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MEMORANDUM

To: File
From: Michael Goodman*
Date: March 13, 2019 – Updated January 27, 2020
Subject: Shadow Pixl Compliance Review Memo

I reviewed the Shadow Pixl business model for compliance with the Telephone Consumer Protection Act (“TCPA”), the Telemarketing Sales Rule (“TSR”), and the CAN-SPAM Act. This analysis does not address state laws or other federal standards. My understanding of Shadow Pixl comes from materials provided for my review and several telephone conversations with Shadow Pixl’s developer, in 2019. The legal analysis in this memo applies only to Shadow Pixl, as described herein.

Short Answer:

With respect to the CAN-SPAM Act, which regulates commercial email messages, Shadow Pixl complies with CAN-SPAM standards, based on sample email messages provided for my review and Shadow Pixl’s explanation of the Shadow emails’ “from” lines, subject lines, opt-out mechanisms, and presentation of required disclosures. Shadow Pixl has implemented a policy of scrubbing commercial messages sent on a client’s behalf against that client’s company-specific unsubscribe list, as CAN-SPAM requires.

With respect to the TCPA and the TSR, which regulate telemarketing calls, Shadow Pixl has implemented a policy of scrubbing its calling lists and calling lists provided to its clients from its database of consumer contact information against the client’s internal company-specific do-not-call list. All of Shadow Pixl’s telemarketing calls on clients’ behalf are manually dialed by live operators. Shadow Pixl does not use equipment that satisfies the TCPA’s “autodialer” standard or prerecorded messages. Shadow Pixl has implemented a policy imposing the same equipment restrictions on its clients, who are also limited to manual dialing by live operators. Neither Shadow Pixl nor its clients are permitted to use any ringless voicemail system, robocalling, or text messaging.

Shadow Pixl has implemented a policy for ensuring that Shadow complies with TCPA and TSR standards regulating compliance with the national do-not-call list. Shadow Pixl’s administrator has registered with the national do-not-call list to receive its own Subscription Account Number (“SAN”). Shadow Pixl has implemented a policy requiring each of its clients to separately register for a SAN and pay the annual fee required for access to national list data based on the area codes requested by each client. Shadow Pixl’s policy also provides for Shadow Pixl to identify each of its clients to the national list administrator and submit the compliance certification required by the TSR.

Analysis:

1. Overview of Facts

This memo presents a compliance analysis of Shadow Pixl under federal telemarketing and email marketing standards. Shadow Pixl offers its clients enhanced options for delivering marketing messages to consumer prospects. Shadow Pixl offers to deliver these enhanced options by appending contact information to clients' identified website visitor prospect lists. Shadow Pixl initially contacts clients' prospects by email. These email contacts are intended to elicit an inquiry from the prospect expressing interest in the client's products and services. Sample Shadow emails encourage the recipient to "Reply with the best number to reach you," and they explain that the client will respond with a contact to, for example, discuss a trade-in for the prospect's current vehicle and schedule a test drive for a new vehicle.

Whether or not a prospect responds to Shadow Pixl's emails, Shadow Pixl may call the prospect on the client's behalf and the client may call the prospect directly. Shadow Pixl scrubs its database of consumer contact information against the national do-not-call list and does not append any phone numbers on the then-current national list to information used by Shadow Pixl to place calls or provided to clients for their own calling campaigns. Shadow Pixl has implemented a policy of scrubbing each client's company-specific do-not-call list against its database of consumer contact information for that client. This means that Shadow Pixl does not call any prospect phone numbers on the client's internal do-not-call list and clients do not receive any prospect phone numbers on their own company-specific do-not-call list.

All of Shadow Pixl's calls on its clients' behalf are manually dialed by live agents. Shadow Pixl does not use technology that could satisfy the TCPA's "autodialer" definition.¹ In addition, Shadow Pixl does not use prerecorded messages or ringless voicemail technology to contact clients' prospects. Shadow Pixl has implemented a policy imposing the same restrictions on clients, who are also limited to manual dialing by live agents and prohibited from using ringless voicemail services. (Shadow Pixl already prohibits clients from engaging in robocalling or delivering text messages to prospects.) This means that the TCPA's "prior express written consent" standard for calls that use an autodialer or a prerecorded message would not apply to Shadow Pixl's calls on behalf of its clients or clients' own calls to prospects who have been included in Shadow.²

2. Forms of Consumer Contact

a. Shadow Pixl Emails

In connection with this compliance review, Shadow Pixl provided six sample email messages that it sends to consumer leads on behalf of its clients. These emails identify the client in the "from" line. The subject lines include the client's name and other content. The body of the messages includes an unsubscribe mechanism and the client's address. The messages explain why the consumer is receiving the message and include a "call to action" with the client's phone number or an invitation to reply to the email with contact information if the consumer is interested in doing business with the client.

¹ 47 C.F.R. § 64.1200(f)(2): Equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

² See 47 C.F.R. §§ 64.1200(a)(2)-(3); (f)(8).

At the federal level, these emails are commercial messages regulated by the CAN-SPAM Act. This Act does not require the consumer's advance permission or consent to send commercial messages. CAN-SPAM prohibits false or misleading transmission information, including in the message's "from" line. A "from" line that accurately identifies any person who initiated the message complies with this provision.³ All of Shadow Pixl's sample emails comply because they identify the client.

CAN-SPAM also prohibits deceptive subject lines. A subject line is deceptive if the initiator has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that the subject line is likely to mislead a reasonable consumer about a material fact regarding the email.⁴ Shadow Pixl has implemented a policy to ensure that all commercial emails that it sends on behalf of clients use subject lines that are consistent with the content of the message and that indicate the message's purpose to the recipient. The following subject lines from the sample Shadow messages provided for review would comply with this CAN-SPAM standard: "May we purchase your vehicle?"; "We now deliver vehicles for test drive to your home or work."; and "Your Turf, Your Schedule, Your Call. Have Our staff deliver a test drive to your home or work." The subject lines in the sample messages also include the client's name. That is helpful but not required by CAN-SPAM.

CAN-SPAM requires a clear and conspicuous opt-out mechanism in every commercial message. The opt-out mechanism must be internet-based, such as a reply email or a link to a website.⁵ Shadow Pixl has implemented a policy of providing internet-based opt-out mechanisms exclusively in every commercial message and processing opt-out requests within ten minutes, much faster than the CAN-SPAM standard of ten business days.⁶

Shadow Pixl has implemented a policy of scrubbing its commercial email delivery lists against the client's internal unsubscribe list. CAN-SPAM prohibits sending commercial messages to consumers on behalf of a client who has previously received an opt-out request from that consumer, and Shadow Pixl's scrubbing policy is consistent with this statutory standard.

b. Shadow Pixl Outbound Calls

Either the client or Shadow Pixl, on the client's behalf, may call consumer prospects, whether or not the prospect responds to the emails that Shadow Pixl sends on the client's behalf. When Shadow Pixl places calls on behalf of the client, all of Shadow Pixl's calls are manually dialed by a live representative. Shadow Pixl does not place calls using technology that satisfies the TCPA's "autodialer" definition and does not use prerecorded messages, including ringless voicemail services. This means that the TCPA's consent requirements for using these technologies do not apply.⁷

Shadow Pixl scrubs its calling lists against the national do-not-call list in connection with all campaigns of outbound telemarketing calls on behalf of all clients. This means that Shadow Pixl does

³ 15 U.S.C. § 7704(a)(1).

⁴ 15 U.S.C. § 7704(a)(2).

⁵ 15 U.S.C. § 7704(a)(3).

⁶ 15 U.S.C. § 7704(a)(4). CAN-SPAM's opt-out provision also restricts the sender's ability to release the email addresses of opted-out consumers. Shadow Pixl must ensure that it uses consumers' unsubscribe requests only for that purpose.

⁷ 47 C.F.R. § 64.1200(a)(2)-(3).

not need to rely on an exception to the national do-not-call list, such as an established business relationship or the consumer's express agreement to be called.

The TCPA and the TSR also require Shadow Pixl to honor any company-specific do-not-call requests that consumers have made to the client on whose behalf Shadow Pixl is calling.⁸ Shadow Pixl has implemented a policy requiring its clients to make the clients' company-specific do-not-call information available to Shadow Pixl, either by providing the information to Shadow Pixl for scrubbing or by having Shadow Pixl submit its calling lists to the client for the client to conduct the scrub.

Note that, at the federal level, there are additional standards that apply to the outbound telemarketing calls that Shadow Pixl places on behalf of its clients.⁹ These include required disclosures, prohibited misrepresentations, transmission of caller ID information, and recordkeeping requirements. If Shadow Pixl would like additional information about these standards or if Shadow Pixl would like me to review its telemarketing scripts or its telemarketing compliance policies and procedures, please let me know.

c. Client Outbound Calls

As noted above, Shadow Pixl's client could call a consumer prospect on the client's own behalf, whether or not the consumer responds to Shadow Pixl's email. The client could also place subsequent calls to the consumer after Shadow Pixl has placed the initial call. Shadow Pixl has implemented a policy of requiring all clients' outbound telemarketing calls to consumers within the Shadow product to be manually dialed by live operators; autodialer calls, prerecorded messages, ringless voicemail services, text messages, and robocalls are prohibited.

As noted above with respect to Shadow Pixl's calls, Shadow Pixl scrubs clients' call lists against the national do-not-call list. This means that the clients' calls comply with federal telemarketing standards requiring compliance with the national do-not-call list, just as Shadow Pixl's calls comply, based on Shadow Pixl's scrub against the national list. The clients' obligations to obtain a SAN from the national do-not-call list and pay any required fee for access to national do-not-call list information are addressed below.

Shadow Pixl's clients would also need to scrub their internal calling lists against their own company-specific do-not-call lists. Federal telemarketing standards do not create an exception from this requirement based on the fact that a consumer who previously made a company-specific do-not-call request subsequently expressed interest in a new offer from the company.¹⁰

As explained above, note that, at the federal level, there are additional standards that apply to the outbound telemarketing calls that Shadow Pixl facilitates and that its clients place on their own behalf. These include required disclosures, prohibited misrepresentations, transmission of caller ID information, and recordkeeping requirements. If Shadow Pixl would like additional information about

⁸ 47 C.F.R. § 64.1200(d); 16 C.F.R. § 310.4(b)(1)(iii)(A).

⁹ 16 C.F.R. Part 310 (FTC's Telemarketing Sales Rule); 47 C.F.R. §§ 64.1200; 64.1601; 64.1604 (FCC's TCPA rules).

¹⁰ 16 C.F.R. § 310.4(b)(1)(iii).

these standards or if it would like me to review sample telemarketing scripts or telemarketing compliance policies and procedures, please let me know.

3. National Do-Not-Call List Compliance

Shadow Pixl scrubs its consumer contact information against the national do-not-call list through a vendor, Real Phone Validation (“RPV”). RPV’s website explains that its users must enter a Telemarketing Sales Rule SAN to use the RPV national do-not-call list scrub.¹¹ Shadow Pixl pays RPV for access to RPV’s national do-not-call list scrubbing service. Shadow Pixl’s administrator has the required SAN. As a “telemarketer” calling on behalf of “sellers,” Shadow Pixl is not required to pay a separate annual fee for access to national do-not-call list information.¹²

The TSR requires Shadow Pixl’s clients, as “sellers,” to subscribe to the national do-not-call list, obtain their own SANs, and, if required, pay the annual fee for access to the list.¹³ The TSR prohibits telemarketers and service providers, such as Shadow Pixl, from accessing the national list (directly or through a vendor), paying the annual fee, and sharing data from the list with their clients without the clients independently subscribing to and paying for access to the national list.¹⁴ Telemarketers who place calls on behalf of sellers who have not complied with the TSR’s national do-not-call list subscription and annual fee provisions can be held directly liable for violating the TSR.¹⁵ It would also violate the TSR to access national do-not-call list information (directly or through a vendor) without a SAN.¹⁶

The TSR offers an exception for sellers who only call consumers based on an exception from the national do-not-call list. The available exceptions are for calls based on an established business relationship and calls based on the consumer’s express agreement.¹⁷ Shadow Pixl and its clients would not qualify for these exceptions because the Shadow product anticipates that Shadow Pixl and its clients will place at least some calls that do not qualify for an exception. This would include calls to consumer prospects who have not responded to a Shadow Pixl email. Because Shadow Pixl’s clients would engage in some cold calling, either on their own or through Shadow Pixl, all of the clients must subscribe to the national list, pay the annual fee, and certify that they will not use the national list for any other purpose. If Shadow Pixl’s clients rely on Shadow Pixl to access the national do-not-call list on their behalf, the TSR requires Shadow Pixl to identify all of the clients on whose behalf it is accessing the national do-not-call list by name and SAN and provide this certification for them.¹⁸

* Admitted Only in Virginia; District of Columbia practice limited to matters and proceedings before federal courts and agencies in accordance with D.C. Ct. App. R. 49(C)(2) and (3).

¹¹ <https://realphonevalidation.com/resources/do-not-call-list-scrubbing/>.

¹² 16 C.F.R. § 310.8; 68 FR 45134, 45136 (July 31, 2003).

¹³ 16 C.F.R. § 310.8(a).

¹⁴ 16 C.F.R. § 310.8(e).

¹⁵ 16 C.F.R. § 310.8(b).

¹⁶ 16 C.F.R. § 310.8(e).

¹⁷ 16 C.F.R. § 310.4(b)(1)(iii). Shadow Pixl’s “marketing opt-in” database does not satisfy either exception because these exceptions are seller-specific and the “marketing opt-in” database is not.

¹⁸ 16 C.F.R. § 310.8(e).