

**Separate Statement of Commissioner Maureen K. Ohlhausen, Dissenting in Part
In the Matter of the Telemarketing Sales Rule
Project No. R411001
November 18, 2015**

Today the Commission amends the Telemarketing Sales Rule (TSR) in an effort to combat telemarketing fraud.¹ I support the Commission’s long-standing efforts to combat fraud. However, I do not support the amendments prohibiting telemarketers and sellers in both inbound and outbound telemarketing calls from requesting or accepting as payment four “novel” payment methods: remotely created checks (RCCs), remotely created payment orders (RCPOs), money transfers, and cash reload mechanisms. The amendments do not satisfy the third prong of the unfairness analysis in Section 5(n) of the FTC Act,² which requires us to balance consumer injury against countervailing benefits to consumers or competition. Although the record shows there is consumer injury from the use of novel payment methods in telemarketing fraud, it is not clear that this injury likely outweighs the countervailing benefits to consumers and competition of permitting novel payments methods.

The comments filed by the Federal Reserve Bank of Atlanta (FRBA)³ raise several serious objections to these amendments that undergird my conclusion. Although the FRBA supports efforts to reduce telemarketing fraud and improve oversight of payments, it does not support the specific prohibitions on novel payments for the following reasons:

- “[I]t is clearly preferable public policy not to create a fragmented ‘law of payments’ in which multiple federal agencies take differing and/or conflicting views on the legitimacy of specific payment instruments.”⁴
- “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.”⁵
- “With respect to the difficulty in distinguishing legitimate uses from fraudulent uses of RCPOs, the FRBA would ask that the FTC allow industry some time to develop mechanisms by which this distinction could be achieved. There is an opportunity, through authentication and other technology driven solutions, for RCPOs to provide many of the benefits of checks without carrying many of the risks. A premature ban

¹ These amendments make several clarifications of the existing rule, which I support. Additionally, I support the amendment’s expansion of the prohibition against advanced fees for all recovery services, regardless of whether the original loss resulted from a telemarketing transaction.

² 15 U.S.C. § 45(n) (prohibiting acts or practices that cause or are likely to cause substantial injury to consumers, which are not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition).

³ The FRBA operates the Federal Reserve System’s Retail Payments Product Office, which manages and oversees the check and Automated Clearing House (ACH) services that the Federal Reserve banks provide to U.S. financial institutions.

⁴ Comments of Federal Reserve Bank of Atlanta, at 2 (Aug. 8, 2013), <https://www.ftc.gov/policy/public-comments/comment-00031-1>.

⁵ *Id.*

on their use in the telemarketing context may limit their use elsewhere as they would be stigmatized as a ‘risky’ form of payment.”⁶

- “FRBA and the Commission both perceive the check collection and return system is lacking a comprehensive method or process of identifying and responding to transactional patterns that are strongly indicative of large scale consumer fraud. However, FRBA does not believe that the problem can be addressed effectively by banning the use of RCCs and RCPOs.”⁷
- “FRBA respectfully suggests that a strengthened regulatory response to this lack of data that could identify significant patterns of consumer fraud is not to ban the use of checks or any subset of checks, but to require every bank to collect and report to its primary federal regulator on a frequent basis each instance in which any of its customers deposited significant numbers of checks that resulted in an abnormal number or rate of returns.”⁸

In sum, the FRBA’s analysis of the prohibition of novel payments in telemarketing indicates that any reduction in consumer harm from telemarketing fraud is outweighed by the likely benefits to consumers and competition of avoiding a fragmented law of payments, not limiting the use of novel payments prematurely, and allowing financial regulators working with industry to develop better consumer protections. The FRBA has instead requested that we work together with our sister agencies by striving to “strengthen anti-fraud and consumer protection measures around existing and emerging payment mechanisms rather than by prohibiting the use of specific payment methods only in the telemarketing industry.”⁹ I believe the better course for consumers and competition is to accept this invitation.

⁶ *Id.* at 3.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.*