



INDIANA UNIVERSITY  
MAURER SCHOOL OF LAW  
Bloomington

August 5, 2013

Office of the Secretary  
Federal Trade Commission  
Room H-113 (Annex B)  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Via Internet Portal: <https://ftcpublic.commentworks.com/FTC/tsrantifraudnprm>

Re: Proposed Prohibition on Certain Payment Methods and Instruments in Telemarketing Sales – 16 C.F.R. Part 310, Project No. R411001

Dear Madam Chair and Honorable Members of the Federal Trade Commission:

I support the Commission's decision to prohibit certain payment methods and instruments in telemarketing sales.

Decisions to prohibit terms in payments methods and instruments and, even more particularly, decisions to prohibit the *use of methods and instruments* should be taken after very careful consideration to be assured that the costs of regulatory action or inaction are balanced with the benefits that consumers might obtain from the continued availability of such payments opportunities. I can recall only a few examples of rulemaking action by the Commission that resulted in a ban on terms and conditions in consumer payments and credit transactions -- the Trade Regulation Rule on the Preservation of Consumers' Claims and Defenses (also known as the Holder-in-Due-Course Rule), the Trade Regulation Rule on Credit Practices, and the Telemarketing Sales Rule. These Rules reach back almost 40 years to their respective inception. Thus, when the Commission sets its mind to a prohibition of the type proposed for telemarketing sales, I know that it has considered its decision long and well because of the time period since the initial promulgation of the Telemarketing Sales Rule when many of the payment methods and instruments were barely in use.

Even since the Commission last amended the Telemarketing Sales Rule, newer payment methods and instruments have come to the general marketplace, and with particular frequency, apparently, are in use in the telemarketing industry. The NPR demonstrates considerable evidence on which to base the need for a new remedy, which is the proposed prohibition. I find the cost-benefit analysis articulated in the Notice of Proposed Rulemaking ("NPR") to be persuasive. I applaud the staff for the care with which they articulated the concerns and evidence supporting this NPR.

The balance of this comment focuses on two sets of considerations: (1) a possible less dramatic remedy than an outright ban on payments methods and instruments modeled on the "remotely created check" warranties in recent amendments to Articles 3 and 4 of the Uniform Commercial Code, and (2) a suggestion that promulgation of the Proposed Rule should be followed by intense consumer education to maximize the prospects that consumers can help protect themselves from telemarketing abuses.

- I. Throughout much of our history as a nation, the regulation of payments and credit has been performed on a dual track by the States and federal government. The NPR notes efforts to curtail abuses by telemarketers that include both amendments to the transfer and presentment warranties Articles 3 and 4 of the Uniform Commercial Code that have been available for the States to enact for some years, but the States generally have not enacted. Much of the consumer injury from telemarketers' uses of the payment method and instruments cited in the NPR could have been avoided if the States had enacted those amendments because they would have allowed the return to the telemarketers themselves or at the least to their payments processors or depository banks of payments that consumers had not authorized in fact, in amount, or in frequency.

I mention these UCC amendments for two reasons. First, the States are performing a valuable role in the regulation of payments and credit, particularly in incubating new solutions to emerging payments and credit problems. And, second, if after receiving comments on this NPR, the Commission seeks another means of curtailing abuses in telemarketing practices without promulgating the proposed bans on methods and instruments, it might consider promulgating new warranties for payments made via the same methods and instruments that the Uniform Law Commissioners and the American Law Institute adopted for transfers and presentments of negotiable instruments, or a solution modeled on them.

The reason that this might work as a compromise is that it is better designed to impose the externalities on payments processors and depository institutions that reap income from handling payments than the current regime where all the externalities are effectively imposed on consumers and their payor/paying banks. Assignment of externalities to the person or persons in the better position to prevent them – through indemnification agreements, charge-backs or other means – is a tool that the Commission employed in the 1975 Holder-in-Due-Course Rule I mentioned above.

- II. A real concern with a proposal as sweeping as the Proposed Rule relates to enforcement resources and priorities. Any Rule prohibiting telemarketers' uses of payment methods and instruments will require robust enforcement efforts -- because we should not assume that telemarketers will go away quickly or without a fight. Enforcement efforts could continue over a long course of time, as they have for the original Rule. The ability of the Commission to pursue non-depository providers and processors is one of the pieces of the enforcement effort that will be required to protect consumers.

Additionally, I recommend that the Commission continue to work with federal bank regulators to promote the use of bank regulators' authorities under Section 5 of the FTC Act to assist in the enforcement of the Rule, through their own rulemaking, enforcement and examination authorities. Additionally, the States can continue to play an important role in policing telemarketing practices and in their own examinations of state-chartered depository institutions and other providers of services to telemarketers.

Lastly, I would expect a robust campaign of consumer education to attend the promulgation of any Telemarketing Sales Rule amendments. I urge the Commission to work with Internet service providers and others in the television and other electronic media so that the message about the new prohibitions or requirements will be “broadcast” widely.

Thank you for the opportunity to comment. These comments do not reflect the views of the Maurer School of Law or the Trustees of Indiana University.

Respectfully,

  
Sarah Jane Hughes  
University Scholar and Fellow in Commercial Law