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CLIENT ALERT

FTC Issues Proposed Amendments to the Telemarketing Sales Rule

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On May 21, 2013, the Federal Trade Commission issued a Notice of Proposed Rulemaking (NPRM) announcing proposed changes to the Telemarketing Sales Rule (TSR or Rule)[1] and soliciting comment on the amendments. With the NPRM, the FTC seeks to: (1) ban certain "novel payment methods"; (2) expand the scope of the advanced fee ban to recovery of losses in any previous transaction; and (3) clarify certain existing TSR requirements, relating to express verifiable authorization, the burden of demonstrating an existing business relationship, the business-to-business exemption, the prohibition against Do Not Call Registry fee sharing, and interference with the right to be placed on an entity-specific do-not-call list, to reflect the Commission's current enforcement policy. The comment period closes on July 29, 2013.

Ban on Novel Payment Methods

The FTC identifies four types of "novel payment methods" that when used by telemarketers "effectively and deliberately deprive consumers of the anti-fraud monitoring, accountability, and dispute resolution rights of other payment methods" such as credit cards, debit cards, and electronic fund transfers. According to the Commission, the use of these payment methods is unnecessary and the harm they present to consumers substantially outweighs any apparent benefits.

The FTC explained that it was particularly focused in the NPRM on the use of a consumer's bank account and routing number to withdraw funds from the account without authorization. The four types of novel payment methods that the FTC seeks to ban in all telemarketing transactions are:

1. **Remotely created checks. This method involves a check that is not created by the paying bank, and does not bear a signature of the person on whose account the check is drawn. Rather, the remotely created check is an unsigned paper check that is created by the payee.**
2. **Remotely created payment orders. This method is similar to remotely created checks except there is no paper check. Instead, a telemarketer simply enters a bank account number and routing number into an electronic file that is sent to a financial institution for processing.**

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3. Cash-to-cash money transfers. As the term implies, this method involves a cash transfer from one person to another by a money transfer provider and received in cash, but does not include transfers via payment service providers, such as PayPal, that are subject to the Electronic Fund Transfer Act. According to the FTC, cash-to-cash money transfers are particularly susceptible to cross-border fraud.
4. Cash reload mechanism. This method allows consumers to load funds onto a general-use prepaid debit card without the use of a bank transfer or direct deposit. A consumer pays cash and a fee to a retailer, such as MoneyPak or Reloadit, and is given a unique authorization code that corresponds with the specific amount of funds paid. The payee simply uses the authorization code to offload the funds onto their own prepaid card or online account, and can do so anonymously.

Although the FTC has previously considered and declined to ban some of these novel payment methods in the past, the Commission believes there are now numerous low-cost, electronic payment alternatives that are just as, if not more, convenient for consumers. Moreover, other more convenient payment methods "provide less anonymity for the wrongdoer."

Expanded Ban on Recovery Services

Sellers of recovery services promise to deliver to consumers lost money or some prize or merchandise never received, often as a result of a previous scam. To protect consumers from what the FTC describes as an "abusive practice," the NPRM proposes to expand the prohibition on telemarketers receiving or requesting payment for recovery services until seven business days after the lost or previously unrecovered money or item is delivered to the consumer. Currently, the recovery services prohibition was limited to services related to money or value lost as the result of telemarketing fraud. However, the Commission believes that consumers are just as susceptible to schemes on the Internet (and other mediums) and therefore to telemarketing pitches promising to recover money or items lost as result of such fraud. As before, the FTC does not seek to ban telemarketing of such recovery services, but rather seeks to prevent telemarketers from requesting or receiving payment for their recovery services, regardless of how the loss occurred, until seven days after the consumer receives the recovered money or merchandise.

Clarification of the FTC's Enforcement Policy

In the NPRM, the FTC clarifies five requirements of the TSR, which it believes had been overlooked or inadequately understood by the telemarketing industry. The proposed amendments modify the TSR to:

1. Make "unmistakably clear" that a seller or telemarketer bears the burden of establishing that the seller has an existing business relationship with a customer who is listed on the Do Not Call Registry;
2. Clarify that any recording to memorialize a customer's express verifiable authorization for a transaction include "an accurate description, clearly and conspicuously stated, of the goods or services or charitable contribution" for which authorization is sought;

3. Clarify that the business-to-business solicitation exemption only extends to calls seeking a sale to or contribution from the business, and not from individuals employed by the business;

4. Emphasize that the ban on Do Not Call Registry fee-sharing among sellers and/or telemarketers is absolute; and

5. Expand the illustrations of impermissible conduct that denies or interferes with a consumer's right to be placed on an entity-specific do-not-call list, such as requiring a consumer to listen to a sales pitch before accepting the do-not-call request. A related amendment specifies that a seller or telemarketer's failure to obtain the information necessary to honor a consumer's request to be placed on a seller's entity-specific do-not-call list disqualifies the entity from relying on the safe harbor provision.

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[1] The FTC promulgated the TSR in 1995 pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act. The Commission subsequently amended the TSR in 2003, 2008, and 2010.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey
Partner – Washington, D.C.
Phone: +1 202.624.2675
Email: cfalvey@crowell.com

Christopher A. Cole
Partner – Washington, D.C.
Phone: +1 202.624.2701
Email: ccole@crowell.com