

2021 TCFA Membership Meeting

Legal Update

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Today's Topics

- TCPA Update
 - US Supreme Court decision and its impact
- CFPB Update
 - Delayed implementation of new Debt Collection Rule (Reg F)
 - New FFIEC Handbook re: AIO
 - Repeal of Abusive Acts Policy Statement
- Federal True Lender Rule
 - Overview
 - Repealed on July 2, 2021
- New Texas Legislation
 - SB 968: Vaccine Passports
 - HB 3510: Remote Work for OCCC Licensees

TCPA – Supreme Court Decision

Facebook, Inc. v. Duguid (April 1, 2021)

- The Supreme Court’s decision narrows definition of “Automatic Telephone Dialing System” (ATDS).
- ATDS clarified to mean dialing equipment that uses a random or sequential number generator.
- Equipment that makes calls to “targeted . . . numbers linked to specific accounts” are excluded from TCPA’s definition of ATDS.
- Resolves long-standing circuit split, and narrows the types of cases that a plaintiff may bring under TCPA.

TCPA – Supreme Court Decision

Facebook, Inc. v. Duguid (April 1, 2021)

- Viewed as a pro-business decision. The Natn’l Assc. of Federally-Insured Credit Unions said the decision “to narrowly interpret autodialers is a win for the credit union industry.”
- Data from April 2021 shows that the number of TCPA lawsuits down 79% as compared to April 2020 and 30% as compared to March 2021.
- 2021 TCPA filings down 57% year to date.
- The TCPA is severely narrowed, but not completely hollow. USSC left open the possibility of liability under “Do Not Call List” violations, and prerecorded messages and artificial voice calls to residential and cell phone lines

Potential Congressional Action re: TCPA

Bipartisan Group of Lawmakers Consider New Legislation

- In the wake of *Duguid*, a bipartisan group of lawmakers appear to be pushing for new legislation that broadens liability for unwanted consumer communications.
- Senator Ed Markey stated: “By narrowing the scope of the TCPA, the court is allowing companies the ability to assault the public with a non-stop wave of unwanted calls and texts.”

CFPB

Delayed Implementation of New Debt Collection Rule

- In November/December 2020, the CFPB published final rules to amend the Debt Collection Rule (Reg F).
 - They were set to take effect November 30, 2021.
- In April 2021, the CFPB determined that it would delay implementation of the revised Debt Collection Rule for another 60 days, or until January 30, 2022.

CFPB Revised Debt Collection Rule

- Call Frequency Limits
 - Presumptions of compliance/non-compliance
 - 7 calls in 7 consecutive days or within 7 consecutive days after having telephone conversation
- If Communicating electronically, must provide consumers with reasonable and simple means of opting-out
- Prohibitions apply to emails and text messages

CFPB Revised Debt Collection Rule

- Technically should not apply to first party/creditor debt collection activity
 - FDCPA does not apply to creditors; only third party collection
 - However, concern it could be applied to creditors through prohibition against UDAAPs under Dodd-Frank Act
- TCFA and NILA filed comments last year, urging CFPB to make clear rule does not apply to creditors/first party collection in any manner

FFIEC Issues New Guidance re: Architecture, Infrastructure, and Operations

- FFIEC – Federal Financial Institutions Examination Council
- The Architecture, Infrastructure, and Operations (AIO) Handbook is prepared for use by financial regulators
- Updates a 2004 Handbook

FFEIC Issues New Guidance re: Architecture, Infrastructure, and Operations

- Handbook discusses enterprise-wide, process-oriented approaches that relate to the design of technology within the overall business structure, implementation of IT infrastructure components and delivery of services and value for customers
- It does not impose requirements; rather, it describes principles and practices that examiners, including the CFPB, review to assess an entity's AIO functions

CFPB Repeals Abusive Acts Policy Statement

- January 2020: CFPB issued policy statement re: its approach to “abusive” acts or practices
 - There was little guidance for regulated entities on the abusive prong of UDAAP prohibition
 - Outlined 3 guideposts
- March 11, 2021: CFPB rescinded policy statement
 - May signal a return by CFPB to its prior use of the “abusive” prong of UDAAP in enforcement actions
 - Incentive to review and revisit policies, procedures and compliance controls

Federal True Lender Rule

- The Office of the Comptroller of the Currency (OCC) issued the “True Lender Rule” in October 2020
- The True Lender Rule governed partnerships between banks and third-party lenders and allowed consumers to take loans with interest rates above the maximum rate set in that borrower’s state
- The True Lender Rule facilitated “rent a charter” lending practices—arrangements in which a bank received a fee to “rent” its charter and unique legal status to a third party lender to avoid certain state and local laws

Congress Repeals True Lender Rule

- In June 2021, the US House of Representatives passed a bill to repeal the True Lender Rule
 - President Biden signed the bill on July 2, 2021
- The True Lender Rule is now void (both retroactively and prospectively), and may not be revived absent explicit Congressional authorization
- Current federal jurisprudence is mixed on the question of whether loans are subject to other state usury laws if they were initially issued by a bank
 - In other words, banks can follow the interest rate limits of their home jurisdictions even when lending across state lines, but other financial institutions likely cannot

New Texas Legislation: SB 968

- Signed into law on 6/16/21 and effective immediately
- SB 968 contains a vaccine passport prohibition
- Businesses are prevented from requiring proof of COVID-19 vaccination from customers
- The bill does not prohibit employers from asking about or requiring vaccination for employees
- EEOC guidance regarding employees' vaccinated status—you can ask or require vaccination, but be careful about disabilities and religion

New Texas Legislation: HB 3510

- Signed into law on 6/14/21 and takes effect 9/1/21
- Permits an employee of an OCCC licensee to work from home if the license holder takes certain measures, most of which related to protecting consumer data

New Texas Legislation: HB 3510

- An employee of an OCCC licensee is permitted to work from home if the license holder:
 - (1) ensures that in-person consumer interactions are conducted at a licensed location;
 - (2) maintains appropriate safeguards for license holder and consumer data, information, and records;
 - (3) employs appropriate risk-based monitoring and oversight processes for work performed at remote locations;
 - (4) ensures that consumer information is not maintained at a remote location;
 - (5) ensures that remote working procedures are available to the OCCC upon request;
 - (6) provides appropriate employee training; and
 - (7) adopts, maintains and follows written procedures to ensure compliance with the requirements