TCPA so that they know what they can and can't do
- Implement policies for employees and vendors
- Ensure Bank-customer documents maximize TCPA protections and do not violate the TCPA
- Consult TCPA professionals before a problem arises

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A partner in ARHMF's litigation department, Ms. Mora represents domestic and foreign businesses in commercial litigation cases in federal and state court, before various arbitration panels, and in federal and state appellate courts. In court, Ms. Mora has represented defendants and plaintiffs in civil disputes involving contracts, banking regulations, business torts, corporate governance, fraud, foreign judgments, injunctions, and appeals. She has represented multiple U.S. companies in defending federal class action lawsuits alleging violations of the Telephone Consumer Protection Act (TCPA). Ms. Mora also advises clients on risk assessment, compliance, government investigations, complex discovery and internal investigations, as well as matters involving the U.S. Attorney's Office, FBI, OCC, FDIC, the State of Florida, grand jury proceedings, civil discovery, and e-discovery.

Ms. Mora joined ARHMF when the firm was founded after having worked several years with ARHMF's founding partners at a large, multinational law firm. Ms. Mora served as a judicial law clerk for the Honorable R. Fred Lewis of the Florida Supreme Court. She also serves as Vice Chair on one of the Florida Bar's Eleventh Circuit Grievance Committees. Ms. Mora is certified by The Florida Bar as an arbitrator for The Florida Bar Grievance Mediation and Fee Arbitration Program.

Nothing in this presentation is intended to provide legal advice or legal conclusions about how the FCC's rules and decisions should be interpreted or applied to specific entities or circumstances.



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