American Bankers Association
Building Success. Together.

Richard R. Riese
Senior Vice President
Center for Regulatory Compliance
Phone: 202-663-5051
Email: rriese@aba.com

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 Sir or Madam:

The American Bankers Association[1] (ABA) is pleased to submit our comments on the Federal Trade Commission's (FTC) proposed changes to the Telemarketing Sales Rule (TSR) implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (Telemarketing Act). The FTC proposal is intended to protect consumers from unscrupulous telemarketers. ABA strongly agrees with the FTC that consumer protection is essential in all areas of commerce.

The proposed rule addresses many areas, including prohibiting telemarketers from accepting or requesting remotely created checks (RCCs) or remotely created payment orders (RCPOs) during inbound or outbound telephone calls. It would also ban telemarketers from accepting money transfers or cash reload mechanisms for payments. In addition to the proposed rule's prohibitions of certain payment types by telemarketers, it addresses other areas, including expanding the scope of a ban on collecting advance fees related to recovery services and several clarifications to language in the TSR to reflect FTC enforcement policy.

Since ABA represents the banking industry in the United States, our comments will focus on the payments issues raised in this proposed rule that directly affect our membership and their customers, the prohibition on telemarketers using RCCs and RCPOs.

ABA strongly supports efforts to protect consumers from unscrupulous telemarketers. We believe that the proposed broad ban on telemarketer use of RCCs and RCPOs will in fact harm consumer interests, including improperly prohibiting legitimate telemarketers from using RCCs and effectuate an unauthorized direct regulation of banks engaged in the intermediation of lawful transactions.

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

RCCs and RCPOs are payment instruments that facilitate the transfer of funds efficiently and economically that, in themselves, does not pose a threat to consumers but are typically effectuating customer decisions. In the cases where harm to consumers has been found it has been the direct result of the telemarketers' deceptive and abusive actions, not the fault of the payment channel. It would be just as appropriate to blame "money" for the harm as it would be to blame this payment mechanism for creating the harm. The FTC would better protect consumers by concentrating its efforts on identifying and addressing telemarketers engaged in illegal acts—that harm customers as well as legitimate businesses—than taking such a broad stroke in prohibiting use of certain long-accepted, legitimate, and economical payment types. For these reasons, we recommend that the FTC withdraw its proposed ban on the legitimate payments mechanism and stay focused on more tailored measures to address telemarketer fraud.

Summary of ABA Comments

- The FTC acknowledges that the telemarketing industry has a history of "unscrupulous" treatment of customers, but instead of directly addressing the bad actors themselves, this proposal would penalize all telemarketers, and their banks and their customers, with no regard to whether they are operating lawfully or not.
- The FTC's assertion that use by all telemarketers of RCCs and RCPOs meets the standards of unfairness to warrant regulation as an abusive practice under the Telemarketing Act has not been substantiated by the facts or the law and ignores the substantial record of daily operations beneficial to customers.
- The FTC opines that consumer protections for check transactions are not as vibrant as those for electronic transactions. However, existing regulations, such as Regulation CC and Federal Reserve Bank Operating Circular 3 (Circular 3), as well as the Uniform Commercial Code (UCC), provide consumers with robust protections as parties to check transactions.
- The FTC's outlawing of RCC and RCPO use by all telemarketers is an unauthorized effort to regulate the payment system and the banking industry's execution of authorized customer transactions.

Background

The proposal seeks to ban telemarketers from using certain payment instruments, RCCs and RCPOs. Regulation CC defines an RCC as "…a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn." These payment instruments are used in a variety of ways to process payments quickly and efficiently. For example, for people needing to pay a utility bill or credit card bill on the due date, many companies allow their customers to make a same day payment over the telephone, allowing them to avoid late-payment penalties, including fees. Consumers provide the biller with their checking account information and routing number and authorize the biller to create a paper check drawn on the consumer's account. The paper check can be deposited at the bank, be imaged and processed via Check 21, or be imaged and converted to an ACH transaction at the discretion of the merchant. Typically, merchants select the deposit method that is the most cost effective depending upon the systems it has in place. A merchant may choose to make a conventional deposit of paper checks to a bank branch if they determine that it would not be cost effective to purchase imaging hardware and software to process checks via Check 21. Similarly, if a merchant has a substantial investment in conventional or check image processing, it may decide that it does not make financial sense to introduce a new payment channel to convert checks to ACH transactions. Merchants must also decide whether to accept card transactions (debit, credit, prepaid) by comparing the costs to the benefits of these payments.

An RCPO is similar to an RCC, with one exception; it is never printed out in paper form so it cannot be presented physically to a bank for deposit. It can be processed via Check 21 or converted to an ACH transaction. (For this reason, this letter generally uses "RCCs" hereafter to refer to both remotely created checks and remotely created payment orders, together.)

The FTC states several reasons for banning telemarketers' use of RCCs. First, criminal telemarketers have been found to use RCCs, and the FTC "preliminarily" concludes that the use of these legal payment products by telemarketers is an "abusive" act or practice under Section 5 of the FTC Act. Second, it asserts that consumers do not receive the same type of protections that they would if the transaction were conducted by credit or debit card or via the ACH network. Neither of these assertions is well-founded.

The FTC Claim that Use of RCCs Is Abusive

The Telemarketing Act directed the FTC to adopt a rule prohibiting three types of deceptive or abusive practices. The Telemarketing Act also granted the FTC the authority to promulgate rules to prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." The TSR identifies five categories of abusive conduct, including:

1. Conduct related to a pattern of calls, including violating the Do Not Call provisions;
2. Violations of the TSR's calling time restrictions;
3. Failure to make required oral disclosures in the sales of goods or services;
4. Failure to make required oral disclosures in charitable solicitations; and
5. Other abusive telemarketing acts and practices.

Since RCCs don't fall under the first four categories, the FTC has employed "unfairness analysis" to determine whether the use of RCCs falls into the "other" category of abusive. The FTC refers to Section 5 of the FTC Act to decide whether an act or practice is unfair if it causes or is likely to cause substantial injury to customers, cannot reasonably be avoided, and there are not any countervailing benefits to consumers or competition.

ABA commends FTC for its efforts to protect our members' customers, and all consumers generally, from the harm that illegal telemarketing practices can inflict. When the Commission addresses the bad conduct of offending telemarketers, it is well within its mission of regulating an industry to make the market safe for reputable providers and responsible consumers. However, ABA believes that the proposal to outlaw a long- established and demonstrably safe payment process for use by all members of a particular merchant category—without determining whether they are individually acting properly or not—exceeds the Commission's mission, jurisdiction, and authority.

ABA understands that the FTC could find it attractive from a superficial public policy standpoint to eliminate avenues of fraud by precluding payment options in a wholesale manner as being in some ways "cleaner" or "more efficient" than doing the messy work of separating good actors from bad. However, the FTC's adoption and adherence to its "unfairness" standards for applying its catch-all "abusive" authority under the Telemarketing Act was precisely to avoid succumbing to such broad-based public policy premises that have historically endangered the FTC's exercise of its authority in the past.[2]

[2] "The ability to proscribe acts and practices by an entire industry as "abusive" without any empirical means for determining what is and is not "abusive" leaves open the door for exactly the types of misuse that occurred with unfocused unfairness authority in the 1970s….When the Commission seeks to identify practices as abusive …, the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence and codified in the FTC Act." *FTC Use of Unfairness Authority: Its Rise, Fall and Resurrection*, Part IV, D. http://www ftc.gov/speeches/beales/unfair0603.shtm

FTC Unfairness Analysis

We are mindful the FTC was given an exception from its usual Magnuson-Moss rule-making constraints when administering the Telemarketing Act. However, this dispensation is not a license to avoid shouldering the agency's responsibility to build a relevant record for its rules under the APA. The Commission still bears the burden for showing that use of RCCs by all telemarketers meets the unfairness criteria if it is asserting a rule that deprives *all* telemarketers from fulfilling consumer informed and authorized purchases by using such an option. We believe it has not and cannot meet that burden.

Our review of the Commission staff's "preliminary" findings illustrates several shortcomings in the FTC's effort to meet its regulatory obligations of proving unfairness. Among the more troubling assertions is that the choice of payment process used to fulfill a consumer's purchase by being in the hands of the telemarketer is thereby "not reasonably avoidable" by the consumer and hence that key unfairness standard is met. Such a presumption amounts to a *per se* rule that would endanger a wide range of exchange—especially in the post-Dodd Frank world. After all, Congress under the Durbin Amendment expressly gave merchants the preference instead of consumers in choosing the network through which to execute debit card transactions. The consumer has no choice in that decision. In other words Congress believes that choice of payment routing is for the merchant to decide, not the consumer. That is similarly the case with many other decisions businesses make with regard to their operations that affect their customers but where the customer does not exercise a detailed choice. The credit reporting agency a business may consult is another example; as would be the choice of telecommunications company that a business uses to communicate with customers.

While the FTC has done an impressive job of marshaling past case precedent and other facts to demonstrate that fraudulent telemarketers have used RCCs to commit fraud, they have not shown that all (or even a majority) of telemarketers commit fraud whenever they use RCCs. Nor have they shown that fraudulent telemarketers commit their frauds using RCCs exclusively. And in no case have they demonstrated that the fraud itself inhered to the RCC mechanism. In fact, many of the cases illustrate that fraudsters are ecumenical in their choice of payment processes in executing their schemes and will use whatever is at hand.

Nor has the FTC demonstrated that the unprecedented action of prohibiting a segment of merchants from using RCCS will measurably address the problem. It has not shown that unscrupulous telemarketers currently using RCCs simply will not shift to other payment instruments. The consumer protections of debit and credit cards and ACH that the FTC relies on will provide little added inhibition because, notwithstanding differences in the detail and the technical legal process between the consumer protections, the general rule is the same for all: consumers are generally not liable for unauthorized transactions regardless of payment instrument type. The consumer protections for card and ACH transactions will not inhibit bad actors much more than the consumer protections for check transactions do today. Moreover, as the FTC acknowledges, unscrupulous telemarketers already use other systems, such as billing

and collection systems of mortgage, telephone, mobile phone, and utility companies for payments and will also shift to those systems.

We believe that application of the "not reasonably avoidable" standard must be connected to the bad conduct of telemarketers that impairs the consumer's ability to make a knowingly authorized purchase and leads to the "serious injury" being protected against. Consumers are entirely in control of whether they give their bank routing and account information to the telemarketer. What leads to the not reasonably avoidable serious injury is not the choice of payment process (ACH or RCC), but whether the transaction itself was fraudulently induced or not. The commission of fraudulent behavior is what inflicts the serious injury and qualifies for consideration as "not reasonably avoidable" due to telemarketer conduct. This is the impairment of consumer choice to which the FTC unfairness doctrine is directed. To claim that any merchant's choice of payment process to complete any purchase renders the consequences a serious injury not reasonably avoidable under unfairness precedent divorces the FTC initiative from the mission target of regulating telemarketer bad practice and converts the agency into a policeman of payment process policy. (An additional concern we will address subsequently.) Here it is sufficient to point out that the analytical path the FTC is proposing to follow is an unwarranted departure from established unfairness precedent.

Clearly, following the FTC analysis of unfairness under the TSR threatens to establish unfairness precedent for all entities under FTC jurisdiction, because the standard applied is supposedly derived from Section 5 precedent and will set new Section 5 precedent. Consequently, the proposal could result in a *per se* rule for all users of RCCs. Such a result would be a troubling boot-strapping of agency authority by enunciating a rule of unfairness that effectively extends beyond telemarketers without fulfilling the Magnuson-Moss requirements, but stands as ready precedent for future FTC enforcement against all merchants of whatever stripe within the agency's jurisdiction.

Another shortcoming of the mistaken approach FTC proposes in outlawing RCCs for all telemarketers is the inadequacy of its record in meeting the requirement to demonstrate a lack of countervailing benefits to consumers or competition. This test cannot possibly be addressed without recognizing the incontrovertible fact that not all telemarketers are fraudulent, and therefore foreclosing an otherwise lawful payment option to legitimate merchants ignores the benefits consumers and competitors receive in being able to conduct authorized transactions using RCCs. Among those benefits are more immediate payment credits compared to ACH in certain circumstances. In addition, not all legitimate tele-merchants are set up to execute ACH or accept card transactions, and not all consumers have or are eligible for the other FTC preferred payment options of debit and credit cards.

Moreover, given the breadth of the impact of this rule and its *per se* application beyond telemarketers, the FTC's burden is to demonstrate what the countervailing benefits for consumers and competition are for all payments to all merchants using RCCs.

A more balanced evaluation of RCCs and better grounded application of the FTC's governing statutes and regulations would result in a finding that RCCs are fair and beneficial to consumers. As noted in detail below, these payment instruments provide consumer protections that are on par with those for ACH and card transactions. Further, they allow a customer that does not have a debit, credit, or prepaid card to purchase goods that the customer would otherwise be denied. Ironically, the prohibition of RCCs could have the result of being harmful to the vast majority of consumers by denying them access to a legal payments channel for their authorized transactions.

For the above and other reasons, ABA believes that the FTC has not fulfilled its obligations to meet the unfairness standard it requires to identify and regulate abusive conduct under the Telemarketing Act and that the proposal to outlaw RCCs for use by all telemarketers must be withdrawn.

FTC Exceeds Its Jurisdiction by Seeking to Regulate Payment Processes

In reading the TSR proposal it appears that the more profound impact of the FTC's proposal would be to force a change in payment process policy—an effect far outside the FTC's mission, jurisdiction, and authority. Such would be the result of this proposed blanket prohibition of a lawful payment option. ABA objects to the FTC's unwarranted foray into this field.

First, the payment process is a well-established franchise of the banking system and operates under the close regulation of that industry's prudential regulators. There is nothing more crystal clear than the absence of FTC jurisdiction over banks either under Section 5 or under the Telemarketing Act. Blanket outlawing of a legitimate payment option for any user class is a bold over-reach of the FTC's jurisdiction. It is an invasive order to banks that they may not honor a legal and authorized payment order of a legitimate and compliant user.

Second, the FTC's assignment of transactions into preferred and disfavored categories by virtue of their regulation under Regulations E and Z alone demonstrates a pure policy bias that has nowhere been reflected by the considered judgment of legislators or regulators who have monitored and supervised the checking system in its various forms and through its development—literally—over centuries, including its transformation under Check 21 into the current century. While some constituencies might like to execute an end run around check laws by appealing to the FTC, the Commission has neither the power nor the expertise to entertain such a petition or resolve such a debate legally or safely.

Third, the FTC's evaluation of the consumer rights and user benefits of RCCs under existing law shows a disregard of the strengths of the American dual banking system that respects the role of state law in our economic system. The FTC advances its policy preferences by setting up a straw-man argument that equates the absence of "federal" protections with the absence of adequate protections. The reality is that our federal system is one of many laws distributed across national regulation and state regulation, where both together represent the legitimate

organization of the financial marketplace. The interactions of these sources draw lines of protection without denigrating one set of protections in comparison to another.

The FTC asserts its policy preference by misrepresenting the consumer protections of its presumptively disfavored payment option. The FTC asserts that consumer RCCs being processed as checks "…receive none of the *federal* protections that safeguard conventional payments that are processed through the credit card system or the ACH Network."

However, while *federal* laws do not provide these kinds of consumer protections for check transactions, *state* laws do. Though there may be differences in the details and the technical legal process between the consumer protections for check transactions and those for credit and debit card and ACH transactions, with regard to consumer liability for unauthorized transactions, the result is the same: just as with credit and debit card and ACH transactions, consumers generally are not responsible for unauthorized check, RCC, and RCPO transactions, a fact that should not be overlooked or understated.

Check transactions are governed by state adoption of the Uniform Commercial Code (UCC), Federal Reserve Operating Circular Number 3 (Circular 3), and Regulation CC:

- Consumers are given considerable protections under Article Four of the UCC. Under Section 4-401(a)[3] of the UCC, a bank may not charge the account of a customer for an item that is not "properly payable." This means that if a customer was defrauded and did not provide authorization for a remotely created check, for example, that item can be returned at the customer's direction and the customer's account re-credited. While the terminology of the UCC is different from that of Regulations E and Z, the effect is the same—consumers are generally not responsible for check transactions they did not authorize. Thus, consumers defrauded by telemarketers using items covered under UCC have protections and recourse.

- FRB Circular 3[4] Section 20.10 provides additional protection to consumers from unauthorized RCCs drawn on their accounts. Under this provision, a paying bank may request an adjustment based on a claim against the Reserve Bank for an alleged breach of the

[3]**Uniform Commercial Code**
§ 4-401(a). WHEN BANK MAY CHARGE CUSTOMER'S ACCOUNT. (a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank. b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

[4]**Federal Reserve Bank Operating Circular 3**
20.10 Warranty Claims Regarding Remotely Created Checks Transferred or Presented by the Reserve Bank
(a) A bank may, in accordance with the following provisions, request an adjustment based on a claim against the Reserve Bank for the Reserve Bank's alleged breach of the warranty set forth in Section 229.34(d) of Regulation CC with respect to a check that the Reserve Bank transferred or presented to the bank.
(b) An adjustment request under this subparagraph must be made no later than 90 days after the date on which the Reserve Bank transferred or presented the check that is subject to the request to the requesting bank.
http://www frbservices.org/files/regulations/pdf/operating_circular_3_041112.pdf

warranty set forth in Regulation CC (see below) if the Reserve Bank presented the check to the paying bank. Importantly, the paying bank (the defrauded customer's bank) has up to 90 days after presentment to make warranty claims regarding RCCs transferred or presented by the Reserve Bank. Although this provision is directed at banks, the consumer who is a victim of fraud receives the benefit because the item may be returned 90 days after it was paid, giving customers sufficient time to dispute the payment and be re-credited. Under ECCHO Rules,[5] comparable RCC adjustments apply to many image exchanges outside of Federal Reserve System clearing.

- Amendments to Regulation CC in 2006 in 12 CFR 229.34(d)[6] require the bank of first deposit to warrant that the customer whose account is being debited (the payor's bank) authorized the RCC payment. The effect is to permit bank customers to dispute such transactions and to have the item returned to the bank of first deposit. The FTC proposal claims that this regulation applies to banks and not to consumers. However, as a practical matter, the regulation ultimately protects the consumer, just as NACHA rules do, because allowing the bank to return and get re-credited for unauthorized items means the bank has the means and incentive to resolve its customers' disputes and re-credit its customers' account for unauthorized transactions. Accordingly, any argument that consumers do not benefit from the warranty is inaccurate.

The proposal leans heavily on the provisions of Regulations E and Z that disputes are to be resolved within certain time frames and improperly dismisses important incentives that move banks to resolve check disputes promptly, and the proposal does so absent any evidence (other than theory) that bank customers are in fact dissatisfied with bank responses to check and other disputes or that banks are not responding to RCC disputes as promptly as they respond to debit and credit card disputes. This lack of evidence suggests that the significant incentives to respond promptly to check disputes, including the potential significant liability for wrongful dishonor, customer dissatisfaction, supervisory pressure, and reputational harm, in fact, do work. That the protections are, as a practical matter, comparable, coupled with the lack of evidence that RCC disputes are not resolved in a timely and satisfactory manner, indicates that shifting unscrupulous telemarketers to payment instruments covered under Regulations E and Z will not ultimately prevent consumers from being harmed by such bad actors, undermining the FTC's justification for prohibiting RCC use for telemarketers.

---

[5] http://www.eccho.org/rules

[6] **Regulation CC 12 CFR 229.34(d)** http://www.law.cornell.edu/cfr/text/12/229.34
(d) Transfer and presentment warranties with respect to a remotely created check.
(1)A bank that transfers or presents a remotely created check and receives a settlement or other consideration warrants to the transferee bank, any subsequent collecting bank, and the paying bank that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. For purposes of this paragraph (d)(1), "account" includes an account as defined in § 229.2(a) as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank.
(2)If a paying bank asserts a claim for breach of warranty under paragraph (d)(1) of this section, the warranting bank may defend by proving that the customer of the paying bank is precluded under U.C.C. 4-406, as applicable, from asserting against the paying bank the unauthorized issuance of the check.

For all of these reasons, ABA believes that the current proposal to outlaw all telemarketer use of RCCs is factually unwarranted, harmful to customers, disruptive to the payments system, and constitutes an *ultra vires* undertaking by the FTC to regulate the payments system and must be withdrawn.

Conclusion

ABA appreciates the FTC's effort to improve consumer protection against telemarketing fraud. We believe that the banking industry works to ensure that proper and effective anti-fraud protections are in place for all types of payments transactions, and we welcome agency enforcement efforts against fraudsters.

As described in this comment letter, consumers using RCCs receive substantial protections under Regulation CC, Circular 3, ECCHO Rules and the UCC. These protections are on par with those associated with card transactions or payments made via the ACH Network. However, no set of protections is ironclad, and no payment system is an exclusive avenue for fraud. Accordingly, ABA objects to the FTC's effort to prefer one safe and legal payment mechanism over another by proposing to prohibit the use of RCCs and RCPOs by all telemarketers. This jurisdictional over-reach and the insufficiency of the record to support an unfairness finding with regard to RCC use by legitimate telemarketers fulfilling the authorized transactions of deserving customers combine to recommend withdrawal of the proposed blanket outlawing of RCCs for use by all telemarketers.

Sincerely,

Richard R. Riese
Senior Vice President