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Via Electronic Submission

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

Re: Telemarketing Sales Rule, 16 C.F.R. Part 310, Project No. R411001

Gentlemen and Ladies:

The Money Services Round Table ("TMSRT") submits these comments to the Federal Trade Commission (the "Commission") in response to the notice of proposed rulemaking regarding the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, as published in the Federal Register on July 9, 2013 at 78 Federal Register 41200 ("NPRM"). TMSRT is comprised of the leading national non-bank money transmitters, including RIA Financial Services, Sigue Corporation, Western Union Financial Services, Inc., MoneyGram Payment Systems, Inc., and Integrated Payment Systems, Inc. These companies offer a variety of non-bank funds transmission services, including cash-to-cash money transfers. TMSRT members are committed to protecting the users of its products from being victimized by fraudsters and to offering products and services that encourage financial inclusion.

Our members have instituted policies and procedures designed to monitor for potential fraud-induced transactions, to alert authorities when such transactions are detected and, if those transactions involve our retail point of sale agents, to take corrective action against such agents. In this regard, we strongly support the Commission's efforts to identify unscrupulous telemarketers and to weed them out of the financial system. However, disruptive and perhaps unintended adverse consequences of the proposed rule for consumers and industry alike are a major concern to TMSRT.

The vast majority of the millions of transactions completed by TMSRT members each week are not fraudulently induced.[1] Individually, these transfers are commonly used to pay for basic household needs, support education, fund investments, address emergency needs, or provide similar assistance. Therefore, it is critical that the Commission craft amendments to the TSR that are tailored to minimize the disruptive impact on these services. We urge the

[1] Please see Section A.1 of this letter for specific data.

Commission to adopt the proposals set forth in this letter in furtherance of our shared goals of protecting consumers.

A. **Current Proposal**

The Commission is proposing to broaden the definition of an abusive telemarketing act or practice by adding a new subsection to section 310.4(a) of the TSR that would prohibit a seller or telemarketer from "[a]ccepting from a customer or donor, directly or indirectly, a cash-to-cash money transfer or cash reload mechanism as payment for goods or services offered or sold through telemarketing or as a charitable contribution solicited or sought through telemarketing."[2] The NPRM does not explain how this "ban" would be enforced but the explanatory text that accompanies the NPRM suggests that these payment methods themselves, rather than an abusive telemarketing practice are the problem.[3] While we share the Commission's goal of protecting consumers from telemarketing fraud, we respectfully suggest that the Commission consider a more tailored approach to this issue. The comments discussed below represent TMSRT's concerns with the proposed ban.

1. The Benefits of Cash-to-Cash Money Transfers Have Not Been Recognized.

Since 1871, U.S. consumers have used cash-to-cash money transfers to pay their rent, for parents to pay tuition for school, for the sick to pay medical expenses and to help victims in areas devastated by natural disasters, including, for example, Hurricane Katrina (2005), the earthquake in Haiti (2010), the Deepwater Horizon Oil Spill (2010), the Tohoku earthquake and tsunami in Japan (2011), and Hurricane Sandy (2012). Further, many international organizations confirm that personal non-bank transfers are commonly used to pay for basic household needs, support education, fund investments, address emergency needs, or provide similar assistance.[4]

The following data sheds light on the role that non-bank cash-to-cash money transfers play in the U.S. and the global economies. This data not only emphasizes the benefits of such transfers, but also supports the need for a narrowly tailored rule that will not inhibit these important transactions.[5]

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[2] Proposed 16 C.F.R. § 310.4(a)(10), NPRM at 41224.

[3] *See* NPRM at 41214 ("[T]he use of cash-to-cash money transfers and cash reload mechanisms in telemarketing is an abusive practice under the TSR because it causes or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits. . . .").

[4] Consumer Financial Protection Bureau (CFPB), *Report on Remittance Transfers*, at 4 (July 20, 2011), *available at* http://files.consumerfinance.gov/f/2011/07/Report_20110720_RemittanceTransfers.pdf (citing Dovelyn Rannveig Agunias, Migration Policy Institute, *Remittances and Development: Trends, Impacts, and Policy Options. A Review of the Literature*, at 20–21 (2006), *available at* www.migrationpolicy.org/pubs/mig_dev_lit_review_091406.pdf); Appleseed, *Remittance Transparency: Strengthening Business, Building Community*, at 6 (Jan. 2009), *available at* www.appleseednetwork.org/Portals/0/Documents/Publications/FE%20Final.pdf; Roberto Suro, et al., *Billions in Motion: Latino Immigrants, Remittances, and Banking*, at 7–8 (2002), *available at* http://pewhispanic.org/files/reports/13.pdf).

[5] *See* 15 U.S.C. § 45(n); FTC Policy Statement on Unfairness, 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/os/2013/05/130521telemarketingsalesrulefrn.pdf (to justify a finding of unfairness, the

- In a July 2011 report to Congress on remittance transfers, the Consumer Financial Protection Bureau ("CFPB") noted that personal funds transfers are part of a worldwide phenomenon of migrants sending money back to their countries of origin. The World Bank estimates that the flow of such transfers globally is considerably larger than the flow of official aid.[6]

- A U.S. Census Bureau August 2008 Current Population Survey, Migration Supplement, indicates that U.S. households sent an estimated $11.7 billion to relatives and friends outside of the U.S. during the 12 month period before the survey.[7]

- Foreign-born households in the U.S. also are more likely to remit larger amounts: 11 percent of foreign-born households remitted $5,000 or more, compared with 7 percent of native households. The median amount sent also reflects this difference. Half of native households sent $384 or more, while half of foreign-born households sent $1,007 or more.[8]

For money transmitters, "cash-to-cash money transfers" to individuals who may be telemarketers are indistinguishable from transfers sent to any other individuals. Because of these challenges, any rule which would have the effect of "banning" these funds transfer transactions, will have a severe adverse effect on consumer access to an essential international and domestic funds transfer system. Therefore, we believe that the proposal fails to fully consider its impact on these vital payment methods.

Commission must determine that the injury is not outweighed by any countervailing benefits to consumers or competition that the practice produces). The Commission must find that the harm is not reasonably avoidable. *Id.* TMSRT disagrees with the Commission's assertion that the consumer injury from cash-to-cash money transfers in telemarketing is unavoidable. Where courts have addressed whether consumers had suffered unavoidable injuries, courts have concluded that consumers suffered unavoidable injuries where the injuries occurred prior to any consumer awareness of the harm. *See, e.g.*, FTC v. Neovi, 604 F.3d 1150 (9th Cir. 2010); FTC v. Inc21.com Corp., 745 F.Supp.2d 975 (2010); FTC v. NHS Systems, Inc., No. 08-2215 (E.D.Penn 2013). These situations are very different from cases when consumers engage in cash-to-cash transfers with telemarketers despite explicit warnings not to do so. Despite this, TMSRT members have taken considerable measures to educate consumers on the risks associated with sending cash-to-cash money transfers to unknown individuals or in response to telephone calls from unknown individuals including, for example, consumer call-back programs to prevent fraudulently induced transfers. In fact, our members continuously enhance and refine their efforts to improve their consumer awareness and anti-fraud programs.

[6] Consumer Financial Protection Bureau (CFPB), *Report on Remittance Transfers*, at 4 (July 20, 2011), *available at* http://files.consumerfinance.gov/f/2011/07/Report_20110720_RemittanceTransfers.pdf (citing The World Bank, *Migration and Remittances Facebook 2011*, at xvi–xvii, 17, 19 (2d ed. 2011), *available at* http://siteresources.worldbank.org/INTLAC/Resources/Factbook2011-Ebook.pdf).

[7] Elizabeth M. Grieco, Patricia de la Cruz, Rachel Cortes, and Luke Larsen, U.S. Census Bureau, *Who in the United States Sends and Receives Remittances? An Initial Analysis of the Monetary Transfer Data from the August 2008 Current Population Survey (CPS) Migration Supplement* (Nov. 2010), *available at* http://www.census.gov/population/www/documentation/twps0087/twps0087.pdf. We note that these numbers do not include U.S. to U.S. transfers.

[8] *Id.*

The NPRM also assumes that if consumers are unable to use non-bank cash-to-cash money transfers, they can turn to credit and debit cards which provide enhanced protections against fraudulent transactions.[9] The flaw in this assumption is that many consumers who utilize non-bank money transfers do not have bank accounts, do not have credit or debit cards, or are underserved by traditional financial institutions because of limited hours of operation or other reasons.[10] Many of these individuals are of limited financial means and seek to avoid the fees associated with traditional banking products. Not surprisingly, therefore, given the choice, many consumers have determined that the "benefits" of traditional checking accounts or credit cards are outweighed by the costs of maintaining such accounts. The proposed rule, though, in an effort to provide increased protections to one group of consumers will significantly disrupt consumer transactions to another. While this is not the outcome sought by the Commission, it is likely to be a consequence of a proposal that leaves consumers with no option but to utilize alternative, less convenient, and higher cost financial services they historically have avoided. Customer choice should be preserved.

Additionally, the unintended consequence of the proposed rule is that it fails to fully recognize the longstanding policy goal of financial inclusion. Facilitating access to a diverse range of financial services, through a range of bank and non-bank providers who can provide the services when and where consumers need them in a convenient, affordable and fast manner is a key tenet of financial inclusion. Importantly, the concept of financial inclusion goes beyond access to traditional banking services, but also includes access to other established financial or payment services, such as domestic or cross-border non-bank remittances, mobile or online payment services, or prepaid payment products. In fact, non-bank financial institutions, such as money transfer companies, indirectly foster the local banking industry by increased demand from the local population for these services. Therefore, the proposal undercuts financial inclusion by depriving customers of a valid, affordable financial service.

2. <u>The Proposed Rule Requires Clarification to be Effective and Workable.</u>

The proposal assumes that it is possible for transmitters to distinguish telemarketers from other legitimate recipients of cash-to-cash money transfers. This is not the case since fraudsters typically instruct consumers to send money to individual persons and not

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[9] The Commission suggests that the error resolution procedures of the CFPB's remittance transfer rule (Subpart B of Regulation E) do not provide sufficient protections where a telemarketer fraudulently induces the consumer to initiate a cash-to-cash money transfer. *See* NPRM at 41211–41212, n. 133–134. The Commission also suggests that the error resolution procedures applicable to electronic fund transfers ("<u>EFTs</u>") contain appropriate protections. *Id.* at 41201, n. 24. However, the error resolution protections applicable to EFTs are no greater than the protections for remittance transfers for fraudulently induced transfers. The error resolution procedures of Subpart A of Regulation E protect consumers from "unauthorized electronic fund transfers." *See* 12 C.F.R. §§ 1005.2(m), 1005.11(1)(i). A fraudulently induced transfer is not necessarily an "unauthorized electronic fund transfer." A consumer who properly authorizes an EFT cannot necessarily avail himself of the error resolution procedures merely because the EFT was fraudulently induced by a telemarketer. Moreover, the CFPB requires providers to apply the error resolution provisions of the remittance transfer rule if there is a conflict between whether a provider should apply Regulation E's error resolution procedures under Subpart A or Subpart B. *See* 12 C.F.R. § 1005.33(f)(1).

[10] One in nine American households is without a checking account, and almost one-third of the American population is underbanked. Michael Sivy, *Why So Many Americans Don't Have Bank Accounts*, TIME (Nov. 20, 2012), *available at* http://business.time.com/2012/11/20/why-so-many-americans-dont-have-bank-accounts/.

businesses. As a result, the transmitter would have no reason to believe consumers are sending money to telemarketers. Accordingly, if the rule takes effect as proposed, money transmitters would have to take steps to prevent potential telemarketers from receiving money transfers, even though the transmitters are unlikely to know or have reason to know if the individual recipient is a telemarketer (or a fraudster posing as a legitimate recipient). Therefore, this proposal is likely to result in a substantial disruption to money transfer services in the absence of additional guidance. For example, it is unclear under the proposed rule whether transmitters will be required to ask consumers several questions at the point of sale in order to ascertain whether they are sending money related to a telemarketing call. Consumers may be coached on how to answer the questions in a certain way in order to continue with the transaction, may be reluctant to respond for privacy reasons, or may not even know whether they are sending a payment to a telemarketer. In the alternative, these same consumers may simply abandon the transaction out of frustration, removing the transaction from the protections and oversight afforded by the formal financial system. Moreover, if these types of practices are required, they will disrupt the flow of legitimate cash-to-cash money transfers and may drive customers to other payment methods, such as sending cash in the mail, or worse, through unlicensed "underground" money transfer providers.

Notwithstanding the difficulty of identifying potentially fraudulent transfers at the time a consumer first initiates a cash-to-cash money transfer with a particular party, TMSRT members have taken steps to substantially reduce the amount of fraudulent activity that is occurring. Specifically, TMSRT members have implemented fraud prevention programs that evaluate historical transactional and complaint data to identify potential fraudulent activity. With historical data in hand, these programs can more effectively identify fraudulent activity and enable us to take action accordingly, such as notifying law enforcement. A rule that bans cash-to-cash money transfers to telemarketers in the first instance, however, requires TMSRT members to distinguish telemarketers from legitimate transactions without the benefit of historical data, which thus becomes impossible to implement. Conversely, flexible programs that are able to leverage historical data are better able to reduce the overall amount of fraudulent activity.

As licensed and regulated entities, and in the interest of our customers, money transmitters need clarity, predictability, and certainty regarding their compliance obligations, especially if we are expected to take steps beyond our current practices to implement the proposed ban. In short, a rule that has the effect of banning non-bank cash-to-cash money transfers to telemarketers requires transmitters to engage in the impossible task of distinguishing on a transaction by transaction basis, transfers to telemarketers (posing as legitimate receivers) from transfers to friends and family members.

3. <u>The NPRM Ignores the Role Played by Others that Can Identify Telemarketers.</u>

Non-bank money transmitters are not the only companies that unknowingly interact with abusive telemarketers. Telemarketing operations are dependent on telephone and Internet service providers, which are capable of monitoring activity across their networks and identifying spikes in calls from or to a specific number or at a specific IP address. The NPRM focuses exclusively on non-bank money transmitters and fails to address the role played by others that can help identify telemarketers. The Commission should explore options that enhance information gathering and early warning capabilities.

B. Proposals & Recommendations[11]

Below are some additional proposals and recommendations that could be productive in fashioning effective steps to combat telemarketing fraud.

1. A Study to Determine the Most Effective Warnings, Disclaimers, and Education to Influence Consumer Behavior Should be Undertaken.

Appropriate disclaimers and warnings have been recognized as a longstanding, effective consumer protection tool to provide consumers with important cautionary information. Over the years, TMSRT members have worked with the Commission, the State Attorneys General and consumer groups to develop and implement prominent fraud prevention warnings and disclaimers and to engage in consumer education and alerts. Indeed, consumers now receive fraud warnings from TMSRT members at the time of the inception of a money transfer transaction.

Despite these efforts, the NPRM indicates that consumers are still falling victim to telemarketing fraud. For this reason, the Commission should consider conducting a study to determine what warnings are most effective in influencing consumer behavior to avoid fraudulently induced transfers. Precedent for such a study can be found in the actions of other U.S. consumer protection regulators such as the Federal Reserve study to assess the effectiveness of remittance transfer disclosures.[12] A similar study by the Commission will yield positive results for consumers and the industry.[13]

2. The Ban Should be Abandoned and Guidance on Fraud Prevention Programs Should be Adopted.

Due to the drawbacks of the proposed ban in distinguishing between legitimate individual money transfers, fraud prevention programs that are reasonably designed and effectively implemented to detect, prevent, and respond to fraud are a far better approach and more likely to have a material impact on decreasing fraudulent telemarketing schemes. The

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[11] Similar considerations apply to cash reload mechanisms and the other payment methods set forth in the NPRM.

[12] Board of Governors of the Federal Reserve System, *Summary of Findings: Design and Testing of Remittance Disclosures*, submitted by Macro International Inc. (Apr. 20, 2011), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110512_ICF_Report_Remittance_Disclosures_(FINAL).pdf.

[13] The Commission has also recognized that an increasing numbers of fraudulent transactions are occurring over the Internet. One potential source of education could be banner warnings that would run on certain websites on which financial transactions are conducted. Such warnings could advise consumers to protect password and account information and never to share such information in a telemarketing transaction. It may be possible to educate consumers by advertising that stresses such messages on cable systems in markets where the incidence of telemarketing fraud is particularly high.

Commission has an important role to play in this regard, and it should offer clear guidance on the elements of such a program. For example, such a program could include the following:[14]

(a) Designation of employees to coordinate and be accountable for the program.

(b) Blocking of transactions from designated consumers.

(c) Evaluation of historical transactional data to identify and prevent future potential fraudulent activity, if possible.

It is essential in this regard that the Commission work collaboratively with industry to develop viable and effective fraud prevention measures, rather than an outright ban as in the proposed rule.

Alternatively, if the Commission finalizes the proposed ban, it should at a very minimum clarify that money transmitters that act in good faith and utilize fraud prevention programs with the elements set forth in (a) through (c) above will not be deemed to be providing "substantial assistance" to telemarketers or sellers under section 310.3(b) of the TSR.

3. The Commission Should Facilitate Information Sharing for Fraud Detection.

The stated objective of the proposed ban is "to curb deceptive and abusive practices occurring in telemarketing." In addition to fraud prevention programs, another useful tool is the collection, analysis, and dissemination of financial intelligence.[15] That is, by gathering financial intelligence in a uniform way, industry, the Commission, state regulators, and law enforcement can take a more holistic, cooperative and concerted approach to the problem. As FinCEN's efforts to collect and analyze suspicious activity reports (SARs) demonstrate, information made available from industry-gathered data can be a powerful tool in battling crime, fraud and corruption. For example, the Commission, in conjunction with FinCEN and the CFPB, should develop and maintain a list of fraudulent telemarketers or telemarketing schemes that could be shared with industry to prevent their products from being used as part of such schemes.

Further, the Commission should consider how it can facilitate information sharing to enable transmitters to detect fraud associated with telemarketing operations. For example, TMSRT has requested a Commission Staff Advisory Opinion to approve of an automated database, maintained and secured by a neutral third-party vendor, containing information about money transmission point-of-sale agents whose contractual relationships with transmitters have been terminated due to compliance failures, including for fraud reasons.[16] Facilitation of such a database will be instrumental in fighting telemarketing fraud and should be considered as an approach to addressing the issues raised in the rulemaking.

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[14] The industry is reluctant to provide specific details of each company's current fraud prevention programs since such information as part of the public record could tip off fraudsters.

[15] *See, e.g.*, United States Department of Treasury, Financial Crimes Enforcement Network (FinCEN), *available at* http://www.fincen.gov/about_fincen/wwd/.

[16] Letter from Ezra Levine, Counsel to TMSRT, to Donald S. Clark, Secretary of the Federal Trade Commission dated July 25, 2013.

4. The Commission Should Explore Additional Sources of Information for Obtaining Information on Fraudulent Telemarketing Practices.

While financial services providers can be important sources of information about potentially fraudulent telemarketing practices, they are not the only source of such information. Additional sources of such information, as indicated above, could be telephone and Internet service providers.

5. Money Orders Should Not Be Covered by the Proposed Ban.

The proposed ban applies to remotely created checks, remotely created payment orders, cash-to-cash money transfers, and cash reload mechanisms. Some non-bank transmitters sell money orders so customers, particularly the unbanked, can pay bills. The proposed ban, if finalized, should be amended to exempt money orders. When money orders are sold, the payee is not identified until the purchaser enters a name on the money order at a later time. Therefore, there is no feasible way for a money order seller to know who the purchaser will designate as a payee of the money order.

6. A Further Notice of Proposed Rulemaking Regarding the Effective Date of the Final Rule is Warranted.

The Commission should issue a further notice of proposed rulemaking regarding the effective date of the final rule. It is critical that an opportunity be afforded to the industry to comment on how long it will take to implement any changes to current practices or procedures mandated by the final rule.

C. Conclusion

TMSRT appreciates the opportunity to provide comments in the pending rulemaking. Its members are committed to assisting the Commission in detecting, deterring, and responding to telemarketing fraud. Therefore, while the intent of the proposal is appreciated, other options must be considered before implementation of a ban on payment methods. To reiterate, the critical concern is that it is not possible for transmitters to comply with the proposed ban, especially in the absence of any compliance guidance in the proposal. Accordingly, the Commission is urged to consider the adoption of the alternative proposals and recommendations set forth above.

TMSRT looks forward to continued participation in the TSR rulemaking process and would be pleased to meet with the Commission to discuss the proposals set forth herein. If there are any questions concerning these comments, or if TMSRT may be of assistance in providing additional information, please do not hesitate to contact us.

Sincerely,

Ezra Levine
Counsel, TMSRT