August 8, 2013

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

Dear Mr. Secretary:

First Data appreciates the opportunity to respond to the Federal Trade Commission's ("Commission") Notice of Proposed Rulemaking and Request for Public Comment-- *Telemarketing Sales Rule, 16 CFR Part 310, Project No. R411001* (the "proposal").

Our comments and responses below specifically note First Data's objections to barring remotely created checks from all telemarketing payment transactions. While we support the Commission's efforts to mitigate fraudulent activity across the payments sector, we feel that there are significant benefits for this payment form, and its use should not be prohibited based on the actions of a small group of bad actors acting on criminal intent.

BACKGROUND

By way of background, First Data is a Fortune 300 company and a leading processor of electronic payment transactions. Our services help consumers, businesses and governmental entities make payments for goods and services using virtually any form of payment – credit card, debit and stored value card, electronic checks and paper checks – at the point of sale, over the telephone and over the Internet. Additionally, we own and operate the STAR debit network, one of the leading nationwide electronic funds transfer (EFT) networks, as well as the Instant Cash ATM network.

Our subsidiary, TeleCheck Services, Inc., provides check acceptance, processing and risk analytics services to thousands of retailers and financial institutions. For over 40 years, TeleCheck has safeguarded businesses from check-related losses and fraud.

GENERAL FIRST DATA COMMENTS

Before we respond to specific questions posed in the proposal, we urge the Commission to consider the following points:

- There are many legitimate businesses and telemarketing transactions where the acceptance of a remotely created check serves as a valid and reliable form of payment. It can be an extremely practical, relatively safe and efficient payment method for both consumers and merchants. Additionally, when a remotely created check is accepted by a merchant with whom the consumer has an existing business relationship – i.e., the parties are known to each other – the consumer's risk of being subject to fraudulent activity is significantly reduced.

- Fraud mitigation already exists for remotely created checks in telemarketing transactions in that both the ACH Network and the Telemarketing Sales Rule (TSR) have requirements to record the conversation or provide a confirmation of the transaction to the account holder prior to the transaction settlement date.

- Traditional checks are lauded throughout the proposal as being safer than remotely created checks due to banks having to verify the signature of the authorized signatory on the checking account. We respectfully disagree. Unfortunately, it is well known within the industry--prior to, and even moreso with the automation of check processing through image exchange--that financial institutions do not verify the signature on every single check. Logistical impossibilities stemming from the mere volume of items processed each day often disallow financial institutions from verifying the signature on every single paper check.

- Another prevailing theme within the proposal is that remotely created checks are vulnerable to fraud because they do not bear the drawer's signature or other readily verifiable authorization indicator. Yet, the same philosophy should also hold true with ACH telemarketing transactions. In an ACH transaction, the account holder is still providing his/her routing and account numbers over the phone, and, like the remotely created check, there is no written signature for the telemarketing transaction. Yet, the Commission would do a great disservice to consumers, businesses and the entire payments sector if it applied the same rationale to ACH transactions as remotely created checks and proposed to ban ACH transactions as well.

- Rather than entirely eliminating remotely created checks as a viable telemarketing payment option, we suggest that the Commission encourage the paper check clearing houses, in concert with the Federal Reserve Board and some nationally-chartered financial institutions, to develop system requirements and risk management programs relating to remotely created checks, similar to those which exist with the ACH system.

RESPONSES TO THE COMMISSION'S QUESTIONS

1. What would be the impact (including any benefits and costs), if any, of the proposed amendments on consumers?

First Data believes that prohibiting the use and acceptance of remotely created checks in telemarketing transactions does not provide any meaningful benefit to consumers, and could, in fact, negatively affect them by: (1) delaying the receipt of goods and services purchased over telephone; and (2) increasing privacy and identity theft risks.

Without a remotely created check option, consumers could be delayed in receiving goods or services. For instance, 54 million consumers do not have credit or debit cards; however, *86% of those consumers without a credit card have a checking account.* If consumers are required to send in a check for payment, then payment is delayed, thus delaying the consumer in receiving the goods or services they desire.

It seems counterintuitive given the Commission's intent to reduce fraud, but eliminating remotely created checks as a viable payment method in telemarketing transactions could actually increase consumers' susceptibility to other areas of fraud, namely privacy risks and identity theft. Consumers who choose to pay with checks (because they do not have a credit or debit card or aren't comfortable using electronic payments) must place a check in the mail to pay for the good or service agreed upon in a telemarketing transaction. That physical check — containing the consumer's name, address, routing and account numbers – has multiple touch points as it is transmitted through the payments channels to ultimately arrive in the telemarketer's account and could be wrongly delivered or, worse, stolen or misused. That physical check, now in the wrong hands, is creating even more risk for the consumer.

The issue of paper check fraud is still a very meaningful threat in the United States. According to the 2013 Payments Fraud and Control Survey, produced by the Association of Finance Professionals in cooperation with JP Morgan Chase, even as consumers shift to electronic payments away from checks, checks continue to lead as the payment type most attacked even as their use dramatically declines.[1] The survey states that "Checks remain the most popular vehicles for criminals committing payments fraud, even as corporate use of checks has declined. Eighty-seven percent of organizations that experienced attempted or actual payments fraud in 2012 were victims of check fraud…"

2. What would be the impact (including any benefits and costs), if any, of the proposed amendments on individual firms (including small businesses) that must comply with them?

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[1] http://www.afponline.org/pub/pdf/2013_AFP_Payments_Fraud_and_Control_Survey_Introduction___Key_Findings.pdf

If remotely created checks are prohibited and the ACH network is unavailable at the time an individual wants to transact, sellers of goods and services would be left without a timely and reliable payment mechanism when transacting business with a consumer that solely relies upon checks. This could lead to the seller missing out on a number of legitimate transactions, and sales would be lost.

3. What would be the impact (including any benefits and costs), if any, on industry, including those who may be affected by the proposed amendments but not obligated to comply with the Rule?

Completely barring remotely created checks from telemarketing transactions would require substantial development by legitimate processors. Necessary blocks would need to be created to effectively prevent a remotely created check as a payment option while simultaneously allowing for other payment applications, such as ACH, to service the consumer.

To elaborate, we generate remotely created checks for all of our payment channels (Internet, lockbox, retail, etc.). We would have to reconfigure some of our products, such as Checks-by-Phone, to make sure that remotely created checks are prohibited from the point of entry of the transaction through to settlement. Further development would be required to block our collections department from sending an instruction to create a remotely created check. Developments like these can be safely estimated at 1,500 to 2,000 new coding hours for all three systems. (Generally, projects that exceed a couple of hundred coding hours are considered significant and take a minimum of 7-8 months to complete.)

Additionally, we would have to invest in merchant training and communications as well as call center training because remotely created checks initiated at the point of sale would be allowed, but if this proposal were enacted as currently written, we would have to block them if associated with a telephone-authorized telemarketing transaction.

4. What changes, if any, should be made to the proposed amendments to minimize any costs to consumers or to industry and individual firms (including small businesses) that must comply with the Rule?

Rather than entirely eliminating remotely created checks from telemarketing transactions, we believe that the Commission should propose rules in the following areas (similar to the regulatory scheme currently applicable to other types of payment mechanisms): proper monitoring and Know Your Customer policies.

For example, the global payment card networks and the National Automated Clearing House Association require financial institutions to sponsor businesses that want to accept certain types of payment mechanisms, such as credit cards and ACH transactions. Under a typical sponsorship arrangement, the financial institution bears full responsibility for the business' actions and the payments it sends into the payment systems. As a result of this responsibility, financial institutions have created robust risk management systems to help protect themselves and the integrity of the larger payments system.

Financial institutions recognize that with any payment channel there are risks of unauthorized transactions or transactions that arise from deceptive business practices. Thus, their risk management programs typically include, among other things, a "Know Your Customer" policy. As part of this policy, financial institutions undertake steps to verify the business owners and check for negative history associated with them to help ensure that the organizations with which they do business are credit-worthy and engage in reputable business practices. This is one of many steps financial institutions proactively take to safeguard their financial assets and reputations.

We believe that financial institutions could extend the scope of their risk management programs to include procedures that help verify that remotely created checks are also being used in a safe and secure manner and ultimately mitigate the fraud risks for consumers.

5. How would each change suggested in response to Question 4 affect the benefits that might be provided by the proposed amendment to consumers or to industry and individual firms (including small businesses) that must comply with the Rule?

The alternatives offered in Question 4 would preserve consumer choice when purchasing goods and services from merchants over the telephone. Relatedly, depository financial institutions would have the responsibility to know who they are doing business with and put risk management systems in place to monitor the activity they are processing. (This would further the Commission's goal of greater consumer protection by affording consumers the same protections found in similar payment channels.)

6. How many small businesses would be affected by each of the proposed amendments?

There are thousands of small businesses in our system that accept remotely created checks, and some of these remotely created checks may be used via telemarketing transactions. However, we cannot speak to the numbers from an industry-wide perspective.

7. With respect to each of the proposed amendments, are there any potentially duplicative, overlapping, or conflicting federal statutes, rules, or policies that are currently in effect?

We believe that barring remotely created checks presents significant problems when complying with existing NACHA Rules.

For instance, payment processors may send out a payment item as either an ACH or a remotely created check depending on how the item may be accepted by the payor's bank. The authorization from the consumer is to create an ACH or remotely created check. Based on rules in the system, processors will send the transaction out to the appropriate payment channel in conformance with the NACHA Rules or check law. The NACHA Rules may allow an ACH, but here, under the proposal, the remotely created check would be unavailable.

8. Should the Commission amend the TSR to prohibit the use in telemarketing of remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms as payment options?

No. We feel that the Commission should not amend the TSR to prohibit the use of remotely created checks as a telemarketing payment option. Barring remotely created checks as a payment option in telemarketing transactions would, in effect, punish an entire industry for the fraudulent actions of some bad actors, and it would deprive the nearly 54 million consumers without credit or debit cards of a viable payment option, while potentially increasing privacy risks.

First Data strongly believes this payment mechanism should be preserved. If, however, the Commission proceeds with changing the TSR in this manner, we feel that it should be as consistent as possible with the existing NACHA Rules.

- Remotely created checks could be used for all inbound calls.
- Remotely created checks can only be used for outbound calls pursuant to a pre-existing business relationship of 2 years.

9. What, if any, systematic fraud monitoring exists for remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms?

It is our position that depository financial institutions are already able to monitor the deposits to their customers' accounts and the returns that post against that account. As noted above, we feel that simple changes such as strengthening risk management programs could further reinforce the ability to systematically monitor and mitigate remotely created check fraud.

10. What, if any, dispute resolution rights for consumers are provided in connection with remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms?

Federal Uniform Commercial Code laws, adopted in many states, allow consumers recovery abilities when unauthorized transactions occur or telemarking fraud occurs. [2] Financial institutions also cannot pay an item that is not properly authorized. [3]

Additionally, paying banks are protected from taking a loss through changes to Regulation CC in 2006, which shifted the liability for unauthorized remotely created checks to the depository bank. This significantly helps consumers get paid for unauthorized transactions since their bank can now recover against the paying bank regardless of the merchant's ability to fund returns.

11. Are there widely available payment alternatives to remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms sufficient for use in telemarketing by consumers who lack access to credit or traditional debit cards? If not, please describe the reasons why these novel payment methods are necessary and the types of telemarketing transactions for which these novel payment methods are necessary, including the types of products or services involved, whether the telemarketing calls are inbound or outbound, etc.

We are unaware of widely available payment alternatives to remotely created checks for use in telemarketing transactions absent ACH or credit/debit cards. In fact, remotely created checks associated with First Data's telemarketing sales efforts are primarily designed to provide our customers — often small businesses – the ability to accept and process credit and/or debit cards via payments processing.

When purchasing our credit/debit card processing products and services, our small business customers (often business startups) are frequently without a business credit/debit card but do have a business checking account. They rely on us to accept remotely created checks so that they can pay for our processing products and services in order to begin accepting electronic payments from their own customers.

Additionally, across the country, small businesses with no other way to accept payments from consumers other than through a consumer's direct deposit account rely on our TeleCheck product to mitigate fraud as they accept checks from their customers. These small businesses accept payments over the phone by receiving their customer's checking account and routing numbers. Transactions are then screened through our risk models to provide the small business confidence advice before deciding to accept the check. The small business receives

[2] See UCC 4-A.
[3] Id.

authorization from the customer to process the check, and the authorization says, “I authorize you to debit my account via EFT or draft…”

12. Do banks have any feasible way of distinguishing among traditional checks, remotely created checks, images of remotely created checks and remotely created payment orders flowing through the check clearing system?

Yes. Banks can simply change the file formats used to send remotely created check transactions to the paying bank by adding an indicator field in the X9.37 file formats. Doing so would distinguish the item as a remotely created check--allowing for clear reporting and monitoring of that remotely created check.

It’s important to note that the return reasons are typically alphanumeric or alpha character mismatches within the X9.37 return file. These characters provide an automated method to monitor the return activity of remotely created checks. Thus, if the return rate, by category, exceeds a certain threshold, then depository financial institutions can take appropriate mitigating and safeguarding actions.

13. Is it feasible to obtain systematic, centralized monitoring of the volume, use, or return rates of remotely created checks and remotely created payment orders flowing through the check clearing system?

Absolutely. Many of the egregious business types cited in the proposal such as phony telephone offers, bogus charity solicitations, purported medical discount plans, illegal online gambling, etc. are high-risk areas that should have been properly screened by the depository bank. In these cases, the depository bank could have prevented this activity through properly applying Know Your Customer polices and complying with the FDIC and/or OCC Third-Party Processor Guidelines.

Instead of preventing legitimate payment activity, the Commission’s concerns can be addressed by working with the banking regulatory agencies to change the rules and regulations to enforce risk management by depository financial institutions (as it is done in other payment forms).

This approach would be consistent with the shift in the regulatory environment to put more responsibility on the depository bank. As discussed in the response to question 10, Regulation CC was amended in 2006 to create transfer and presentment warranties for remotely created checks.[4] The purpose of the amendments was to shift liability for unauthorized remotely created checks from the paying bank to the depository bank, which is generally the bank for the person that initially created and deposited the remotely created check.

[4] See 12 CFR Part 229.

We respectfully disagree with the proposal's contention that there is no systemic monitoring to detect or deter fraud. Technological advances and the enactment of the Check Clearing for the 21st Century Act provide participants with the necessary tools to systemically monitor remotely created check activity. Requiring this monitoring would benefit the entire industry--not just the telemarketing segment.

14. Do payment processors and depositary banks typically receive additional fees when processing payments and returns for merchants with high return rates? Do they incur additional costs in dealing with merchants with high return rates? Please describe the nature and amount of any such fees and costs, including how the additional fees charged compare to the increased costs incurred by the payment processors and banks.

While we cannot speak for other processors, First Data does not receive additional fees for processing payments and returns for merchants with high return rates. In fact, we face substantial risks for returned items and therefore engage in significant efforts to minimize returns. In doing so, we utilize many processes and methodologies in the areas of Know Your Customer, merchant activity monitoring and transaction risk modeling.

15. What specific costs and burdens would the proposed prohibition on the use of remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms in telemarketing impose on industry and individual firms (including small businesses) that would be required to comply with the prohibition, or on consumers?

Major development costs would be needed to prohibit the creation of remotely created checks on telephone-initiated transactions but allow them on other payment applications. There would also be costs associated with educating consumers and staff on why they would be prohibited from making a payment over the telephone but can shop at a brick and mortar location or over the Internet and have their payment processed successfully.

16. Are there other payment mechanisms used in telemarketing that cause or are likely to cause unavoidable consumer harm without countervailing benefits to consumers or competition that the Commission should consider prohibiting or restricting?

We are unaware of any additional telemarketing payment mechanisms for the Commission to consider prohibiting or restricting.

CONCLUSION

As one of the largest payments processors, we support the Commission's efforts to protect and prevent against any type of payment fraud. However, we believe that barring remotely created checks in all telemarketing transactions is not the answer.

We feel that prohibiting this payment mechanism entirely sets a bad precedent for the Commission to start cherry picking other payment forms to eliminate, which would negatively impact consumers, sellers, and the industry as whole. We do believe there is a better approach via strengthening existing regulations and requiring affected entities such as depository financial institutions to include remotely created checks under the scope of their overall risk mitigation and fraud prevention programs.

Thank you for the opportunity to provide comments, and we appreciate your consideration of our concerns. In closing, we ask that you seriously reconsider this proposal and continue to let the 54 million consumers without access to credit and debit cards a viable payment option that can be responsibly managed.

Please don't hesitate to contact me with any questions.

Sincerely,

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