

Separate Statement of Commissioner Noah Joshua Phillips
Concurring in Part and Dissenting in Part
Federal Trade Commission v. Avant, LLC

Matter No. 1623090

April 15, 2019

I commend staff on their diligent work in investigating and bringing this action against Avant, LLC (Avant), a company that offers and services online loans to consumers. Among other things, the Commission's complaint alleges in Counts VI and VII that Avant violated the Telemarketing Sales Rule (TSR) and the Electronic Fund Transfer Act (EFTA) and its implementing Regulation E. These two allegations stem from the fact that, as part of its loan application, Avant required consumers to authorize Avant to initiate either recurring electronic fund transfers or remotely created checks (RCCs) for periodic loan payments, as a condition of obtaining credit.

I agree that Avant is a seller or telemarketer engaged in telemarketing as defined by the TSR. As such, Avant is prohibited from creating, or causing to be created, RCCs as payment for goods or services offered or sold through telemarketing.¹ Accordingly, I agree that the complaint should contain Count VI, which alleges that Avant has violated the TSR. In numerous instances, Avant has created or caused to be created RCCs as payment for its online loans offered or sold through telemarketing.

But the Commission's complaint also goes further, alleging that, because the TSR prohibits telemarketers from using RCCs, Avant, as a telemarketer, in fact provides only one payment method as a condition of extending credit: electronic fund transfers (EFTs). EFTA provides that no person may condition the extension of credit to a consumer on such consumer's repayment by means of recurring preauthorized EFTs. No one disputes that, were Avant not a telemarketer, the payment choice it offers consumers – EFT or RCC – would not violate EFTA.

The EFTA violation alleged in Count VII flows from the prohibition on telemarketers using RCCs. I take issue with predicating EFTA liability on the fact that Avant happens to fall within the TSR's definition of a telemarketer. The real quibble with Avant's business practice is that, as a policy matter, RCCs are not a meaningful alternative to recurring preauthorized EFTs under EFTA. That may be, but the law treats the two differently. And Avant falling within the definition of the TSR has nothing whatever to do with the policy argument underlying Count VII. It follows only from the way in which the firm conducts customer service and sales.

I believe the Commission could reach the same relief obtained in its settlement with Avant by pleading only a TSR violation. Doing so would avoid the use of novel pleading based on the facts of a particular case to rewrite a statute based on our policy preferences. EFTA does not prohibit the use of RCCs as an alternative to EFTs, and we should not pretend it does.

¹ 16 C.F.R. § 310.4(a)(9); 16 C.F.R. § 310.2(cc).