

Separate Statement of Commissioner Christine S. Wilson
Concurring in Part and Dissenting in Part
Federal Trade Commission v. Avant, LLC
FTC File No. 162-3090

April 15, 2019

The proposed order settles the FTC’s allegations that Avant violated Section 5 of the FTC Act, the Telemarketing Sales Rule (“TSR”), and the Electronic Fund Transfer Act (“EFTA”). While I am not dissenting from the Section 5 allegations, I am voting against counts VI and VII pertaining to the TSR and the EFTA. This dissent is motivated by my concerns about regulatory overreach. Here, the majority uses an alleged violation of the TSR to prohibit behavior the agency could not reach under EFTA alone. If the Commission is sufficiently concerned about electronic draft payments, we should urge our regulatory counterparts to address the payment processing risks through rulemaking rather than mandate broad policy changes through enforcement.

The TSR Violation (Count VI)

The Commission amended the TSR in 2015 to enhance its anti-fraud protections by banning payment methods favored in fraudulent telemarketing schemes (“Novel Payments”), including remotely created checks (“RCCs”).¹ My dissent is prompted in part by the fact that the scenarios that the Novel Payments amendments were intended to address – fraud and fraudulent withdrawals – are not applicable here. For two reasons, I believe the FTC should have exercised its prosecutorial discretion and declined to include the TSR count.

First, the Commission should use its limited resources to pursue TSR Novel Payments cases that involve consumer harm stemming from fraudulent telemarketing transactions. To date, the FTC has not accused any telemarketer of violating the anti-fraud amendments of the TSR by accepting Novel Payments.² I cannot support use of these provisions, particularly on their maiden application, against a legitimate company offering legitimate products to customers.³

¹ See generally Amended Telemarketing Sales Rule Statement of Basis and Purpose and Final Rule, 80 Fed. Reg. 77,519 (Dec. 14, 2015) [hereinafter TSR Final Rule]. The revisions also clarified amendments that apply primarily, though not exclusively, to the provisions restricting unwanted calls. The revised rule also expanded the prohibition against advanced fees for recovery services. Commenters voiced their support of the ban because RCCs are highly susceptible to fraud and can cause harm to consumers if duplicitous companies make unauthorized and fraudulent withdrawals from consumers’ bank accounts. *Id.* at 77,525.

² See 16 C.F.R. § 310.4(a)(9); see also Statement of the Federal Trade Commission on Amendments to the Telemarketing Sales Rule (Nov. 18, 2015), <https://www.ftc.gov/public-statements/2015/11/statement-federal-trade-commission-amendments-telemarketing-sales-rule> (“Our ban is focused on addressing abusive telemarketing practices using [novel] payment methods”).

³ The Statement of Basis and Purpose (“SBP”) notes, “the TSR is fundamentally an antifraud rule that protects consumers from deceptive and abusive telemarketing practices.” TSR Final Rule, 80 Fed. Reg. at 77,520. The SBP refers to the prohibition of Novel Payments as the Anti-Fraud Amendments. Commenters in support of the prohibition argued that RCCs are highly susceptible to fraud and allow bad actors easily to make unauthorized and

Second, this matter could have a chilling effect on pro-consumer business behavior. While I recognize the TSR's prohibition on RCCs is intended to be a bright line rule,⁴ I fear that the decision to penalize a company, in part, for fielding phone calls from consumers interested in purchasing complex and expensive financial products could limit legitimate efforts by Internet firms to provide quality customer service.

For these reasons, I dissent from the TSR count.

The EFTA Violation (Count VII)

Even if it were an appropriate use of the FTC's prosecutorial discretion to bring the TSR count, I do not agree that liability under the TSR gives rise to liability under the EFTA. The TSR was adopted to protect consumers against deceptive acts or practices by telemarketers. The TSR provisions banning Novel Payments protect consumers from fraud risks associated with these payment instruments. The EFTA was implemented to protect consumers who use electronic means to manage their finances. The compulsory use prohibition of the EFTA, discussed in more detail below, protects consumers who arrange to have regular payments deducted from their bank accounts and ensures consumers have choice over repayment options. Whether a product is sold in-person, over the phone, or online is a separate issue from the risks associated with payments that are automatically deducted from consumers' accounts. EFTA's compulsory use prohibition was put in place to protect choice, not to prevent fraud.

Under the EFTA's compulsory use prohibition, companies cannot condition the extension of credit on a commitment from consumers to repay loans through preauthorized electronic fund transfers ("EFTs").⁵ EFTs are a defined term under the Act, and the definition expressly excludes checks.⁶ RCCs are checks, and therefore RCCs are not EFTs.⁷ Avant made loans available to

fraudulent withdrawals from their financial accounts. *Id.* at 77,525. The Commission is not alleging facts that would support this characterization in the instant matter.

⁴ *Id.* at § 310.4(a)(9).

⁵ 15 U.S.C. § 1693k(1); *see also* 12 C.F.R. § 1005.10. This provision generally is referred to as the prohibition on compulsory use.

⁶ 15 U.S.C. § 1693(a)(7) (excluding a transaction originated by check, draft or similar paper instrument); *see also* 12 C.F.R. § 1005.3(c)(1) (exempting checks, drafts, or similar paper instruments from the definition of an EFT). An example of an EFT is a payment made through the Automated Clearing House network (an "ACH").

⁷ As a general matter, the EFTA and its implementing regulation, Regulation E, do not apply to payments originated by check or other similar paper instruments. Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has rulemaking authority for the EFTA. Both the Board of Governors of the Federal Reserve System ("the Board") and the CFPB have noted in various rulemaking efforts that they will continue to monitor developments in payment systems to determine whether it would be appropriate to apply the EFTA to RCCs and other check transactions initiated online or by telephone. Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire and Availability of Funds and Collection of Checks Statement of Basis and Purpose and Final Rule, 70 Fed. Reg. 71,218, 71,220 (Federal Reserve Nov. 28, 2005) (The final rule amends Regulation CC to define "remotely created checks" and create transfer and presentment warranties. The SBP noted that the Board would continue to monitor developments to determine whether the EFTA should apply to

consumers on the condition that they repay those loans by preauthorizing payments either through the Automated Clearing House network (an “ACH”) or by the creation of RCCs. Because RCCs are not EFTs, Avant offered consumers an alternative to preauthorized EFTs during the loan application process and its conduct was therefore lawful under the EFTA.

The complaint bootstraps Avant’s liability under the EFTA to its alleged violations of the TSR. Because the TSR prohibits telemarketers from using RCCs, the complaint alleges that Avant provided only one legal repayment method: an ACH.⁸ But applying prohibitions under the TSR to create prohibitions for certain payment methods under EFTA is a troubling form of regulation by enforcement.

Based on this theory of liability, if Avant never initiated phone calls to consumers or fielded a telephone call from consumers (and consequently avoided placing itself under the auspices of the TSR), it could have obligated consumers to repay loans with either RCCs or ACHs.⁹ It is an odd result if EFTA’s compulsory use prohibition does not expressly prohibit lenders from offering RCCs as an available payment method, but does provide a disincentive to lenders who offer RCCs as a payment method from making or accepting any consumer calls in the context of the application process.

Moreover, such an application has the potential to create a fragmented law of payments in which multiple federal agencies take conflicting views on the legitimacy of specific payment instruments.¹⁰ Bootstrapping the TSR to the EFTA means that only a subset of financial

RCCs); Availability of Funds and Collection of Checks Notice of Proposed Rule Making, 76 Fed. Reg. 16,862, 16,866 (Federal Reserve Mar. 25, 2011) (emphasizing that making electronically-created items subject to check warranties would not affect any future determinations by the Board or the CFPB as to whether such electronically-created items are subject to the EFTA); *see also* Telemarketing Sales Rule Notice of Proposed Rulemaking, 78 Fed. Reg. 41,200, 41,205 n.61 (FTC July 9, 2013) (noting the CFPB has not made a determination as to the applicability of Regulation E to electronically-created items).

⁸ The Commission may prefer preauthorized EFTs and other payment types to RCCs because the protections available to consumers who use RCCs are substantially less robust than the protections afforded by credit cards and ACHs. TSR Final Rule, 80 Fed. Reg. at 77,535 (noting the UCC “provides no legally mandated error resolution procedure, no recredit right, and no specific timeframes for enforcing its zero liability rule, thereby abandoning a consumer to choose between accepting an unauthorized debit or suing her bank”).

⁹ *See* Complaint ¶ 10 (describing Avant’s telemarketing activities).

¹⁰ The Federal Reserve Bank of Atlanta, which oversees the electronic network that facilitates credit and debit payments between banks, raised several serious objections to the proposed Novel Payment amendments to the TSR. Federal Reserve Bank of Atlanta, Comment Letter on Proposal to Ban Payment Methods Favored in Fraudulent Telemarketing Transactions at 2 (Aug. 8, 2013), https://www.ftc.gov/sites/default/files/documents/public_comments/2013/08/00031-86298.pdf (“RCPOs are an emerging form of payment.... Prohibiting their use prior to achieving clarity regarding the potentially enhanced consumer protections they offer or the business functionalities they could provide would be premature.”); *see also* Am. Bankers Ass’n, Comment Letter on Proposal to Ban Payment Methods Favored in Fraudulent Telemarketing Transactions at 7 (Aug. 8, 2013), https://www.ftc.gov/sites/default/files/documents/public_comments/2013/08/00041-86307.pdf (noting the amended TSR would not apply to financial institutions, but could negatively affect payment systems by fragmenting the law of payments); Separate Statement of Comm’r Maureen K. Ohlhausen, Dissenting in part, In the Matter of the Telemarketing Sales Rule, FTC File No. R411001 (Nov. 18, 2015), https://www.ftc.gov/system/files/documents/public_statements/881203/151118tsrmkospeech.pdf.

institutions (those subject to the TSR) are prohibited from conditioning the extension of a loan on customer repayment by RCCs.¹¹ I recognize the Commission has long noted the hazards associated with RCCs. Where appropriate under our limited authority, the FTC has adopted rules to protect consumers from the fraud risks associated with these payment instruments. To the extent the agency has identified payment-processing business practices that create risks to a consumer's control over automatic debits, I encourage the FTC to share its views with the appropriate regulatory agencies in order to determine whether further action is appropriate.

I have serious reservations about using the TSR to outlaw behavior the FTC could not address through the application of the EFTA alone. Regardless, the structure of Avant's loan payments did not run afoul of the compulsory use clause of the EFTA.

For these reasons, I also dissent from the inclusion of the EFTA claim.

¹¹ The FTC's TSR authority does not apply to banks, federal credit unions, and federal savings and loans, even though these businesses could conduct telemarketing campaigns. 15 U.S.C. § 6105(a).