GUEST COMMENTARY

LITIGATION TRENDS UNDER THE TCPA

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Over the course of the past several years, most in-house litigators for consumer-facing businesses likely have heard the warnings that they should beware the Telephone Consumer Protection Act. Given recent developments in TCPA litigation which suggest that the scope of the TCPA is now more expansive than ever before, and that potential damages associated with TCPA violations are greater than previously considered, these warnings deserve significant attention.

This heightened risk of liability demands that consumer-facing businesses analyze both their internal policies and litigation strategies relating to the TCPA. Businesses questioning the urgency of this charge need look no further than the steady stream of multi-million dollar settlements that have been littering dockets across the country. (*See, e.g., Craftwood Lumber Co. v. Interline Brands Inc.*, No. 1104462, (N.D. Ill. 03/23/15), approving a $40,000,000 settlement of a TCPA class action, and *Rose v. Bank of America Corp.*, No. 11-02390 (N.D. Cal. 08/29/14, approving a $32,000,000 settlement of a TCPA class action).

What follows is a brief overview of the TCPA and recent developments in TCPA-related litigation. Specifically, this article analyzes the developing trend of “aggregating” damages where a single communication constitutes or contains multiple TCPA violations, as well as the parameters in which a business may be held vicariously liable for TCPA violations of its third-party contractors.

In light of the increased risk brought on by these TCPA developments, businesses should be equally aware of the best available litigation strategies. With respect to TCPA class actions, one such strategy that is both potent, yet equally prone to mishandling, is the use of Rule 68 offers of judgment. If properly worded and used in a timely fashion, such offers have the potential to stop a TCPA class action dead in its tracks.

OVERVIEW OF THE TCPA

First introduced in 1991 “to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes,” the TCPA was enacted as a response to a national outcry regarding unwanted telephone solicitations. Among other limitations and requirements, including the establishment of a do-not-call list, the TCPA prohibits three important types of communications: (1) the making of telemarketing calls or text messages to wireless or residential telephone lines without prior written consent using an automatic telephone dialing system and autodialer; (2) the making of telemarketing calls to wireless or residential telephone lines without prior written consent using artificial or prerecorded voice messages; and (3) the faxing of unsolicited advertisements.

The details regarding application of the TCPA have changed over time along with changes in the rules and regulations promulgated by the Federal Communications Commission, its implementing agency. In general, these changes have not been friendly to businesses. For example, although as initially implemented the TCPA exempted communications to consumers with whom the caller had an established business relationship, this exception recently was eliminated by FCC regulations.

The most relevant feature of this statutory scheme to litigators, however, was the decision of Congress to allow consumers, in addition to the FCC and state Attorneys General, to “tak[e] on the role of a private attorney general” under the TCPA. (*See Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010).) Specifically, the TCPA provides a private right of action for recipients of TCPA-violative communications and allows such plaintiffs to recover the higher of their actual monetary loss or $500 for each violation.

Where the court finds that the defendant acted willfully or knowingly, the court has discretion to treble that award up to $1,500. Even without the possibility of aggregated damages, the potentially massive liability that could result from an advertising campaign that runs afoul of the TCPA is readily apparent. And unlike the Truth in Lending Act or the Real Estate Settlement Procedures Act, the TCPA has no cap on total damages — making it easy to imagine that a large company with millions of customers could quickly expose itself to billions of dollars of civil liability in a class action.

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AGGREGATED DAMAGES

Under the TCPA, a private plaintiff can bring an action to recover its "actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. 227(b)(3)(B). In recent years, plaintiffs have focused in on the "for each such violation" language of this provision, arguing that a single phone call, text, or fax that violates the TCPA and/or the FCC regulations in multiple ways can subject the sender to multiple statutory damages of $500, or even multiple awards of $1,500 if the violations were done knowingly or willingly.

Different courts have taken different views on this question. For example, the 6th U.S. Circuit Court of Appeals found that if a single communication from a telemarketer contains two distinct violations both done knowingly and both under separate subsections of the TCPA, the plaintiff can recover $3,000 under the TCPA for a single call. In *Charvat v. NMP, LLC*, 656 F.3d 440 (6th Cir. 2011), for example, the plaintiff alleged violations of § 227(b), which relates to automated and prerecorded communications, as well as § 227(c), which relates to minimum procedures for maintaining a do-not-call list. The 6th Circuit found that because § 227(b) and § 227(c) each contained their own private right of action provisions, which differed in material ways, Congress must have intended to allow borrowers to recover for a violation of each section, even when both violations arise out of the same communication:

> The fact that the statute includes separate provisions for statutory damages in subsections (b) and (c) suggests that a plaintiff could recover under both. Subsection (b) permits "an action based on a violation of this subsection or the regulations prescribed under this subsection," and subsection (c) permits an action based on a "telephone call ... in violation of the regulations prescribed under this subsection." Additionally, the two private-right-of-action provisions contain significant textual differences, indicating that they are distinct provisions to be treated independently.

Although the *Charvat v. NMP* decision held that a plaintiff may obtain multiple recoveries for a single communication that violates two different subsections of the TCPA, it also noted that multiple recoveries cannot be had for the same communication for multiple violations of § 227(c)'s do-not-call provisions. Wrote the appellate court: "§ 227(c)(5)'s damages provision unambiguously allows for statutory damages on only a per-call basis." The one question that the 6th Circuit did not address, however, is whether multiple violations of § 227(b)'s automated dialing and prerecorded message provisions in a single communication can provide for multiple statutory recoveries.

"On the opposite end of the spectrum, many courts appear to have assumed that TCPA damages are only available on a per-communication basis."

At least one court has noted the limited scope of the *Charvat v. NMP* decision. In *McGee v. Halsted Fin. Servs.*, No. 13-CV-1555, 2014 WL 1203138, (D. Del. 03/19/14), the district court rejected the plaintiffs' argument that they were entitled to multiple recoveries based upon multiple violations of § 227(b). The plaintiffs pointed to the fact that the subject communication was both made by way of an ATDS and contained a prerecorded message. In rejecting this argument, the district court found that "[w]hen a defendant calls a plaintiff's cellular phone using an ATDS and a recording, the defendant only violated one subsection of the law, so there is only one violation. [*Charvat v. NMP*] does not apply because, in that case, the two violations arising from one phone call were grounded in separate subsections of the TCPA."

More recently, the 11th Circuit has found that multiple violations of §227(b) in a single communication can provide for multiple statutory recoveries. (See *Lary v. Trinity Physician Fin. & Ins. Servs.*, No. 14-11036, 2015 WL 1089326 (11th Cir. 03/13/15). In *Lary*, the plaintiff claimed that a single fax sent by the defendants violated both §227(b)(1)(C)'s prohibition on faxing unsolicited advertisements as well as §227(b)(1)(A)'s prohibition on automatic-dialing a health care facility's emergency line. While noting that §227(c)(5) suggests that damages may only be awarded per "call," the 11th Circuit held that "[i]n plain terms, [§227(b) of the TCPA] allows a person to recover '$500 in damages for each' 'violation of this subsection,' . . . [and] has no language limiting the recovery to $500 per 'call' or 'fax.'"

On the opposite end of the spectrum, many courts appear to have assumed that TCPA damages are only available on a per-communication basis. For example, in *Gene And Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. 2008), the 5th Circuit said that "the TCPA allows statutory damages of $500 per offending fax, with up to treble damages for willful or knowing violations of the statute. Even with treble damages for willful or knowing violations of the statute, a single plaintiff would need to receive over fifty faxes to exceed the $75,000 threshold." And in *Klein v. Vision Lab Telecommunications, Inc.*, 399 F. Supp. 2d 528 (S.D.N.Y. 2005), the district court opined: "The TCPA empowered citizens to sue

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for relief from the problem created by the receipt of unsolicited fax advertisements, not for deficiencies in the faxes received. The TCPA provides for injunctive and compensatory relief in order to stop and/or compensate the plaintiff for the annoyance, the conversion of paper and ink and the effective preemption of his fax machine during the intervals when it is receiving advertisement transmissions."

Adherents to this interpretation often cite to a statement by Senator Hollings, the TCPA's sponsor, stating that prosecution of TCPA claims in "[s]mall claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer." (*See* 137 Cong. Rec. S16205 (11/07/1991). In light of this apparent congressional intent to keep damages at $500, "[a]llowing separate recovery for each and every technical violation alleged would create a windfall for plaintiffs clearly not in the contemplation of Congress," as the *Klein* court noted.

The dramatic difference in damages that could result from an advertising campaign that runs afoul of the TCPA depending upon where the class action complaint is filed, begs the question of potential U.S. Supreme Court involvement. Until there's an answer to the question — whether multiple recoveries may be had for multiple TCPA violations in single communication — consumer-facing businesses and their attorneys must remain cognizant of where their cases are pending and prepare their litigation strategies accordingly, including the amounts of their offers of judgment, discussed below.

VICARIOUS LIABILITY

Upon certification from the 6th Circuit and the U.S. District Court, Central District of Illinois on the question of vicariously liability, the FCC in May 2013, issued a declaratory ruling that "a seller is not directly liable for a violation of the TCPA unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer." (*See In the Matter of Dish Network, LLC*, 28 F.C.C. Rcd. 6574 (05/09/13).

For purposes of the TCPA, the FCC found that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." Thus, in the typical situation, it is the telemarketer that is directly liable for TCPA violations, and a seller may only be held liable by way of vicarious liability.

With respect to the question of agency, the FCC ruled that the TCPA defers to federal common law, which provides that an agency relationship exists where the principal manifests assent to another person that they shall act on the principal's behalf. However, "[p]otential liability under general agency-related principles extends beyond classical agency" and a seller may be liable under the TCPA where a telemarketer has apparent (if not actual) authority, or when the seller ratifies the acts of its telemarketer by knowingly accepting their benefits. Some of the factors that the FCC said are to be taken into account when analyzing whether there is apparent authority include whether:

- The seller allows the outside sales entity access to information and systems that normally would be within the seller's exclusive control, including access to detailed information regarding the nature and pricing of the seller's products and services or to the seller's customer information.
- The outside sales entity has the ability to enter consumer information into the seller's sales or customer systems.
- The outside sales entity has the authority to use the seller's trade name, trademark, and service mark.
- The seller approved, wrote, or reviewed the outside entity's telemarketing scripts.
- The seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.

The recent decision in *Ossola v. American Express Co.*, 13-04836 (N.D. Ill. 02/20/15), provides an example of the FCC's *Dish Network* standard in practice. The plaintiffs in *Ossola* alleged that AmEx made debt collection and telemarketing calls to the plaintiffs' cellphones in violation of the TCPA. AmEx moved for partial summary judgment, arguing that it may not be held directly liable for any claim made under TCPA, because it was its telemarketers, not AmEx, that placed the calls at issue. The district court soundly rejected that argument, stating that "whether American Express itself actually placed the calls at issue is irrelevant; calls placed by a third-party collector on behalf of that creditor are treated as if the creditor itself placed the call'" (*quoting Jamison v. First Credit Services, Inc.*, 290 F.R.D. 92 (N.D. Ill. 2013), which found that a seller is liable under ratification agency principles where that seller "received the benefit of the calls placed by [its contractor] as it received the money (or a percentage thereof) obtained in connection with these calls")).

With respect to unsolicited advertisements sent by fax, the standard is even less business-friendly. An 11th Circuit appellate panel in *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, No. 13-14013, 2015 WL 1004234 (11th Cir. 03/09/15) held that "a person whose services are advertised in an unsolicited fax transmission, and on whose behalf the fax is transmitted, may be held liable directly under the TCPA's ban on the sending of junk faxes."

The 11th Circuit panel based its ruling in part on the FCC's response to a request from the court asking the FCC whether the agency's *Dish Network* ruling regarding vicarious liability only applied to telemarking calls, or if it also applied to faxes. The FCC's letter response confirmed that *Dish Network* only applied to telemarketing calls, and that the FCC "attributed direct liability under the statute to those on whose behalf fax advertisements are sent" (citing Letter from Laurence N. Bourne, Counsel, Federal Communications Commission, to John Ley, Clerk of Court, United States Court of Appeals for the 11th Circuit (07/17/14).)

"The question of whether an unaccepted offer of judgment moots an individual plaintiff's claim is still open. "

Thus, whereas plaintiffs need to prove vicarious liability (*i.e.*, an agency relationship) when they seek to recover against a business for calls made by a telemarketer, no such proof is required for fax transmissions. Accordingly, in *Palm Beach Golf Center,* the 11th Circuit panel held that although the district court had found that the defendant could not be found vicariously liable for sending the subject faxes, this standard was inapplicable and the defendant was liable by the mere fact that the faxes were sent on its "behalf."

These developments in TCPA vicarious liability demand that in-house counsel familiarize themselves with the contours of their business's relationship with its third-party telemarketers and, where necessary, implement policies and procedures that ensure an appropriate degree of separation to protect the business from being held liable for the conduct of third parties. For those businesses that utilize third-party contractors for fax-related advertising, no degree of separation will suffice. Such businesses must be vigilant in ensuring TCPA compliance by its contractors.

RULE 68 OFFERS OF JUDGMENT

The increasingly dangerous climate surrounding the TCPA behooves consumer-facing businesses not only to make themselves aware of the confines of appropriate conduct under the TCPA, but also to inform themselves as to how best to defend allegations that they have run afoul of those parameters. One potential avenue through which defendants may combat TCPA class action complaints is the use of Fed. R. Civ. P. 68(a) offers of judgment, which permit a defendant to "serve on an opposing party an offer to allow judgment on specific terms." Under this strategy, a defendant to a TCPA action makes an offer of judgment that provides the plaintiff with the complete relief requested in the complaint in the hopes that the court will find that that the offer has mooted the plaintiff's claim and thus strips the court of its subject-matter jurisdiction.

The question of whether an unaccepted offer of judgment moots an individual plaintiff's claim is still open. (See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, (2013), noting that "the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot.") That question becomes all the more complicated when the complaint at issue is a class action complaint. Whereas some jurisdictions have held that an unaccepted Rule 68 offer of judgment for complete relief moots the entire action, other jurisdictions reject that principle in the class action context. Others still look to the timing of the offer in relation to a motion for class certification. Even in jurisdictions that look favorably on unaccepted Rule 68 offers of judgment as a means for mooting class actions, there are certain barriers upon which practitioners may easily trip.

For example, in *Compressor Engineering Corp. v. Thomas*, No. 10-10059, 2015 WL730081 (E.D. Mich. 02/19/15), the defendant filed a motion to dismiss the plaintiffs' putative class action complaint brought under the TCPA on the grounds that plaintiffs failed to respond to or accept a Rule 68 offer. Under established 6th Circuit precedent, an unaccepted offer of judgment made before class certification that satisfies the plaintiffs' entire demand moots the case. Thomas offered Compressor the amount of $1,500 along with the costs of the action and reasonable attorney's fee. However, because the offer of judgment did not offer injunctive relief "against further violations" as was demanded in the named plaintiff's complaint, the court denied the defendant's motion to dismiss on the grounds that the offer of judgment failed to satisfy the plaintiff's entire demand.

A defendant's attempt to moot a plaintiff's putative class action complaint via an offer of judgment was also found insufficient in *G. Neil Garrett, D.D.S., P.C. v. New Albertson's, Inc.*, No. 13 C 7965, 2014

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WL 2198242 (N.D. Ill. 05/27/14). In *New Albertson's*, the plaintiff filed its putative class action for TCPA violations on Nov. 6, 2013, against "Albertson's, LLC." On Nov. 21, 2013, counsel for "New Albertson's, Inc." made a settlement offer that purportedly provided the plaintiff with complete relief. Thus, the defendant argued that "before plaintiff even named New Albertson's as the defendant in this action, and before plaintiff moved to certify a class as to New Albertson's Inc., it made a complete offer of relief to plaintiff, thereby mooting plaintiff's claims."

The district court rejected this argument. First, the district court acknowledged that under 7th Circuit precedent, a defendant may moot a class action complaint by serving a Rule 68 offer of judgment for complete relief so long as the offer is made prior to the plaintiff's filing of a motion to certify the class, citing *Damasco v. Clearingwire Corp.*, 662 F.3d 891 (7th Cir. 2011). However, the court distinguished the set of facts in *New Albertson's* from those in *Damasco* on the grounds that the offer was not made by a defendant, because New Albertson had not yet been named in the lawsuit at the time of the offer. The court also recognized that its decision ensured that a plaintiff seeking to file a class action complaint in the 7th Circuit can continue to avoid the Rule 68 mootness problem by filing a motion to certify at the time it files its complaint.

Likewise, in *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC*, 880 F. Supp. 2d 689 (D. Md. 2012), the district court analyzed the effectiveness of a pre-filing offer of judgment. Although the district court denied the defendant's claim that the plaintiff's class action complaint brought under the TCPA was mooted by a pre-filing settlement offer, it did not do so for the same reason as the court in *New Albertson's*, which found that a Rule 68 offer from a non-defendant cannot moot a class action complaint.

In *Kensington*, the district court did not express any hostility towards settlement offers made prior to filing; rather, it focused on the terms of the settlement offer. In particular, the settlement offer included full statutory damages, injunctive relief, and reasonable attorney's fees. However, the *Kensington* court found that the offer was incapable of mooting the plaintiff's claim because a settlement offer is complete only if it includes no conditions, imposes no confidentiality requirement, and includes an offer for entry of judgment. Because the defendant's offer did not include an offer of judgment or a confidentiality waiver, it was insufficient.

Although not in the TCPA context, *Tocco v. Real Time Resolutions, Inc.*, 14-cv-810 (S.D.N.Y. 08/13/14), demonstrates another obstacle to mooting a class-action complaint under Rule 68. In *Tocco*, the district court refused to find a class action complaint mooted by an unaccepted offer of judgment. The plaintiff filed its putative class-action complaint in February 2014, along with a letter requesting a pre-motion conference in anticipation of moving for class certification. Soon thereafter, the defendant made an offer of judgment which would have provided the plaintiff with complete relief, and moved for dismissal for lack of subject matter jurisdiction.

The district court denied the defendant's motion. Specifically, the Court pointed to the fact that the plaintiff requested permission to move for class certification before the Rule 68 offer was made. In doing so, the court distinguished another New York case in which the plaintiff only moved for class certification after a Rule 68 offer had been made — *Franco v. Allied Interstate LLC*, No. 13 CIV. 4053, 2014 WL 1329168 (S.D.N.Y. 04/02/14).

Unlike the above-mentioned cases that merely recognize certain procedural obstacles to using a Rule 68 offer of judgment to moot a class action complaint, the recent 11th Circuit's decision in *Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698 (11th Cir. 2014), couched in the context of a TCPA claim, rejected outright the Rule 68-mootness strategy for two reasons.

First, relying on Justice Kagan's dissent in *Symczyk*, in which she stated that an unaccepted Rule 68 offer is a legal nullity which cannot moot a claim, the 11th Circuit found that once the 14-day period applicable to a Rule 68 offer passes, the parties return to the same positions that they held pre-offer. And second, even if an individual plaintiff's claims were somehow deemed moot, the named plaintiff retains the ability to pursue the class claims. Relying in part on a prior decision analyzing a settlement offer to a named plaintiff outside of the Rule 68 context in which the court found that the class action should not be dismissed upon tender of such an offer, the 11th Circuit found in *Buccaneers* that the "relation back" exception to the mootness doctrine applies to "inherently transitory" class action claims. The court found that to the extent an offer of judgment can moot a named plaintiff's claim, such a class action would qualify as inherently transitory.

Meanwhile, the question of whether an unaccepted Rule 68 offer of judgment moots a class action complaint is currently pending before the 2d Circuit. Oral arguments recently were heard in *Franco v. Allied Interstate LLC*, 14-1464 (2d Cir.), which arose from a U.S. District Court, Southern District of New York holding that an unaccepted offer does moot a class action complaint; and in *Tanasi v. New Alliance Bank, et al.*, 14-1389 (2d Cir.), which arose from a U.S. District Court, Western District of New York holding that found just the opposite. Given the significant number of

TCPA claims that are brought within the 2d Circuit, TCPA practitioners are eagerly awaiting a ruling on these appeals.

Collectively, these cases demonstrate that a Rule 68 offer of judgment must be given careful consideration. Although some jurisdictions like the 11th Circuit have rejected Rule 68 offers altogether as a means for mooting a class action complaint, other jurisdictions continue to recognize mootness as a consequence of an unaccepted offer of judgment. As such, upon receiving a TCPA demand letter or an indication that a TCPA complaint may soon be filed, or after a complaint actually has been filed, businesses should immediately consider the propriety of making such an offer and give careful attention to its terms.

The landscape of TCPA litigation is rapidly changing and all consumer-facing businesses should stay apprised of the developments. A firm understanding of the parameters of the TCPA, as well as the best litigation strategies, may help businesses avoid becoming a party to the next multimillion dollar TCPA settlement.

LAWS, RULES & REGULATIONS

CONSUMER FINANCIAL PROTECTION BUREAU

CARD Act inquiry. The CFPB is investigating the credit-card market and the impact of credit-card protections on consumers and issuers, as part of its mandatory review under the CARD Act. The bureau wants to hear from "consumers, credit-card issuers, industry analysts, consumer advocates, and others on the state of the credit card market." What the CFPB is looking for in its request for information includes:

- Changes in both the terms of credit-card agreements and the practices of credit-card issuers since the CFPB's last review of the market two years ago.
- Unfair or deceptive acts or practices in the credit card market.
- Related debt-collection practices, including those for past-due amounts, as well as the frequency that issuers use third-party collection agencies and how those relationships are managed.
- Consumer understanding of rewards products disclosures.

The CFPB says its review will culminate in a report to Congress on the state of the consumer credit card market, and will help the bureau inform future policy decisions on the topic. Comments are due by May 18, 2015. *Find the RFI at* gpo.gov/fdsys/pkg/FR-2015-03-19/pdf/2015-06351.pdf.

Consumer Complaint Database/Consumer narratives. The CFPB finalized its policy allowing consumers to publicly voice their complaints about consumer financial products and services in the bureau's Consumer Complaint Database. At the same time, the CFPB published a request for information on ways to record consumer compliments. The Consumer Complaint Narrative Policy describes specific procedures and safeguards, including the following:

- Consumers must opt-in to share their story. The CFPB will not publish the complaint narrative unless the consumer check a consent box to give the bureau permission to publish their narrative when they submit a complaint through consumerfinance.gov. Currently, only narratives submitted online are available for the opt-in to publish.
- Personal information will be removed from narratives. The CFPB says it will take reasonable steps to remove personal information from the complaint to minimize the risk of re-identification.
- Companies can choose a response to publish. Companies will be given the option to select from a set list of structured response options as a public-facing response to address the consumer complaints. Companies will be under no obligation to offer a public response, and they have 180 days after the consumer complaint is routed to them to select the optional, public response. Companies will have the option to address all consumer complaints submitted after this policy announcement, not just those where a consumer consented to publication.
- Consumers can opt-out, *i.e.*, withdraw their consent to publish a narrative, at any time.
- Complaints must meet certain criteria to qualify for narrative publication. The complaint delivered online to the CFPB must not be a duplicate submission, and the consumer has a confirmed relationship with the financial institution. Complaints will not be published if they do not meet all of the publication criteria.

The CFPB will disclose the consumer narrative when the company provides its public-facing response, or after the company has had the complaint for 60 calendar days, whichever comes first.

The bureau also issued an RFI seeking feedback on its ideas (and others) regarding input from the public on the potential collection and sharing of information about consumers' "positive interactions" with financial service providers. The CFPB currently sees two options for sharing such positive narra-

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