

April 11, 2002

By E-Mail to: tsr@ftc.gov

Federal Trade Commission
Office of the Secretary
Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Attn: FTC File No. R411001

Re: Telemarketing Rulemaking--Comment FTC File No. R411001

To whom it may concern:

1. This comment letter is submitted on behalf of NACHA – The Electronic Payment Association, in response to the Federal Trade Commission’s (“FTC”) request for comment on the Telemarketing Sales Rule (“Proposed Rule”). We appreciate the opportunity to comment on this very important matter.
2. NACHA represents more than 12,000 financial institutions through its 33 regional ACH associations, 7 councils and corporate Affiliate Membership program. A leader in the payments industry, NACHA develops and administers the operating rules for the Automated Clearing House (“ACH”) Network, and for emerging electronic payment solutions in the areas of Internet commerce, bill payment and presentment, financial electronic data interchange, cross-border transactions, electronic checks, and electronic benefits transfer.
3. NACHA’s comments focus on section 310.3(a)(3) of the Proposed Rule, which pertains to telemarketing billing methods. We believe the billing and payment issues in the Proposed Rule need to be resolved before a final version of the Telemarketing Sales Rule (“Final Rule”) should be adopted.
4. Section 310.3(a)(3) of the Proposed Rule contains provisions on submission of billing information for payment that are problematic and appear to be based on misconceptions of current law. The Proposed Rule prohibits a telemarketer from submitting billing information for payment, or collecting or attempting to collect payment, without first obtaining the consumer’s express verifiable authorization, when the payment method used does not impose a limit on the consumer’s liability for unauthorized charges or provide for dispute resolution procedures comparable to the Truth in Lending Act as amended (“TILA”). This disparate treatment of different payment methods is critical

because the procedure for obtaining express verifiable authorization will be both cumbersome and costly to implement.

5. The billing method limitations should expressly exempt payment methods covered by Regulation Z (which implements TILA), and payment methods covered by Regulation E¹ (which implements the Electronic Fund Transfer Act), as well as payment methods covered by payment system rules that provide comparable protections to consumers. The Supplementary Information to the Proposed Rule states that this expansion of the billing method provisions from the current Telemarketing Sales Rule is designed to “provide protections for consumers in a . . . class of transactions where an unauthorized charge is likely to present a particular hardship to the consumer because of a lack of TILA . . . protections.” While we understand this desire to provide adequate consumer protections, we note that this provision is overly broad and unnecessarily encompasses payment methods that already provide adequate dispute resolution methods or limits for consumer liability for unauthorized charges.

6. Specifically, the billing method provision should not apply to transactions covered under Regulation E because Regulation E provides for limitations on consumer liability for unauthorized transactions and dispute resolution procedures that are, in practice, substantially similar to the limitations on liability provided in Regulation Z. We note that although Regulation E may provide for somewhat higher liability where lost access devices are not reported promptly, this provision is unlikely to have any application in the context of unauthorized telemarketing transactions where the individual retains control of any physical access devices and the unauthorized transaction is based on knowledge of the account number, rather than possession of the access device. Accordingly, no meaningful distinction exists between the rights of consumers with respect to unauthorized transactions using credit cards and the rights of consumers with respect to unauthorized transactions using electronic payment systems subject to Regulation E, such as retail ACH transactions.

7. Further, the Final Rule should permit the use of billing information without express verifiable authorization from the consumer, as defined by the Proposed Rule, in the case of transactions using payment systems such as those covered by the NACHA operating rules for the ACH Network (the “NACHA Rules”) that limit customer liability by payment system association rules. In practice, the NACHA Rules provide comparable, if not greater, protection for customers from unauthorized transactions than is provided under either Regulations Z or E. The FTC should not impose artificial restrictions on the use of payment systems that provide their users with greater protection than is otherwise provided under federal law.

8. NACHA has developed a specific set of “Telephone-Initiated Entry” (“TEL entry”) provisions as part of the NACHA Rules that, among other things, specifically address the

¹ 12 C.F.R. Pt. 205.

unauthorized use concerns raised in the Supplementary Information to the Proposed Rule. In addition to the protections of Regulation E that apply to certain ACH transactions, under the NACHA Rules TEL entries only can be used for a single, non recurring debit entry to a consumer's account that is initiated pursuant to an authorization received orally via the telephone and where there is an existing relationship between the originator of the entry and the consumer or where the consumer originates the telephone call. Accordingly, TEL entries are limited to circumstances where the risks to the consumer are already significantly lower than in cold calls initiated by a telemarketer.

9. Moreover, TEL entries provide for additional consumer protections. For example, TEL entries require that the consumer orally authorize the originator (telemarketer) to initiate a debit entry to the consumer's account. The originator must ensure that the following minimum information be included as part of the authorization:

- the date on or after which the consumer's account will be debited;
- the amount of the transaction;
- the receiver's name;
- a telephone number for receiver inquiries that is answered during normal business hours;
- the date of the receiver's oral authorization; and
- a statement by the originator that the authorization obtained from the receiver is for a single-entry ACH debit.

10. The originator of a TEL entry must either tape record the consumer's oral authorization, or provide in advance of the settlement date written notice to the consumer that confirms the oral authorization. The oral authorization must state clearly that the consumer is authorizing an ACH debit entry to his or her account, and express the terms of the authorization in a clear manner. Although these authorization requirements are similar to the requirements in the Proposed Rule, they are not identical. It is important that the NACHA Rules retain the flexibility to adapt these requirements to evolving market practices.

11. In addition, other provisions of the NACHA Rules provide warranties to protect the consumer and provide for the return of unauthorized TEL entries. Specifically, in addition to the general warranties that apply to business as well as consumer transactions, including a warranty that each transaction is authorized, a bank that transmits TEL entries on behalf of an originator warrants that each originator for which it transmits TEL entries has employed commercially reasonable procedures to verify the identity of the consumer and that each routing number is valid. Moreover, if a consumer claims that he or she did

not authorize the originator to transmit a TEL entry, the NACHA Rules provide the consumer with a right to have his or her account recredited.

12. Because NACHA has developed an effective system that provides protection from unauthorized electronic transactions and dispute resolution procedures comparable to TILA, transactions governed by the NACHA Rules should be exempt from the billing method provisions as of the Proposed Rule. However, if the FTC decides to go forward with the billing method provisions as proposed, without excluding transactions covered by the NACHA Rules, we request a delayed effective date so that NACHA has sufficient opportunity to revise the NACHA Rules to conform to the language of the Final Rule and its members have adequate time to implement such revised NACHA Rules.

13. In conclusion, NACHA believes that the FTC should adopt the recommendations set forth in this letter before moving forward with a Final Rule. Again, NACHA appreciates this opportunity to comment on the Proposed Telemarketing Rulemaking.

Sincerely,

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