



**U.S. Department of Justice**

Criminal Division

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Washington, D.C. 20530

August 8, 2013

BY EMAIL

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

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

Dear Sir:

These comments pertain to the Notice of Proposed Rulemaking (NPR) by the Federal Trade Commission (Commission or FTC) that was published in the *Federal Register* on July 9, 2013 regarding proposed changes in the Telemarketing Sales Rule (TSR).<sup>1</sup> The proposed amendments would: (1) bar sellers and telemarketers from accepting remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms as payment in inbound or outbound telemarketing transactions; (2) expand the scope of the advance fee ban on “recovery” services, now limited to recovery of losses in prior telemarketing transactions, to include recovery of losses in any previous transaction; and (3) clarify six TSR provisions regarding (a) recording of a consumer’s express verifiable authorization; (b) statement of the seller’s or telemarketer’s burden with regard to the Do Not Call Registry; (c) the TSR business-to-business exemption; (d) the prohibition against sellers sharing the cost of Do Not Call Registry fees; (e) the types of impermissible burdens that deny or interfere with a consumer’s right to be placed on an entity-specific do-not-call list; and (f) the consequences of a seller’s or telemarketer’s failure to obtain the information necessary to honor a consumer’s request to be placed on an entity-specific do-not-call list.

The Department of Justice supports each of these sets of changes in the TSR. The following comments are presented in two parts: (1) substantive comments on several specific proposed changes in the TSR; and (2) supplemental comments on a number of the general and specific questions that the Commission offered for comment in the NPR.

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<sup>1</sup> See Federal Trade Comm’n, Telemarketing Sales Rule, 78 Fed. Reg. 41200 (July 9, 2013), available at <https://www.federalregister.gov/articles/2013/07/09/2013-12886/telemarketing-sales-rule>.

## **I. Substantive Comments on Proposed Changes**

### **A. Banning Use of Novel Payment Methods**

The Department supports the proposed TSR provisions that would bar sellers and telemarketers from using what the NPR describes as four “novel” payment methods in telemarketing: remotely created checks, remotely created payment orders, cash-to-cash money transfers through companies such as Western Union and MoneyGram, and cash reload mechanisms such as MoneyPak.<sup>2</sup> In the Department’s experience, mass-marketing fraud schemes, both domestic and international, make extensive use of each of these payment methods because they represent the most effective means by which these schemes can rapidly receive and transfer victim proceeds with less regulatory or industry oversight than traditional payment methods such as checks and payment cards.

#### **1. Cash-to-Cash Money Transfers**

For some time, cash-to-cash money transfer has been the payment method that fraud victims have most frequently reported to law enforcement agencies and consumer organizations. The FTC’s Consumer Sentinel fraud complaint data show that over the past three years wire transfer was by far the most frequently reported payment method, ranging from 40 percent in 2010 to 47 percent in 2011 and 2012.<sup>3</sup> The Better Business Bureau’s Top Ten Scams of the Year for 2012 include several schemes, such as lottery, loan, and “grandparent scams” (in which callers call grandparents and falsely claim that their grandchild has been injured or arrested and needs money to be wire-transferred immediately), that rely heavily on receiving victim proceeds through money transfer services.<sup>4</sup>

Moreover, law enforcement authorities have observed that as mass-marketing fraud has expanded to multiple continents around the world, the frequent use of cash-to-cash money transfers by such schemes has also become a transnational problem.<sup>5</sup> For example, according to the Internet Crime Complaint Center (IC3), in 2012 victims of the “grandparent scam” reported that the callers were from Canada, the United States, Mexico, Haiti, Guatemala, Peru, and the Dominican Republic.<sup>6</sup> In one recent federal prosecution, money transfers from mass-marketing victims in Pennsylvania were routed to fraud participants in Brooklyn, Spain, Romania, Canada, and Nigeria.<sup>7</sup>

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<sup>2</sup> See *id.* at 41200-41201.

<sup>3</sup> See FEDERAL TRADE COMM’N, CONSUMER SENTINEL NETWORK DATABOOK FOR JANUARY – DECEMBER 2012 at 8 (February 2013), *available at* <http://ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf>.

<sup>4</sup> See Ron Jacobs, Better Business Bureau, BBB Top Ten Scams of 2012 (February 22, 2013), *available at* <http://www.bbb.org/blog/wp-content/uploads/2013/02/Top-10-2012-final-13.jpg>.

<sup>5</sup> See INTERNATIONAL MASS-MARKETING FRAUD WORKING GROUP, MASS-MARKETING FRAUD at 9, 21 (June 1, 2010), *available at* <http://www.stopfraud.gov/news/immfta.pdf>.

<sup>6</sup> See INTERNET CRIME COMPLAINT CENTER, INTERNET CRIME REPORT 2012 at 10 (May 2013), *available at* [http://www.ic3.gov/media/annualreport/2012\\_IC3Report.pdf](http://www.ic3.gov/media/annualreport/2012_IC3Report.pdf).

<sup>7</sup> See U.S. Attorney’s Office, Middle District of Pennsylvania, Press Release (July 3, 2013) (conviction at trial of Brooklyn resident for role as money transfer agent in processing transfers from fraud victims), *available at* [http://www.justice.gov/usao/pam/news/2013/Agho-Allen\\_07\\_03\\_2013.htm](http://www.justice.gov/usao/pam/news/2013/Agho-Allen_07_03_2013.htm).

One noteworthy feature of this global expansion of cash-to-cash transfer use has been the continuing efforts of criminals to compromise accurate recordkeeping and identity verification by money transfer services. Over the past decade, criminals' techniques have shifted from bribery or physical intimidation or assault of money transfer agents<sup>8</sup> to fraudulent applications by mass-marketing fraud ring members to become agents of legitimate money transfer companies. In the latter case, the sole purpose of the criminals is to operate their agencies as money-laundering operations with only a pretense of legitimacy.<sup>9</sup> In response, several United States Attorney's Offices have aggressively responded to this trend by prosecuting a number of individuals operating as corrupt money-transfer agents.<sup>10</sup> Some mass-marketing fraud schemes, however, have changed their tactics by expanding their efforts to corrupt money-transfer agents to the United Kingdom and elsewhere.<sup>11</sup>

## 2. Remotely Created Checks and Payment Orders

While law enforcement agencies, for more than a decade, have been pursuing mass-marketing fraud schemes that exploit cash-to-cash transfer mechanisms, during that same period criminals increasingly have been turning to the use of remotely created checks and payment orders in telemarketing and other mass fraud schemes.<sup>12</sup> As recent civil litigation by the Department has shown, mass-marketing fraud schemes have found remotely created checks (also commonly known as "demand drafts") useful to conduct large-scale fraud schemes where the individual amount of each check may only be a few hundred dollars but the aggregate proceeds from tens of thousands of such checks can be in the millions of dollars.<sup>13</sup> In just one federal prosecution in

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<sup>8</sup> See BINATIONAL WORKING GROUP ON CROSS-BORDER MASS-MARKETING FRAUD, MASS-MARKETING FRAUD at 10-11 (May 2003), *available at* <http://www.justice.gov/opa/pr/2003/May/remmffinal.pdf>.

<sup>9</sup> See MASS-MARKETING FRAUD SUBGROUP, CROSS-BORDER CRIME FORUM, MASS-MARKETING FRAUD at 6-7 (March 2008), *available at* <http://www.justice.gov/opa/documents/08mass-marketing-fraud.pdf>.

<sup>10</sup> See, e.g., U.S. Attorney's Office, Middle District of Pennsylvania, Press Release (July 22, 2013) (conviction at trial of Texas resident for role in operating Western Union and MoneyGram outlets to launder fraud proceeds), *available at* [http://www.justice.gov/usao/pam/news/2013/Adigun\\_07\\_22\\_2013.htm](http://www.justice.gov/usao/pam/news/2013/Adigun_07_22_2013.htm); U.S. Attorney's Office, Middle District of Pennsylvania, *supra* note 6; U.S. Attorney's Office, Southern District of Texas, Press Release (May 21, 2010) (indictment of individual for allegedly operating money transfer business to facilitate fraud and launder money), *available at* <http://www.justice.gov/usao/txs/1News/Releases/2010%20May/052110%20Akinola.htm>; U.S. Attorney's Office, Central District of California, Press Release (December 19, 2007) (indictment of 22 member of Montreal-based telemarketing fraud ring, including five who allegedly operated money transfer businesses as part of scheme), *available at* <http://www.justice.gov/opa/pr/2003/May/remmffinal.pdf>.

<sup>11</sup> See INTERNATIONAL MASS-MARKETING FRAUD WORKING GROUP, *supra* note 5, at 21.

<sup>12</sup> See, e.g., INTERNATIONAL MASS-MARKETING FRAUD WORKING GROUP, *supra* note 5, at 17; BINATIONAL WORKING GROUP ON CROSS-BORDER MASS-MARKETING FRAUD, *supra* note 8, at 100 (2001 FTC case against processor of demand drafts for telemarketing fraud schemes).

<sup>13</sup> See, e.g., United States Attorney's Office, Eastern District of Pennsylvania, Press Release (November 19, 2012) (announcement of \$15 million civil settlement with First Bank of Delaware), *available at* [http://www.justice.gov/usao/pae/News/2012/Nov/FBD\\_release.htm](http://www.justice.gov/usao/pae/News/2012/Nov/FBD_release.htm).

2010, a conspiracy to use fraudulent demand drafts and Automated Clearing House debits from unsuspecting customers' accounts resulted in an attempted \$30 million fraud.<sup>14</sup>

### **3. Cash Reload Mechanisms**

Law enforcement agencies also have been monitoring the increasing use of cash reload mechanisms in a variety of fraud and identity theft schemes. As with cash-to-cash transfers and remotely created financial instruments, cash reload mechanisms allows criminals to target and obtain funds rapidly from numerous consumers, with far fewer consumer protections than regular bank checks or credit cards. In one 2012 federal prosecution, a single defendant obtained tens of thousands of dollars from the GreenDot MoneyPak cards of 50 different victims in at least 14 states.<sup>15</sup> More recently, law enforcement authorities have warned the public about international lottery schemes in which the callers persuade victims to buy one or more Green Dot, MoneyPak, or PayPal cards to pay the bogus "fees" associated with the purported lottery winnings, and then call back the caller with the identifying numbers on the card.<sup>16</sup> Because the fraud participants can then immediately access the funds on the card, they can obtain immediate access to the funds with no delay or need to appear at a physical location to pick up the funds.

#### **B. Expanding Scope of Ban Regarding "Recovery" Services**

The Department supports the Commission's proposal to expand the scope of the ban on advance fees in so-called "recovery" services to include losses in any previous transaction.<sup>17</sup> Almost invariably, if not invariably, those who promise fraud victims that they can recover funds lost to prior fraud schemes are themselves engaging in fraud, especially when they falsely claim to be associated with law enforcement, the judicial system, or a law firm.

For the last two decades, the so-called "recovery room" has been one of the most persistent and pernicious types of fraud schemes targeting U.S. consumers.<sup>18</sup> Although mass-marketing fraud schemes in the early 1990s could use only telemarketing to reach prospective victims, 21<sup>st</sup>-century schemes can make use of telemarketing and email to make initial contact with victims, and later exploit either or both media to present a "recovery" scheme to those same victims. Because mass-marketing fraud techniques have changed over time, there is no substantial reason that the TSR's scope should be limited only to recovery schemes that claim to recover funds lost in a previous telemarketing transaction.

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<sup>14</sup> See U.S. Attorney's Office, District of New Jersey (August 5, 2010), *available at* <http://www.justice.gov/usao/nj/Press/files/pdf/2010/Rosiere,%20Shaun%20et%20al%20Sentencing%20PR.pdf>.

<sup>15</sup> See U.S. Attorney's Office, Eastern District of California, Press Release (December 4, 2012) (sentence of 41 months imprisonment for defendant), *available at* <http://www.justice.gov/usao/cae/news/docs/2012/12-2012/12-4-12Moynihan.html>.

<sup>16</sup> See U.S. Attorney's Office, District of North Dakota, Press Release (May 28, 2013), *available at* <http://www.justice.gov/usao/nd/news/2013/05-28-13-Lottery%20Scam%20Calls.html>.

<sup>17</sup> See 78 Fed. Reg. at 41217.

<sup>18</sup> See, e.g., BINATIONAL WORKING GROUP ON CROSS-BORDER MASS-MARKETING FRAUD, *supra* note 8, at 4, 81, 87, and 94; U.S. Dep't of Justice, Press Release (December 7, 1995) (announcement of Operation Senior Sentinel, *available at* [http://www.justice.gov/opa/pr/Pre\\_96/December95/609.txt.html](http://www.justice.gov/opa/pr/Pre_96/December95/609.txt.html)).

## C. Clarification of TSR Provisions

### 1. Recording of Consumer's Express Verifiable Authorization

The Department supports the Commission's proposal to add to the TSR specific language to make explicit the requirement that a verification recording describe the goods, services or charitable contribution for which payment authorization is sought.<sup>19</sup> Especially if, as the NPR states, some telemarketers often omit such information from their verification recordings, sometimes intentionally, such omissions could constitute evidence of intent to defraud<sup>20</sup> as well as relevant conduct for purposes of the federal Sentencing Guidelines.<sup>21</sup> The proposed language would therefore be necessary to ensure that consumers are given clear information about the true purpose of the transaction and the telemarketer's intention to impose a charge.

### 2. Impermissible Burdens on Consumer's Right to Be Placed on Entity-Specific Do-Not-Call List

The Department supports the Commission's proposal to amend the TSR's prohibition against denying or interfering with a consumer's right to opt out of receiving telemarketing calls.<sup>22</sup> There is no valid business justification for telemarketers engaging in the kind of abusive and obstructive practices that the NPR describes.<sup>23</sup>

## II. Supplemental Comments in Response to Specific Questions

### A. General Questions

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

The proposed changes in the TSR, by clarifying the obligations of sellers and telemarketers and limiting the ability of telemarketers to exploit novel payment systems to obtain funds from consumers, would be highly beneficial to consumers and increase the protections that the TSR affords consumers from fraudulent or deceptive practices.

#### 8. *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?*

The Department is not aware of any federal statutes, rules, or policies for which it has enforcement responsibility that would conflict with the proposed amendments.

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<sup>19</sup> See 78 Fed. Reg. at 41217.

<sup>20</sup> See *United States v. Wetherald*, 636 F.3d 1315, 1324 (11<sup>th</sup> Cir.), *cert. denied*, 132 S. Ct. 360 (2011).

<sup>21</sup> See *United States v. Treadwell*, 593 F.3d 990, 1002 (9<sup>th</sup> Cir.) (citing USSG § 1B1.3(a)(1)(B)), *cert. denied*, 131 S. Ct. 488 (2010).

<sup>22</sup> See 78 Fed. Reg. at 41218.

<sup>23</sup> See *id.* at 41218.

## **B. Specific Questions**

- 13. *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?***

Yes, for the reasons stated above.

- 16. *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?***

Consumers who lack access to credit or traditional debit cards can still make payments in legitimate consumer transactions by using well-established financial instruments such as checks and money orders that consumers can purchase with cash from banks or other third-party institutions.

- 24. *Is the harm caused by remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms in telemarketing outweighed by countervailing benefits to consumers or competition? If so, please identify and quantify the countervailing benefits.***

No, for the reasons stated above.

- 26. *Is there any material difference between telemarketing sales and Internet sales that would require the use of advance fees for recovery services aimed at victims of Internet fraud?***

No. For both types of sales, offers of recovery services upon payment of advance fees are highly likely to be fraudulent and to constitute violations of federal criminal and civil law.

- 28. *Please describe the types of businesses that seek advance fees for recovery services, and whether these businesses require significant capital or labor outlays prior to providing the services.***

In the Department's experience with prosecution of mass-marketing fraud schemes, the types of individuals or businesses that seek advance fees for recovery services are highly likely to be engaged in fraud – sometimes the very fraud that causes consumers losses that the same scheme later claims it can recover for a fee. Such individuals and businesses invariably do not require significant capital or labor outlays before providing the promised services, simply because they have no intention of providing legitimate recovery services and therefore do not need to make

significant capital or labor outlays that are actually dedicated to providing legitimate recovery services.

Sincerely,

A small, handwritten mark resembling a stylized 'J' or a similar character, positioned below the word 'Sincerely,'.

Jonathan J. Rusch  
Deputy Chief for Strategy and Policy  
Fraud Section