



MARIE C. GOODING
FIRST VICE PRESIDENT

1000 Peachtree Street, NE
Atlanta, GA 30309-4470
404-498-8373
fax 404-498-8073
marie.gooding@atl.frb.org

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Federal Trade Commission
Office of the Secretary
Room H-113 (Annex B)
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

The Federal Trade Commission (“Commission”) has issued proposed amendments to the Telemarketing Sales Rule, 16 CFR Part 310. The principal proposed amendments would prohibit telemarketers and sellers in both inbound and outbound telemarketing calls from requesting or accepting remotely created checks (“RCCs”), remotely created payment orders (“RCPOs”), money transfers, and cash reload mechanisms as payment.

The Federal Reserve Bank of Atlanta (“FRBA”) operates the Federal Reserve System’s Retail Payments Product Office, which manages and oversees the check and ACH services that the Federal Reserve Banks provide to the nation’s financial institutions. FRBA also operates the Retail Payments Risk Forum, which frequently invites representatives from federal and state agencies, private sector rule makers, and leaders from the payments industry to discuss known and emerging retail payments risk issues.

There is a history of cooperation between the staffs of FRBA and the Commission at the intersection between consumer fraud and the U.S. payment system. We applaud the Commission’s proposed rulemaking insofar as the proposed rule invites all of the participants in the payments industry to engage in a serious discussion about the use of the U.S. payments system to facilitate the movement of money in carrying out schemes that defraud consumers. Our staff, like the Commission’s, hear reports from law enforcement personnel and consumer advocates that RCCs are disproportionately used by fraudsters. FRBA is aware of, and we appreciate, the Commission’s desire, which has been expressed to our staff, to “get this right.” However, we have concerns about the specific prohibitions that the Commission has set forth in its proposed rulemaking. Each of our concerns is enumerated and explained below.

1. *Potential Fragmentation of Payments Law.*

The Telemarketing Sales Act (“TMSA”) authorizes the Commission to promulgate rules “prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”¹ Pursuant to the TMSA, the Commission has targeted a number of telemarketing acts and practices by requiring certain disclosures on telemarketing calls, prohibiting specific material misrepresentations, and imposing liability on third parties that provide substantial

¹ 15 U.S.C. 6102(a)(1).

assistance to telemarketers that violate the TMSA, among other actions.² Prohibiting the use by telemarketers and sellers of certain payments methods and thus impacting how those payments are processed in the check collection system is a new and different use of the Commission's Unfair or Deceptive Acts or Practices ("UDAP") authority. If the Commission were to finalize the Proposed Rule, a payment instrument, the RCC, that is implicitly permitted for bank to bank transfer and presentment under one federal regulation (Section 229.34(d) of Regulation CC) will be expressly banned for use by one sector of the sales market under another federal regulation. We believe that in both the short and long term, it is clearly preferable public policy not to create a fragmented "law of payments" in which multiple federal agencies take differing and/or conflicting views on the legitimacy of specific payments instruments. FRBA is interested in working together with the Commission and other federal agencies in an effort to define a regulatory solution that does not further fragment the law of payments.

2. A ban on RCCs and RCPOs could easily be circumvented.

While FRBA supports the Commission's efforts to combat abusive telemarketing acts and practices, we fear that banning specific payments would not be an effective method by which to achieve the Commission's objective. If the Commission adopts the proposed rule, defrauders will continue to offer shoddy or non-existent goods and services to consumers, and the consumers would continue to pay for them, using mechanisms adapted to evade or circumvent the ban. Defrauders might evade the coverage of the Commission's prohibition on RCCs simply by issuing payment orders that bear a signature instead of a printed legend. FRBA notes that it is not possible to detect the difference between an image captured from a paper check and an electronically created image riding the check rails, or the difference between an image issued by an account holder and an image created by a payee. A prohibition that is easily circumvented is not likely to prove effective. FRBA fears that if the Proposed Rule is adopted and does have practical impact, that impact will be that depository banks will stop accepting RCCs and may become reluctant to offer remote deposit capture services out of fear that impermissible items might lurk in the image files. While FRBA would prefer that the Commission adopt a different path for the reasons set forth herein, if the Commission decides to move forward with the proposed prohibition on RCCs and RCPOs, FRBA may be able to help the Commission to refine the regulation to make the final rule harder to circumvent.

3. A ban on the use of "remotely created payment orders" could stifle innovation that includes the legitimate use of electronically issued payments and the potential adoption of effective consumer protective authentication methods.

RCPOs are an emerging form of payment. As a topic for public rulemaking, they were first addressed in the proposed amendments to Regulation CC only two years ago.³ Prohibiting their use prior to achieving clarity regarding the potentially enhanced consumer protections they offer or the business functionalities they could provide would be premature.

² Proposed Amendments to the Telemarketing Sales Rule (May 21, 2013), pg. 5, available at <http://www.ftc.gov/os/2013/05/130521telemarketingsalesrulefrn.pdf> (hereinafter, the "Proposed Rule"). Other abusive acts or practices considered include "(1) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of his or her right to privacy; (2) restrictions on the time of day telemarketers may make unsolicited calls to consumers; and (3) a requirement that telemarketers promptly and clearly disclose in all calls to consumers that the purpose of the call is to sell goods or services or solicit a charitable contribution." Proposed Rule, pg. 4.

³ See discussion on "Electronic Items Not Derived From Checks." Proposed Rule, Regulation CC, 76 FR16862, 16865 (Mar. 25, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-5449.pdf>.

The Commission itself has recognized the unsettled legal landscape for RCPOs. As it notes in the Proposed Rule – “...it remains unclear whether remotely created payment orders are subject to the EFTA. Regardless, without changes to the interbank clearing system that would enable banks to distinguish remotely created payment orders from remotely created checks, banks may continue to treat remotely created payment orders as if they are remotely created checks covered by the UCC.”⁴ If it is decided by the appropriate rulemaking agency that consumer RCPOs do fall within the purview of EFTA, they would receive the same pro-consumer protections as credit cards and debit cards (e.g., limitations on liability and a formalized dispute resolution process). The absence of these protections is what the Commission has repeatedly expressed concern with in the Proposed Rule. We, similar to the Commission, recognize the lack of clarity around the legal framework governing RCPOs and the various implications that result should consumer RCPOs definitively become subject to the EFTA. RCPOs are a part of the pending Regulation CC rulemaking by the Board of Governors of the Federal Reserve System (“Board”). Prior to banning their use, FRBA would urge the Commission to allow the relevant rulemaking bodies the opportunity to provide this much needed clarity.

Recent discussions involving the payments industry and the banking and consumer protection agencies have made it clear that there are legitimate reasons why merchants want to use RCPOs. As recognized by the Commission in the Proposed Rule, “[i]t is much easier for a merchant to open an ordinary business checking account and use it to create and deposit remotely created checks or remotely created payment orders into the check clearing system than it is to establish a credit card merchant account or qualify for ACH origination service.”⁵ In particular, recent industry discussions about the future of payments have suggested that there are significant barriers to establishing ACH origination services, which is why a number of merchants, especially those that are small to mid-sized, have generally been slow adopters of ACH. These barriers to ACH when compared to checks include, but are not limited to, the following: (1) checks are easy to integrate with existing accounting systems, (2) checks have near universal acceptance in the U.S., (3) checks require less precise information and minimum efforts, (4) many small to mid-sized businesses cannot easily initiate an ACH transaction because such businesses do not have the requisite systems and resources, (5) a large number of banks do not offer ACH origination services to small businesses, (6) image clearing systems generally have faster availability than ACH, and (7) small to mid-sized businesses that do gain access to the ACH network generally pay higher fees for ACH services than large corporates.

With respect to the difficulty in distinguishing legitimate uses from fraudulent uses of RCPOs, FRBA would ask that the FTC allow the industry some time to develop mechanisms by which this distinction can be achieved. There is an opportunity, through authentication and other technology driven solutions, for RCPOs to provide many of the benefits of checks without carrying many of the risks. A premature ban on their use in the telemarketing context may limit their use elsewhere as they would be stigmatized as a “risky” form of payment. With proper authentication methods (e.g., verification of consumer consent passed along with the RCPOs), there may be ways to take advantage of RCPOs while reducing consumer risk and realizing cost savings and efficiencies that may not otherwise be available. It is not clear to FRBA what the future might hold if the industry is free to innovate with RCPOs, but there may be upside possibilities both with respect to efficiency and the adoption of authentication that could offer much more consumer protection than what currently exists under the law that applies to checks. Therefore, we urge the Commission to push forward with its insistence that the payments industry do more to protect consumers but allow additional time to for the industry, law enforcement, consumers advocates, and the banking agencies to complete the ongoing dialogue about “electronic payment orders,” possible business uses, and possible requirements for building consumer protections into the mainstream uses of these payment orders before banning their use as a deceptive and abusive practice.

⁴ Proposed Rule, pg. 39.

⁵ Proposed Rule, pg. 27.

4. *Establishing a Reporting Requirement for Excessive Returns Would Effectively Combat Check Fraud.*

FRBA shares the Commission's belief that problems need to be resolved at the intersection between consumer fraud and the way that checks are collected and returned. FRBA and the Commission both perceive the check collection and return system is lacking a comprehensive method or process of identifying and responding to transactional patterns that are strongly indicative of large scale consumer fraud. However, FRBA does not believe that the problem can be addressed effectively by banning the use of RCCs and RCPOs.

The Commission expresses concern in the Proposed Rule regarding the absence of systematic fraud monitoring in the check clearing system. There are commercially available vendor solutions that have been widely adopted in the check clearing system which help detect and deter check fraud. In addition, the banking agencies have in recent years published guidance that instructs depository institutions to adopt risk management policies and practices with respect to payments services such as ACH debit origination and remote deposit capture and with respect to relationships with payment processors. Thus, it is not entirely accurate to state that RCCs and RCPOs cleared via check clearing networks are subject to little to no systematic monitoring to detect or deter fraud.⁶ What clearly is true is that in the check collection system, because forward and return processing can and do follow different, highly fragmented paths, there are no intermediary parties that possess sufficient data to calculate the rate of returns with respect to checks sent forward for collection by any particular depositor or depository bank. We note, however, that this issue is true of all checks and is not specific to RCCs or RCPOs. In this respect, the check collection and return process differs from the ACH network, in which the operators are able to collect and report on return rates in ways that have been useful to law enforcement and consumer protection agencies in their efforts to identify and investigate patterns indicative of fraud.

FRBA respectfully suggests that a strengthened regulatory response to this lack of data that could identify significant patterns of consumer fraud is not to ban the use of checks or of any subset of checks, but to require every bank to collect and report to its primary federal regulator on a frequent basis each instance in which any of its customers deposited significant numbers of checks that resulted in an abnormal number or rate of returns. Such a reporting requirement would empower the consumer protection staff in the FFIEC agencies to identify apparent abuses and to react more swiftly than in the past. In our view, a reporting requirement of this kind might be incorporated into the examination process and would be much more effective than the Commission's proposed ban on using specific payments instruments if the goal is to detect and deter large scale consumer fraud.

We appreciate and share the Commission's desire to combat consumer fraud. However, FRBA urges a broader solution rather than prohibiting the use of RCCs and RCPOs in telemarketing. Some of the business cases for using these payments methods have not yet been fully developed, and the possibility of building consumer protective authentication requirements into the issuance of RCPOs has not been vetted between the industry and the regulators. We respectfully submit that the Commission's purposes may be better served if the Commission works with the industry and its sister agencies to strengthen anti-fraud and consumer protection measures around existing and emerging payments mechanisms rather than by prohibiting the use of specific payments methods only in the telemarketing industry. We are always willing to collaborate with the Commission to find effective solutions. The views expressed in this comment are those of FRBA and do not necessarily reflect the views of the Board or other Federal Reserve Banks.

⁶ Proposed Rule, pg. 9.

We appreciate the opportunity to comment on the Commission's proposed rulemaking, and we look forward to future opportunities to cooperate with Commission staff.

Very truly yours,

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Marie Gooding
First Vice President, Chief Operating Officer,
Retail Payments Product Director