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On Deck, Telemarketing Sales Rule Regulatory Review

The Federal Trade Commission ("FTC") **recently announced** that it intends to begin review of, and solicit comments on the Telemarketing Sales Rule ("TSR"). The opportunity to provide comments will be a significant opportunity for marketers to weigh-in on one of the FTC's main regulatory and enforcement tools.

Despite its focus on telemarketing practices, the TSR's breadth and impact goes far beyond merely the telephone and the well-known Do Not Call Registry. The TSR is one of the few methods the FTC can efficiently (although sometimes controversially) adopt rules prohibiting deceptive or abusive practices. And, it's the TSR's broad scope of coverage that has made it a popular enforcement vehicle for the FTC, Consumer Financial Protection Bureau ("CFPB"), and state Attorneys General.

Since the TSR was promulgated it has undergone several significant expansions, and at the same time the marketplace for telemarketing has changed in significant ways that impact consumers and marketers. The TSR gives effect to the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act") that was signed into law in 1994. The Telemarketing Act directed the FTC to adopt a rule prohibiting deceptive or abusive practices in telemarketing and specified, among other things, certain acts or practices that should be addressed, and additional practices if found deceptive or abusive. Pursuant to its authority under the Telemarketing Act, the FTC promulgated the TSR in August 1995, and has subsequently amended the TSR on three occasions, in 2003, 2008, and in 2010.

Key provisions of the TSR include:
- Prohibits calling consumers who have put their phone on the National Do Not Call Registry
- Coverage of solicitation of charitable contributions by for-profit telemarketers
- Disclosures of specific information
- Prohibits misrepresentations
- Limits when telemarketers may call consumers
- Requires transmission of Caller ID information
- Prohibits unauthorized billing
- Addresses the use of pre-recorded messages in telemarketing
- Sets payment restrictions and other requirements for credit repair services, recovery services, advance-fee loans, and debt relief services
- Requires specific business records to be kept for two years

In 2013, the FTC also issued a **Notice of Proposed Rulemaking** concerning, primarily, proposed prohibitions on telemarketers and sellers in both inbound and outbound telemarketing calls from accepting or requesting remotely created checks, remotely created payment orders, money transfers, and cash reload mechanisms. The **FTC's position** is that these four payment methods are favored in fraudulent telemarketing transactions. The FTC also proposed expanding the scope of the advance fee ban on recovery services.

The TSR gives the FTC, CFPB, and state Attorneys General broad enforcement power over telemarketers and those that provide "substantial assistance" to a seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the rule. As a result, the TSR has become a favored enforcement tool of the FTC against those that allegedly facilitate the conduct of others.

Under the Telemarketing Act, the FTC was given an exception from its Magnuson-Moss Act rulemaking constraints that place practical limits on the FTC's ability to regulate specific marketing practices. Of note, however, the FTC has come under criticism for using the TSR as a means to extend its reach outside its jurisdiction and authority by using the rule to regulate particular products and services, and with respect to the ongoing effort to regulate payment methods. The FTC has justified regulatory expansion of the TSR, in part, using its “unfairness” doctrine, derived from Section 5 of the FTC Act.

Violations of the TSR are subject to civil penalties of up to $16,000 per violation. In addition, the TSR allows for nationwide injunctions that prohibit certain conduct, and redress to injured consumers.

The *Federal Register* notice could be released by the FTC before the start of summer 2014; however, the FTC **previously announced** that the TSR would be reviewed in 2013.