U.S. Department of Justice
Consumer Protection Branch

Michael S. Blume, Director
Michael.S.Blume@usdoj.gov
Phone: 202-307-3009
Fax: 202-514-8742

Overnight Delivery Address
450 Fifth Street, NW
Sixth Floor South
Washington, D.C. 20001

Mailing Address
P.O. Box 386
Washington, D.C. 20044

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

Re: Telemarketing Sales Rule, 16 CFR Part 310, Project No. R411001

Dear Mr. Secretary:

The Consumer Protection Branch of the United States Department of Justice submits these comments on the Notice of Proposed Rulemaking and Request for Public Comment regarding the Telemarketing Sales Rule. The notice was issued on May 21, 2013. Comments originally were to be submitted by July 29, 2013, but the FTC delayed the deadline to August 8, 2013. We appreciate the opportunity to comment on the proposed rulemaking.

The Consumer Protection Branch agrees with the FTC's proposed changes to the TSR. This letter addresses specific aspects of the proposed changes with which the Consumer Protection Branch has considerable expertise through its pursuit of civil and criminal matters.

I. Narrowing Telemarketer Access to Consumer Bank Accounts

Advances in technology and the relative affluence of the American consumer have led fraudulent telemarketers from across the world to target U.S. consumers. The Consumer Protection Branch has active consumer fraud investigations and prosecutions against perpetrators from countries as varied as Canada, Jamaica, Costa Rica, and Argentina. The scams use a variety of sales pitches and diverse financial instruments to draw money from consumers' bank accounts.

The FTC's proposed edits to the Telemarketing Sales Rule barring telemarketers from using Remotely Created Checks, Remotely Created Payment Orders, cash-to-cash money transfers and cash reloadable products would prevent hundreds of millions of dollars in consumer loss each year while, at the same time, leaving open safer mechanisms for legitimate marketers to accept consumer payments.

A. Barring Remotely Created Checks and Payment Orders in Telemarketing Transactions

Remotely Created Checks ("RCCs") and Remotely Created Payment Orders ("RCPOs") furnish fraudulent telemarketers with an easy and effective tool for debiting consumer accounts. The Consumer Protection Branch's experience with RCCs and RCPOs mirrors that of the FTC, as described in Section II.A.3 of FTC's Notice of Proposed Rulemaking. Fraudulent operators offering bogus debt relief services, promoting deceptive payday loans, and debiting consumer accounts with no authorization at all have used RCCs and RCPOs to execute their schemes. Like others, we have seen third party payment processors that promote their use of RCCs as a means to process transactions for merchants that have been blacklisted from credit card and ACH transactions, that is from merchants who are unable to utilize traditional, and more robustly monitored, payment systems.

The Consumer Protection Branch has engaged in several investigations into banks, payment processors, and merchants that have used RCCs and RCPOs to illegally draw money from consumers' bank accounts. Return rates – the rates at which financial entities or consumers stop the withdrawals – often provide a clear clue that a merchant uses an account for fraud. While most return rates for transactions run below 1%, some merchants and processors have bank accounts with return rates of 30% to 70% or higher. Banks and processors sometimes unlawfully ignore return rates and other telltale signs of fraud. While ACH and credit card transactions frequently are monitored and terminated at the level of approximately 1% of returns, no such threshold exists for RCCs or RCPOs and they continue unabated, to the detriment of hundreds of thousands of consumers.

The Consumer Protection Branch's own knowledge and experience with these transaction types is supplemented by cases brought by other parts of the Department of Justice. Cases such as *United States v. Wachovia, N.A.*, Cr. No. 10-20165 (S.D. Fla. Mar. 16, 2010), *United States v. First Bank of Delaware*, Civ. No. 12-6500 (E.D. Pa. Nov. 19, 2012), and *United States v. Payment Processing Center*, LLC, Civ. No. 06-725 (E.D. Pa) illustrate that fraudulent actors frequently debit consumer bank accounts using RCCs and RCPOs.

The serious risks posed by RCCs are well documented in and outside of the FTC's Notice of Proposed Rulemaking, and need not be repeated here. *See, e.g.*, Financial Crimes Enforcement Network, Advisory FIN-2012-A010, Risk Associated with Third-Party Payment Processors (October 22, 2012); NACHA, Remotely Created Checks and ACH Transactions: Analyzing the Differentiators (Mar. 2010); FFEIC, Bank Secrecy Act Anti-Money Laundering Examination Manual: Third-Party Payment Processors B Overview (2010); Federal Reserve Bank of Atlanta, 2008 Risk & Fraud in Retail Payments: Detection & Mitigation Conference Summary (Oct. 6-7, 2008); Public Comment filed with the Federal Reserve by the National Association of Attorneys General, the National Consumer Law Center, Consumer Federation of America, Consumers Union, the National Association of Consumer Advocates, and U. S. Public Interest Research Group in Docket No. R-1226 (May 9, 2005).

The FTC's proposed rule change will not adversely affect legitimate telemarketers. Honest telemarketing merchants of goods and services can use a variety of other payment means, *e.g.*, ACH, credit card, billing in anticipation of payment by check, and other payment systems that, unlike RCCs, have effective mechanisms and systems in place to protect against consumer fraud.

The Consumer Protection Branch strongly favors amendment of the Telemarketing Sales Rule to bar use of RCCs and RCPOs for telemarketing transactions.

B. Barring Cash-to-Cash Money Transfers and Cash Reloadable Products in Telemarketing Transactions

The Consumer Protection Branch's experience with cash transfers arises principally from Jamaican lottery fraud investigations and other advanced fee schemes. Those committing lottery fraud contact Americans, frequently targeting elderly consumers, and tell them they have won a lottery. The caller states that the consumer must pay advanced fees and/or taxes before winnings can be distributed. Under instructions from the caller, elderly consumers transfer money frequently using Western Union, MoneyGram, or cash reloadable products.

Like RCCs and RCPOs, these products and services have far fewer protections in place than ACH and credit card payments. Even when fraud may be clear to money transfer businesses themselves, they do not always stop the fraudulent proceeds from passing through their hands. *See, e.g.*, *United States v. MoneyGram Int'l, Inc.*, Cr. No. 12-291 (M.D. Pa. Nov. 9, 2012).

Cash Reloadable products can similarly be used by fraudulent telemarketers to evade centralized monitoring of fraud. As a result, the Consumer Protection Branch has seen a rise in the number of frauds using these products.

The Consumer Protection Branch strongly favors amendment of the Telemarketing Sales Rule to bar use of cash-to-cash money transfer and cash reloadable product transactions.

II. Amendments to TSR's Recovery Services Provisions

The Notice of Proposed Rulemaking contains a valuable proposed revision regarding recovery services. As the rule currently stands, it applies to businesses that purportedly recover money consumers lost to other *telemarketing* businesses. The rule would be expanded to cover businesses that purport to recover money lost to all types of businesses, not simply telemarketing businesses. The goal of this specific provision is to protect consumers from the deceptive acts of recovery services, not the underlying business from which the consumer lost money. Thus, whether the underlying business acted through telemarketing is irrelevant.

In the Business Recovery Services ("BRS") case, for example, the Consumer Protection Branch found that victims hired BRS to recover money lost to several separate firms. *United States v. Business Recovery Services, LLC*, Civil No. 11-390 (D. AZ.). Where the previous transactions did not involve telephone calls, the recovery services purchase from BRS did not fall under Section 310.4(a)(3). Our action was therefore unable to reach a portion of BRS's business that was as unsavory as the portion that we were able to reach. There is no logical reason to differentiate recovery room victims based upon the means by which they entered into the underlying transactions, and we encourage the Commission to adopt this change.

III. Amendments Making Caselaw Explicit as Part of the TSR Do-Not-Call Provisions

The proposed rulemaking would add a provision stating explicitly that telemarketers bear the burden of proving that they are exempt from the Do Not Call Rules based upon an express written agreement or existing business relationship.

The Consumer Protection Branch considers this change to be unnecessary, given that case law already has clearly and consistently held it to be the case. When a statute announces a broad prohibition and then carves an exception out of it, the defendant bears the burden of proof on the exception. *See*, e.g., *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("'[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'") (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948)).

Nevertheless, if the Commission wishes to add this provision for those unfamiliar with the case law to bolster understanding of their obligations, the Consumer Protection Branch supports the amendment. The Commission should clarify that the amendment does not state a new or changed rule, but that it is making explicit what the rules of legal interpretation and case law already hold.

In sum, the proposed edits to the TSR will both protect consumers from criminal and civil fraud schemes and deter abusive telemarketers from barraging consumers with unwanted calls. The FTC's changes are well-reasoned and supported and should be enacted.

Sincerely,

Michael S. Blume
Director