

**VENABLE<sup>®</sup>** LLP

**New Federal Regulation of Tax Resolution, Tax  
Negotiation and Tax Settlement Services:  
FTC Telemarketing Sales Rule**

**October 5, 2010, 3:00 – 4:00 pm ET**

*Jonathan L. Pompan, Esq.  
Venable LLP, Washington, D.C.*



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# FTC Enforcement Statement: October 27, 2010

**NOTE:** On October 27, 2010, the Federal Trade Commission (“FTC”) issued an enforcement policy statement on the Debt Relief Service Amendments that were added to the Telemarketing Sales Rule. The FTC says “that while most companies that sell debt relief services over the telephone are now prohibited from charging fees before settling or reducing a consumer’s credit card or other unsecured debt, it will defer enforcement of the new rule for tax debt relief services.” The enforcement policy states, however, that tax debt relief services must comply with the FTC’s Telemarketing Sales Rule, except for the debt relief amendments, during the enforcement deferral period. The FTC also reminded providers that they must comply with the FTC Act, which prohibits unfair and deceptive practices. The FTC’s Enforcement Policy on Debt Relief Amendments to the Telemarketing Sales Rule can be found on the FTC website.



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# Introduction

- Background: How did we get here?
  - FTC Background
  - History Debt Relief Services Enforcement
- Debt Settlement Workshop
- Debt Relief Services Rulemaking
  - Telemarketing Sales Rule
- Amendments to the Telemarketing Sales Rule
- What's next?



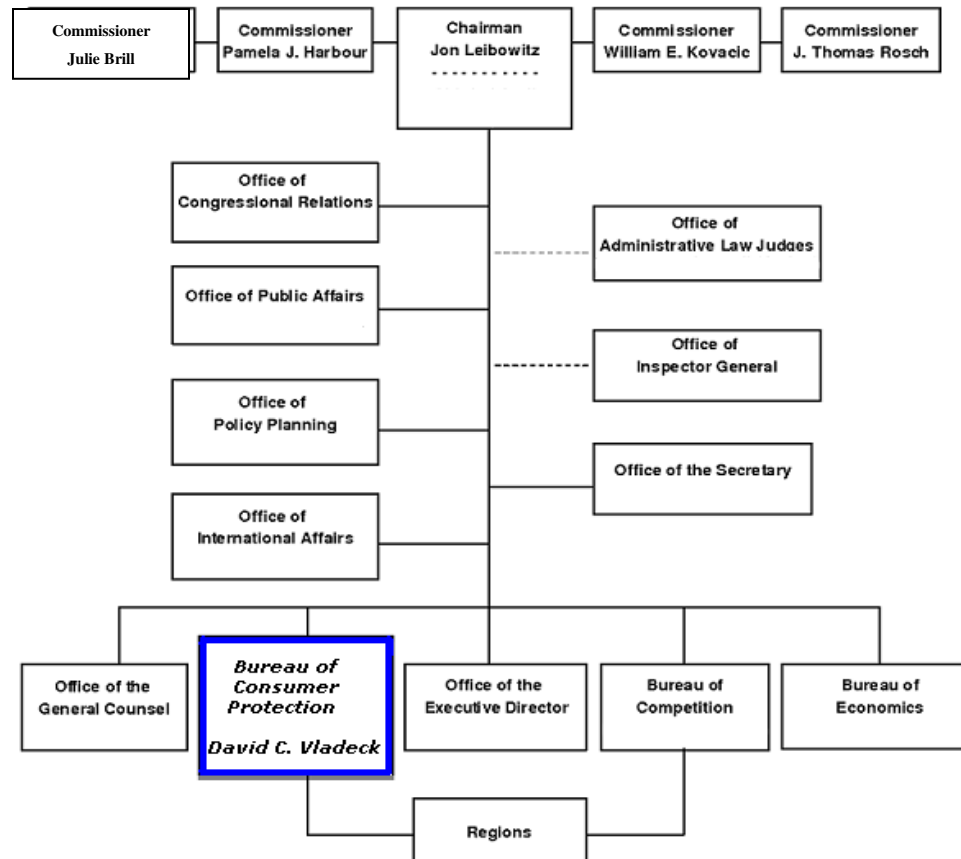
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# Federal Trade Commission- Background



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# Federal Trade Commission Overview



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# Federal Trade Commission Act

- **FTC pursues deceptive practices under Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45 *et seq.*:**
  - Section 5 gives the Commission broad authority to prohibit "unfair or deceptive acts or practices"
  - Section 13(b) authorizes FTC to file suit in United States District Court to enjoin any act or practice that is in violation of any provision of law enforced by the FTC
  - No rulemaking authority
- **Enforcement against unfair or deceptive practices**
  - Not required to prove actual deception
  - Wide array of remedies: civil penalties, injunctions, restitution, corrective advertising
- **Issues Policy Statements and "Guides" for specific industries and advertising practices**
  - Not official regulations but represent FTC's views of certain practices

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## FTC Guides

- Dietary Supplements: An Advertising Guide for Industry
- Guide Concerning the Use of Endorsements and Testimonials
- Guide Concerning the Use of the Word "Free"
- Guides Against Bait Advertising
- Guides Against Deceptive Pricing
- Guides for the Jewelry, Precious Metals, and Pewter Industries
- Guides for the Household Furniture Industry
- Guides for Private Vocational and Distance Education Schools
- Jewelry Guides and Information
- Joint FTC/FCC guides on Long Distance Advertising
- Refractive Eye Surgery Advertising: Guidance for Marketers
- FTC Guides for the Use of Environmental Market Claims (Green Guides)

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# FTC Policy Statements

- Enforcement Policy Statement on Food Advertising
- Enforcement Policy Statement on US Origin Claims (Made In USA)
- FTC Policy Statement on Comparative Advertising
- FTC Policy Statement on Deception
- FTC Policy Statement on Unfairness
- FTC Policy Statement Regarding Advertising Substantiation
- Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers
- "Made In USA" Standard - Homepage



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## Other FTC Related Statutes and Regulations

- Telephone Consumer Protection Act
- **Telemarketing and Consumer Fraud and Abuse Prevention Act**
  - **Telemarketing Sales Rule**
- Gramm-Leach-Bliley Act
  - Privacy Rule
  - Safeguards Rule
- CAN-SPAM Act
- Credit Repair Organizations Act
- Fair Debt Collections Practices Act (transferred to new Bureau of Consumer Financial Protection)
- Fax
- FACTA Red Flags Rule



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## FTC Enforcement History Related to Debt Relief Services

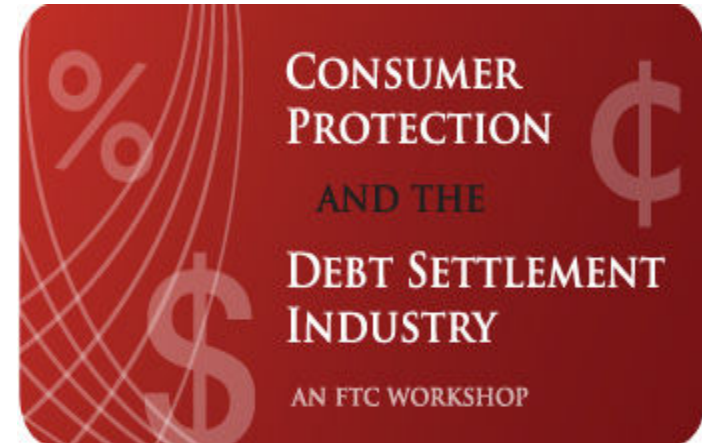
- In the last seven years, the FTC has brought over 20 lawsuits against sham nonprofit credit counseling agencies, debt settlement companies, and debt negotiators. These cases involved allegations of violations of Section 5 of the FTC Act and some of these cases involved TSR violations.
- The Commission also has issued numerous publications to consumers warning of debt relief scams and has sent warning letters to media outlets. In addition, the FTC has authority to challenge credit repair companies under the Credit Repair Organizations Act and has a pending rulemaking to address Mortgage Assistance Relief Services.



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# Federal Trade Commission Workshop: Sept. 25, 2008

- **Panel 1: Overview of the For-Profit Debt Settlement Industry: Understanding the Origins of the Industry**
- **Panel 2: The For-Profit Debt Settlement Industry Today: Perspectives on Current Industry Trends and Practices**
- **Panel 3: Protecting the Consumer: a Discussion of Consumer Protection Challenges Facing the For-Profit Debt Settlement Industry**
- **Panel 4: The Future of the For-Profit Debt Settlement Industry: Where Will the Industry Go from Here**



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# FTC Commissioner Rosch Speech on Consumer Protection and the Debt Settlement Industry (April 2, 2009)



Federal Trade Commission

CONSUMER PROTECTION AND THE DEBT SETTLEMENT INDUSTRY:  
A VIEW FROM THE COMMISSION

Remarks by J. Thomas Rosch<sup>1</sup>  
Commissioner, Federal Trade Commission

before

The 4th Annual Credit and Collection News Conference  
Carlsbad, California  
April 2, 2009

I. INTRODUCTION

My remarks today will be about consumer protection challenges in the debt settlement industry. To begin with, though, I'd like to engage in some "straight talk" from Washington about the credit situation in the U.S. today, and how we got here.

You all know about the "subprime lending" that has occurred, and the foreclosure crisis it has partially spawned. With the downturn in the economy and record job losses, credit card debt is said to be emerging as the next financial crisis.<sup>2</sup> According to the Federal Reserve Board's

<sup>1</sup>The views expressed herein are my own, and do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner. I would like to express my appreciation to Carolyn Hann, my attorney advisor, for her contributions to this speech.

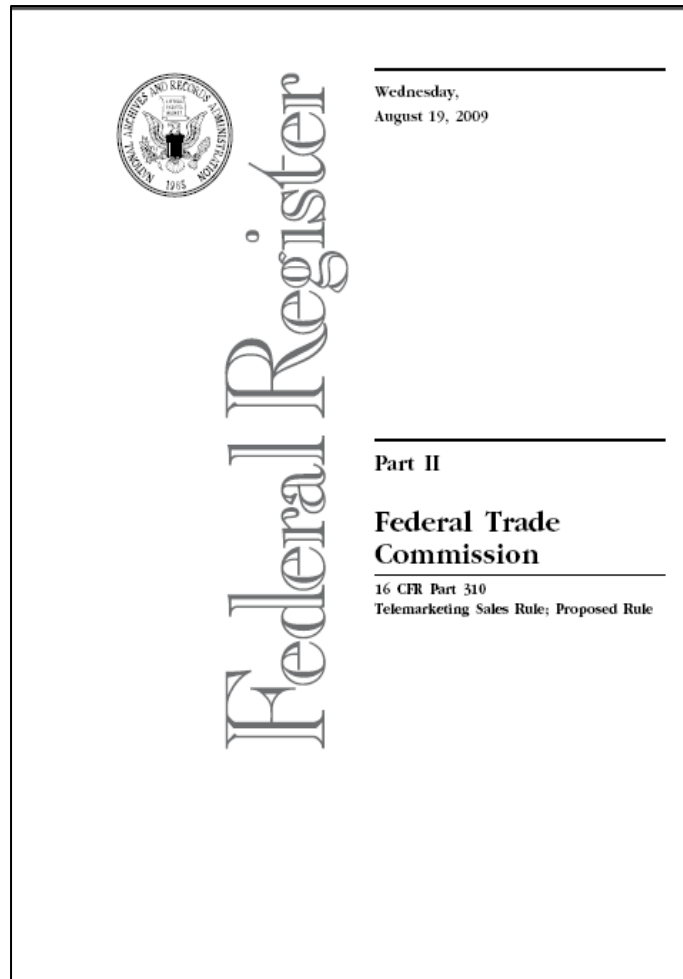
<sup>2</sup>See "Consumers Feel the Next Crisis: It's Credit Cards," Oct. 29, 2008, *The New York Times*, available at: <http://www.nytimes.com/2008/10/29/business/29credit.html?sep=10&sq=credit%20card&st=e-se>.

- *FTC Commissioner J. Thomas Rosch Recommendations for the Debt Settlement Industry*
  - "limit their performance claims to those they can adequately substantiate";
  - not "misrepresent the benefits of debt settlement";
  - "disclose, clearly and conspicuously, the negative impact that participation in a program may have on a consumer's credit score, and how long that impact may linger. This disclosure should not be made only in the written contract, but in the ad itself"; and
  - "if a debt settlement firm promises to refund debt settlement service fees to consumers if their debt settlement negotiations are unsuccessful, the firm must honor that promise."
- Concerns about advance fees
- Prior Written Consent for Disbursements
- Supports Self-Regulation

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# Notice of Proposed Rulemaking (NPRM) to Protect Consumers of Debt Relief Services (July 30, 2009)



- Prohibit companies from charging fees until they have provided the debt relief services;
- Require disclosures about the debt relief services being offered, including how long it will take to obtain promised debt relief and how much it will cost;
- Prohibit specific misrepresentations about material aspects of debt relief services, including success rates and whether a debt relief company is nonprofit;
- Extend the TSR to cover calls consumers make to debt relief services in response to their advertisements; and
- Define the term “debt relief service” to cover any service to renegotiate, settle, or in any way alter the payment terms or other terms of the debt between a consumer and one or more unsecured creditors or debt collectors, including a reduction in the balance, interest rate, or fees owed.
- Comment period closed October 26, 2009.

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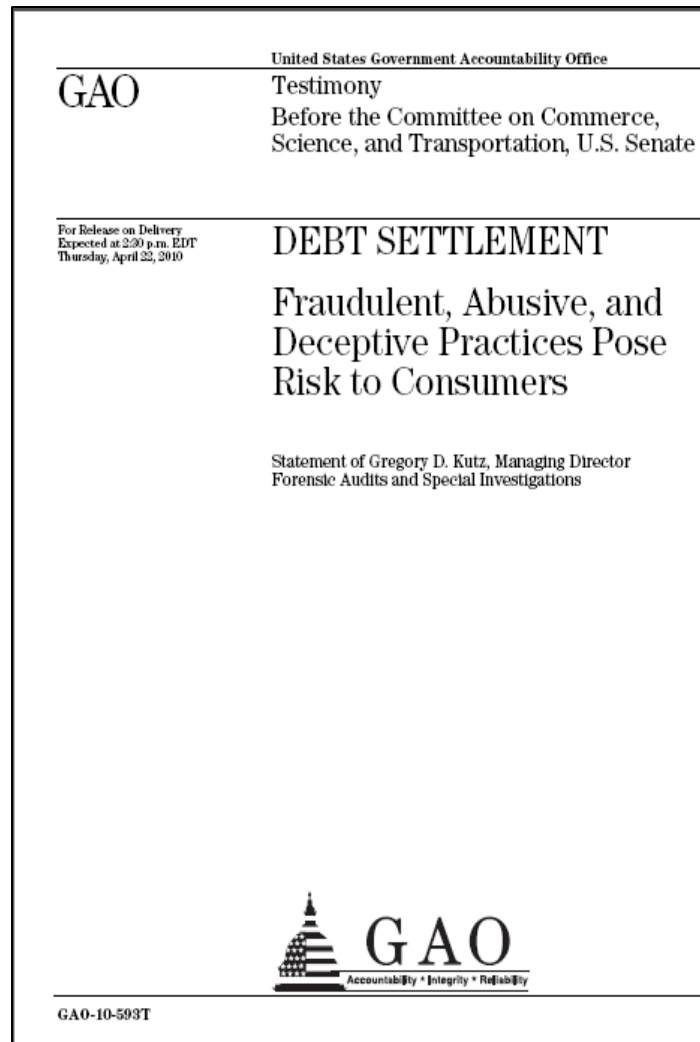
# FTC Public Forum on Proposed TSR Amendments (Nov. 4, 2009)

- **Panel 1** – Advance Fee Ban
- **Panel 2** - Advance Fee Ban - Implementation
- **Panel 3** – Disclaimers and Disclosures
- **Panel 4** – Scope & Definitions



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# GAO Report on Debt Settlement



- GAO's investigation found that some debt settlement companies engage in fraudulent, deceptive, and abusive practices that pose a risk to consumers.
- 17 of 20 companies GAO called while posing as fictitious consumers say they collect fees before settling consumer debts--a practice FTC has labeled as harmful and proposed banning--while only 1 company said it collects most fees after it successfully settles consumer debt.
- GAO found some debt settlement companies provided fraudulent, deceptive, or questionable information to its fictitious consumers, such as claiming unusually high success rates for their programs--as high as 100 percent. FTC and state investigations have typically found that less than 10 percent of consumers successfully complete these programs.
- Other companies made claims linking their services to government programs.

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## Summer 2010 – The Wait

- FTC Chairman Jon Leibowitz, May 20, 2010: “To curb ongoing abuses in the debt relief industry, in August 2009 the Commission proposed a rule to, among other things, prohibit debt relief service providers from charging consumers a fee until they have delivered the promised results. The FTC expects to complete this rulemaking proceeding within the next 60 days.”
- Section 553(d) of the APA – Publication in *Federal Register* no less than 30 days before the rule’s effective date.



## Final Rule – Amendment to the TSR

- Released on July 29, 2010
- 16 C.F.R. Part 310: Telemarketing Sales Rule: Amendments Addressing the Telemarketing of Debt Relief Services: Final Rule and Statement of Basis and Purpose
- Key Features:
  - advance fee ban for debt relief services;
  - require debt relief companies to make specific disclosures to consumers;
  - prohibit them from making misrepresentations; and
  - extends the Telemarketing Sales Rule to cover calls consumers make to these firms in response to debt relief advertising.



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# Types of Entities Subject to the Rule

- The new rule applies to for-profit sellers of debt relief services and telemarketers for debt relief companies. The TSR defines “telemarketing” as a “plan, program, or campaign . . . to induce the purchase of goods or services” involving more than one interstate telephone call.
- In addition, under the TSR, it is illegal for a person to provide “substantial assistance” to another 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.
- Although the TSR generally exempts inbound calls placed by consumers in response to direct mail or general media advertising, there is no such exemption in the Final Rule. The Final Rule, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption. As a result, virtually all debt relief transactions involving interstate telephone calls are now subject to the TSR.



# Definition of Debt Relief Services

- The Final Rule defines “debt relief service” as “any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.”
- The FTC’s makes clear that the use of the term “service” is not intended to be limiting in any way. As a result, the Commission states that “regardless of its form, anything sold to consumers that consists [sic] of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition.” Further, “[t]he Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services.”
- Although the Final Rule does not include “products” in the definition of “debt relief services,” the Commission notes in the Statement of Basis and Purpose that this limitation should not be “used to circumvent the rule by calling a service – in which a provider undertakes certain actions to provide assistance to the purchaser – a ‘product.’ Nor can a provider evade the rule by including a ‘product,’ such as educational material on how to manage debt, as part of the service it offers.”



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## Coverage of Tax Relief Services

My company helps customers settle debts that aren't necessarily credit card debts. Does the new Rule apply to us?

The definition of "debt relief service" covers all types of unsecured debts. If the other debts you settle are unsecured – for example, medical debts or tax debts owed to the government – you're covered by the new Rule. Services promising relief from mortgage debt are not covered under the TSR. They're the subject of a separate FTC Rulemaking on Mortgage Assistance Relief Services (MARS). Visit [www.ftc.gov](http://www.ftc.gov).

**Note: Not mentioned in the Final Rule, but only in the Business Guidance**

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# Advance Fee Ban

- Effective October 27, 2010
- The Final Rule contains specific requirements for debt relief providers related to charging an advance fee before providing any services. It specifies that fees for debt relief services may not be collected until:
  1. the debt relief service successfully renegotiates, settles, reduces, or otherwise changes the terms of at least one of the consumer's debts;
  2. there is a written settlement agreement, debt management plan, or other agreement between the consumer and the creditor, and the consumer has agreed to it; and
  3. the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.



## Dedicated Accounts

- May require consumers to set aside their fees and savings payments to creditors. Providers may only require a dedicated account as long as five conditions are met:
  1. the dedicated account is maintained at an insured financial institution;
  2. the consumer owns the funds (including any interest accrued);
  3. the consumer can withdraw the funds at any time without penalty;
  4. the provider does not own or control or have any affiliation with the company administering the account; and
  5. the provider does not exchange any referral fees with the company administering the account.



# Disclosures and Prohibited Misrepresentations

- Effective September 27, 2010.
- Under the Final Rule, providers will have to make several disclosures when telemarketing their services to consumers. Before the consumer signs up for any debt relief service, providers must disclose fundamental aspects of their services, including how long it will take for consumers to see results, how much it will cost, the negative consequences that could result from using debt relief services, and key information about dedicated accounts if they choose to require them.
- The Final Rule also prohibits misrepresentations about any debt relief service, including success rates and whether the provider is a nonprofit entity. The FTC's Statement of Basis and Purpose, which accompanies the Final Rule, provides extensive guidance about the evidence providers must have to make advertising claims commonly used in selling debt relief services.

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# What's next at the FTC related to debt relief services?




- Mortgage Rulemakings
  - Mortgage Advertising and Marketing
  - Mortgage Assistance Relief Services (“MARS”)
- Push for Greater Rulemaking Authority
- Stepped-up Enforcement

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**Media Advisory:** 10/04/2010

### FTC to Announce Major Law Enforcement Action Against National Tax Relief Scam

The Federal Trade Commission will host a press conference in Chicago on **Wednesday, October 6, 2010, at 11 a.m. CST (noon EST)** to announce a major law enforcement action against a national operation based in Beverly Hills, California, that allegedly bilked consumers out of more than \$60 million by falsely claiming it can lower people's tax debts. David Vladeck, Director of the FTC's Bureau of Consumer Protection, will be available to answer reporters' questions. A TV commercial used in the operation will be shown.

**WHO:** David C. Vladeck,  
FTC's Bureau of Consumer Protection  
Director

Consumers affected by the scheme

**WHEN:** Wednesday, October 6, 11 a.m. CST (noon EST)

**WHERE:** FTC Midwest Regional Office  
Suite 1825  
55 West Monroe Street  
Chicago, Illinois 60603  
312-960-5634

**CALL-IN:** Reporters who wish to participate, but who cannot attend may call: 866-363-9013 Conference ID: 15089434. The leader is Gail Kingsland. This phone number is only for news reporters.

**MEDIA CONTACT:** Office of Public Affairs  
202-326-26180

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## QUESTIONS AND DISCUSSION

Jonathan L. Pompan, Esq.  
[jlpompan@Venable.com](mailto:jlpompan@Venable.com)  
(202) 344-4383

Venable LLP  
575 7<sup>th</sup> Street, N.W.  
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