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FTC Announces Telemarketing Sales Rule Amendment Regulating B2B Telemarketing

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On March 7, 2024, the Federal Trade Commission announced significant amendments to its Telemarketing Sales Rule. The effective dates for these changes are tied to publication of this announcement in the *Federal Register*, which has not yet happened. These amendments follow from a Notice of Proposed Rulemaking that the FTC published in June 2022. The final revisions largely mirror the FTC's proposals, but the FTC did alter certain aspects of these changes based on public comments. One significant amendment applies certain TSR provisions to all business-to-business telemarketing for the first time. The other key amendment significantly expands the TSR's recordkeeping provision, but that provision does not apply to B2B sales calls.

From the TSR's beginning in 1995, it has taken a virtually hands-off approach to B2B telemarketing, limiting application of the rule to sales of office and cleaning supplies. The FTC had pulled those specific offers out of the B2B exception because of a record of fraud specific to that market. The FTC has revisited this approach over the years but never codified any changes to the TSR's B2B exemption. In 2022, the FTC proposed applying the TSR's two provisions prohibiting misrepresentations to all B2B telemarketing. At the same time, the FTC also requested public comment on the idea of applying the entire TSR to B2B telemarketing. In a second announcement also published on March 7, 2024, the FTC explained that it decided not to further regulate B2B telemarketing in the TSR, beyond the new amendment limited to misrepresentations.

When the TSR's new B2B provision takes effect, 30 days after the FTC's announcement is published in the Federal Register, all "telephone calls between a telemarketer and any business to induce the purchase of goods or services" must comply with the TSR's two provisions prohibiting misrepresentations. The first provision identifies ten categories of prohibited misrepresentations. Four of these categories are generally applicable, relating to cost and quantity of offered goods or services, material restrictions and conditions, material aspects of performance and central characteristics, and material aspects of the seller's refund and cancellation policies. The remaining six categories are more specific, addressing prize promotions, investment opportunities, claims of affiliation or endorsement, credit card loss protection, negative option features, and debt relief services. The second TSR provision broadly prohibits making a false or misleading statement to induce any person to pay for goods or services.

The FTC appears to make an effort in this announcement to claim that this TSR amendment simply reflects business as usual for a compliant company. However, all sellers that use inbound or outbound telemarketing, including B2B companies, should take a close look at the details in the amendment to assess whether they need to make any adjustments before the changes take effect. For one thing, prohibiting misrepresentations as a deceptive act or practice under the TSR means that the FTC can seek civil money penalties in an enforcement action. A unanimous 2021 U.S. Supreme Court decision took away the FTC's ability to obtain monetary relief in typical FTC Act enforcement cases. With this TSR amendment, B2B companies that had previously concluded that the risk of monetary penalties in FTC enforcement actions was low will need to recalibrate that assessment. Any TSR enforcement action carries significant risk of substantial civil penalties: currently capped at $51,744 per violation when the FTC is the enforcing agency.

Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

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