

Two agencies and various industry standards offer guideposts on mobile disclosure requirements

By Margo H.K. Tank and
John A. Richards

Two federal agencies shed some light on how regulators may view the provision of legally required disclosures on smartphones and other mobile devices. In addition, industry standards on accessibility and mobile Web best practices have developed that will impact mobile platform design and build. This article reviews two recent pronouncements, explores several industry standards and suggests a number of questions in-house counsel may wish to raise with their clients in designing and presenting disclosures on mobile devices.

Issuance by the Bureau of Consumer Financial Protection (CFPB) of a final rule on international remittance transfers has demonstrated some flexibility in the provision of disclosures in the remittances context via a mobile device (CFPB Remittance Rule). See *Electronic Fund Transfers (Regulation E)*, Final Rule 77 Fed. Reg. 6194-6309 (Feb. 7, 2012) (effective Feb. 7, 2013, to be codified at 12 C.F.R. Part 1005). Additionally, the Federal Trade Commission (FTC), in a recent report on best practices in consumer data privacy, noting the difficulty in providing privacy notices on the smaller screens of mobile devices, has encouraged shorter, more effective privacy policies in that realm. See *FTC Report Protecting Consumer Privacy in an Era of Rapid Change: v For Businesses and Policymakers* (March 26, 2012).



BuckleySandler's
Margo H.K. Tank



BuckleySandler's
John A. Richards

The CFPB Remittance Rule, among other things, allows a remittance service to provide a remitter with certain prepayment disclosures via mobile application or text message as long as the transaction is conducted entirely by such means, and meets other language and cancellation disclosure requirements. See 77 FR at 6286. The CFPB took notice of industry concerns that paper-based formatting requirements (such as grouping, proximity and font sizing) would likely create compliance difficulties for mobile-provided disclosures. See Final Rule, *Supplementary Information*, 77 Fed. Reg. at 6231; see also 77 Fed. Reg. at 6287.

By waiving those formatting requirements, the CFPB essentially affirmed that such disclosures generally could be provided via mobile (and text messaging) means. However, at the same time, the agency underscored the need to clearly and conspicuously disclose the information otherwise subject to those requirements. In the mobile context, the CFPB indicated that the “clear and conspicuous” standard may be met if the information is provided “in a logical sequence” and “in equal prominence to each other.” 77 Fed. Reg. at 6231.

With respect to the recently released FTC report, the FTC specifically noted the “small space available for disclosures on mobile screens,” and encouraged development of standard disclosures and other ways of communicating with consumers in a clear and consistent fashion, including through the provision of short, meaningful disclosures. See *FTC Report* at 63-64.

The FTC report follows up on earlier electronic disclosure requirements and guidelines established by the agency. See 16 C.F.R. Part 313 (*Privacy of Consumer Financial Information*) and “Dot Com Disclosures.” Similar to the CFPB Remittance Rule, the FTC regulations focus on providing “conspicuous” online disclosures and note that such disclosures need to be reasonably understandable, and designed to call attention to the information that must be disclosed. See, generally, 16 C.F.R. 313.3(b).

A disclosure will be “reasonably understandable” if the information is laid out in clear, concise sentences, paragraphs and sections; the information must use short explanatory sentences or bullet lists, as well as concrete, everyday words and the active voice, and must avoid multiple negatives, technical jargon, and ambiguous language. See 16 C.F.R. 313.3(b)(2)(i).

Moreover, an online disclosure is “designed to call attention to itself” if the information is placed on a screen the consumer must access or is likely to access frequently, or available behind a hyperlink on an introductory screen labeled to convey the importance of the information behind the link; the information must also use textual or

visual cues to encourage scrolling, if necessary, and be presented with a clear, visible heading calling attention to the disclosure and an easy-to-read type face and size. See 16 C.F.R. 313.3(b)(2)(ii)-(iii).

The foregoing CFPB/FTC guidance and regulations offer clues as to whether those--and other--regulators might view disclosures rendered on a mobile screen as "clear and conspicuous," "readily understandable" or "reasonably understandable."

Standards-setting and other industry organizations also have sought to provide guidance on developing mobile disclosures and content. For example, the Web Accessibility Initiative, an effort of the World Wide Web Consortium (W3C), the Internet standards development body, has developed a set of guidelines aimed at presenting mobile content in a way that meets basic accessibility standards, including those that relate to communities of disabled users. See <http://www.w3.org/WAI/>.

The U.S. Justice Department, in seeking input into its development of regulations to implement the Americans with Disabilities Act (ADA), has specifically referenced the work of the W3C relating to its second version of web content accessibility guidelines, or WCAG 2.0, for the disabled user community. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations 75 Fed. Reg. 43460, 43465 (Oct. 26, 2010).

Given the overlap of accessibility issues relating to content rendered on desktop and laptop monitors with that displayed on mobile screens, it is not inconceivable that the W3C's mobile guidelines (known as Mobile Web Best Practices, or MWBP 1.0) could be embraced by the ADA regulatory framework, and perhaps eventually by other such frameworks. In fact, the W3C notes that the recommendations set forth in MWBP 1.0 are derived in part from the Justice Department-sanctioned WCAG 2.0, and considers them to be supplementary to its Mobile Web Best Practices. See MWBP 1.0, § 1.5.

MWBP 1.0 contains 60 design and technical best practices aimed at improving the mobile user experience. By way of example, these best practices address the need to take into account the appropriate number of links to include on a page (#7--BALANCE), identify the target of each link (#10--LINK_TARGET_ID) and ensure the suitability of content for use in a mobile context (#17--SUITABLE). MWBP 1.0 also addresses a number of issues that align with concerns raised by the CFPB and FTC regarding the delivery of mobile disclosures, such as using clear and simple language (#18--CLARITY), dividing pages into usable but limited size portions (#20--PAGE_SIZE_USABLE) and providing short but descriptive page titles (#29--PAGE_TITLE).

Other industry and trade groups also have sought to get out in front of the mobile disclosure issue from various angles. For example, the Mobile Marketing Association has developed a Mobile Application Privacy Policy Framework that offers a content template for privacy policies associated with mobile apps. Also, Standards and Procedures for electronic Records and Signatures (SPeRS) addresses a range of e-commerce platform design and development considerations, including the provision of 'clear and conspicuous' disclosures in the electronic medium.

The regulatory framework and best practices touched on above raise a number of questions for corporate counsel to bear in mind when advising internal system design teams in shaping mobile disclosures and their implementation. Specifically, the following should be considered:

1. In terms of style, do the disclosures use short, explanatory sentences or bullet lists? Is the length of the disclosure document as brief and succinct as it can be? Does it use concrete, everyday words and the active voice? Do the disclosures avoid multiple negatives, technical jargon and ambiguous language?

2. Are they presented in a logical sequence? Are the disclosures laid out in clear, concise sentences, paragraphs and sections? Are they placed in equal prominence to each other, absent any

other specific regulatory format or placement requirements? Is the content placed on a particular page appropriate for the sizing of the page on the mobile screen? If not, are textual or visual cues used to encourage scrolling?

3. Does a disclosure "call attention to itself?" Is it on a screen the mobile user must access or will likely access frequently? If not, is it behind a hyperlink on an introductory screen that is clearly labeled so as to convey the importance of the linked disclosure? Is it presented with a clear, visible heading and an easy-to-read typeface and typesize?

4. Have various technical and other applicable industry standards been consulted in the process of designing, developing and displaying mobile disclosures?

While each implementation is different, corporate counsel who can guide design teams to affirmative answers to each of these questions will have a good start in favorably positioning their clients to comply with the emerging regulatory framework affecting mobile disclosures.

Margo H.K. Tank is a partner, and John A. Richards, is counsel, at BuckleySandler in Washington.

Reprinted with permission from the April 11, 2012 edition of THE NATIONAL LAW JOURNAL © 2012 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. #005-10-12-04