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FTC Seeks Public Comment on Proposed Amendments to the Telemarketing Sales Rule

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On May 21, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking ("NPRM") regarding proposed amendments to the Telemarketing Sales Rule ("TSR"). Notably, the proposed changes would: (1) expressly state that the seller or telemarketer bears the burden of demonstrating an existing business relationship with a customer whose number is listed on the Do Not Call Registry, or that it has obtained an express written agreement from such customer; and (2) clarify that the exemption for calls to businesses extends only to calls inducing sale or contribution from the business, and not to calls inducing sales or contributions from individuals employed by the business. The Commission believes that these proposed revisions are consistent with current enforcement policy.

In addition, the FTC proposes to amend the Rule to explicitly state the following requirements, which it also believes are consistent with current enforcement policy. These proposed amendments would:

1. Modify the prohibition against sellers sharing the cost of Do Not Call Registry fees to emphasize that the prohibition is absolute;
2. Illustrate the types of impermissible burdens on consumers that deny or interfere with their right to be placed on a seller's or telemarketer's entity-specific do-not-call list (such as requiring the person to listen to a sales pitch before accepting the Do Not Call request or assessing a charge or fee for honoring the request); and
3. Clarify that the recording memorializing the express verifiable authorization required before a seller or telemarketer bills a customer or donor (unless payment is made by debit or credit card) must include an accurate description, clearly and conspicuously stated, of the goods or services or charitable contribution for which the payment authorization is sought.

The FTC has also proposed to prohibit sellers or telemarketers from requesting or receiving payment for recovery services for losses incurred in any prior transaction, regardless of whether that loss occurred via telemarketing, the Internet, or another means or medium, until seven business days after the consumer received the recovered money or merchandise. The prohibition currently is limited to services for the recovery of money lost through telemarketing fraud only. However, the Commission notes that consumer complaints and the FTC's regulatory efforts reveal that consumers are susceptible to the same type of fraud over the Internet, and are therefore equally susceptible to pitches for telemarketing services promising to recover, in exchange for an advance fee, the money or merchandise lost as a result of such Internet fraud.

Finally, the FTC has also proposed to bar sellers and telemarketers from accepting remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms (collectively defined as "novel payment methods") as payment during inbound or

outbound telemarketing transactions. The Commission’s rationale for the proposed changes is, in part, that the consumer protections typically associated with traditional payment methods, such as credit cards, debit cards, and electronic fund transfers are not present with novel payment methods. Further, the Commission expresses concern that the “express verifiable authorization” provision currently in the TSR, which requires telemarketers to obtain a consumer’s express verifiable authorization for all telemarketing transactions where payment is made by a method other than a credit or debit card, does not adequately protect consumers against fraud, as evidenced by the law enforcement actions discussed in the NPRM.

The comment period will remain open until July 29, 2013.