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ALERT

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FEDERAL TRADE COMMISSION BANS USE OF REMOTELY CREATED CHECKS AND OTHER "NOVEL" PAYMENT METHODS IN TELEPHONE SALES

Effective June 13, 2016, the Federal Trade Commission ("FTC") Telemarketing Sales Rule prohibits the use of the following types of payment methods as payment for goods or services offered or sold through telemarketing or as a charitable contribution solicited or sought through telemarketing:

- Remotely created payment orders (including remote checks), defined as any payment instruction or order drawn on a person's account that is created by the payee or the payee's agent and deposited into or cleared through the check clearing system (the term does not include a payment order cleared through an Automated Clearinghouse (ACH) Network or subject to the Truth in Lending Act (TILA));
- Cash-to-cash money transfers, defined as electronic transfer of the value of cash received from one person to another person in a different location that is sent by a money transfer provider and received in the form of cash; and
- Cash reload mechanisms, defined as a device, authorization code, personal identification number, or other security measure that makes it possible for a person to convert cash into an electronic form that can be used to add funds to a general-use prepaid card, or an account with a payment intermediary (for purposes of this definition, a cash reload mechanism is not itself a general-use prepaid debit card or a swipe reload process or similar method in which funds are added directly onto a person's own general-use prepaid card or account with a payment intermediary).

The Telemarketing Sales Rule implements the Telemarketing and Consumer Fraud and Abuse Prevention Act that authorizes the FTC to prescribe rules prohibiting "deceptive" and "abusive" telemarketing acts or practices.

The FTC categorizes these payment methods as "novel" because they lack the same error resolution rights and liability limits provided by the TILA and Regulation Z (for credit card payments) or the Electronic Funds Transfer Act (EFTA) and Regulation E (for electronic fund transfers, ACH debits and traditional debit card transactions). The FTC states that these payment methods expose consumers to the risk of unrecoverable losses from telemarketing fraud. The FTC has declared these payment methods "abusive." Interestingly, the FTC acknowledges in the supplemental information issued with the final Rule that in response to the FTC's original Telemarketing Sales Rule rulemaking proceedings in 1995, the FTC received numerous comments from representatives of the automated payments industry demonstrating the widespread use of remotely created checks by legitimate telemarketers and sellers and the lack of effective payment alternatives. However, the FTC has now rejected these comments and in support of its argument that these payment methods are "abusive," reports that it appeared from the FTC's law enforcement experience that all these novel payment methods are used almost exclusively by perpetrators of telemarketing fraud.

These new rules are yet another illustration of how regulators broadly interpret the term "abusive" to push the boundaries of their rulemaking authority. ❑

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