



August 8, 2013

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex B)
600 Pennsylvania Avenue N.W.
Washington, DC 20580

Re: Telemarketing Sales Rule 16 CFR Part 310, Project No. R411001

Ladies and Gentlemen:

The Electronic Check Clearing House Organization (“ECCHO”) appreciates this opportunity to provide its comments to the Federal Trade Commission (“FTC”) regarding this significant proposal (the “Proposal”) to amend the Telemarketing Sales Rule (“TSR”). ECCHO has developed these comments with input from its member financial institutions.¹

ECCHO is a not-for-profit national check clearinghouse owned by its over 3,000 member financial institutions dedicated to promoting electronic check collection and related payment system improvements. ECCHO is recognized across the U.S. as the national provider of private sector check image exchange rules. During 2012, ECCHO member financial institutions used check images to exchange under the ECCHO check clearinghouse rules approximately 10 billion transactions totaling \$13.8 trillion.²

ECCHO does not act as a check exchange network, but rather it provides the private sector check image exchange rules that support image exchanges by financial institutions through check image networks, clearing houses and bilateral exchanges. The ECCHO Rules are drafted with input from ECCHO member organizations and other non-bank sponsoring organizations that participate in ECCHO committee meetings. The ECCHO Rules are interbank rules only, which do not address directly a bank’s relationship with its depositing customer or drawer customer.

In addition to the comments in this letter, ECCHO supports the positions set forth in the letter from The Clearing House commenting on the FTC’s proposed amendments to the TSR.

1. Scope of Comment Letter

As ECCHO’s expertise and experience are associated with the interbank collection and exchange of check images, we have limited our comments to the FTC’s proposal to ban remotely created checks and remotely created payment orders (referred to herein collectively as “RCCs”). We do not in this letter expressly address the FTC’s proposed ban

¹ This letter does not necessarily represent the view of all ECCHO members, certain of which may submit their own comment letters on the FTC’s Proposal.

² For more information regarding ECCHO, please see ECCHO’s web page at www.ECCHO.org.

on cash-to-cash or cash reload mechanisms. In addition, we do not speak extensively in this comment letter of all of the potential legitimate uses of RCCs by telemarketing and other merchants that accept RCC payments from their customers.

Our letter focuses on the FTC's unprecedented proposed action in this rulemaking to ban a segment of RCC use, which could stifle RCCs as well as other emerging payment mechanisms for legitimate payments. The significant volume of RCCs in the check system today supports the conclusion that RCCs are a useful payment method for a range of merchants and financial institutions, such as credit card lenders and mortgage lenders. Financial institutions, collecting funds owed by their borrower customers, and merchants use millions of RCCs a year. Information from the Federal Reserve's 2010 Retail Payment Study showed that there were approximately 515 million RCCs processed in 2009.³ Based on these usage numbers, it is clear that RCCs are serving a need for merchants and financial institutions in the payments space, to the benefit of both these merchants and financial institutions and their consumer and business customers.

2. General Comments on the FTC Proposal to Ban Use of RCCs by Telemarketers

A. ECCHO Supports Continued FTC Enforcement Efforts Against Fraudulent Merchants Under Existing Rule With Respect to Unauthorized Payments Made With Any Payment Type

ECCHO agrees with the FTC that the failure of certain telemarketers to comply with the current TSR is a significant problem for consumers and the financial services industry. ECCHO strongly supports the enforcement actions taken by the FTC over the last decade against telemarketers that are committing fraud against consumers or otherwise violating the payment authorization requirements of the TSR with respect to any payment type -- check, ACH or credit/debit card payments. The enforcement orders cited by the FTC in the Proposal indicate that telemarketing fraud and insufficient customer authorization processes are evident in all payment types. For example, the recent complaint that the FTC brought against Independent Resources Network, a payment processor, alleged processing of unauthorized credit card payments by telemarketing merchants.⁴ ECCHO acknowledges the significant benefit of the FTC's exercise of its authority to enforce the current provisions of the TSR that prohibit telemarketing merchants from submitting a payment to debit a

³ This RCC volume number is based upon information from the 2010 Federal Reserve Payments Study. This Federal Reserve study estimated that approximately 2.1 percent of 2009 checks were RCCs. During 2009, the volume of checks paid was estimated at 24.5 billion items. Accordingly, 515 million RCCs represent 2.1 percent of the 2009 volume. See The Federal Reserve Payments Study, Noncash Payment Trends in the United States: 2006-2009, Federal Reserve System at page 37 (rel. Dec. 2010, updated Apr. 5, 2011), available at: http://www.frbservices.org/files/communications/pdf/research/2010_payments_study.pdf. The Federal Reserve is currently in the process of preparing an updated study on retail payments.

⁴ First Amended Complaint, Federal Trade Commission v. Innovative Wealth Builders And Independent Resources Network Corp, filed June 04, 2013. <http://www.ftc.gov/os/caselist/1223127/130605iwbcmpt.pdf>.

customer's financial account without appropriate authorization from the customer, regardless of the payment method that the fraudulent telemarketer uses to collect its payment.

B. Ban on One or More Specific Payment Types Would Be Unprecedented and Would Limit Payments Industry Innovation

It would be unprecedented for a U.S. government agency to impose a permanent ban on an otherwise legal payment type for a specified use or for a class of merchants. We are not aware of any similar ban on a type of payment instrument that has been proposed or implemented by a U.S. government agency. In contrast, payment networks have from time to time limited the use of payment transaction types for certain merchants; however, these payment system limitations have been market-driven, governed by agreements among the parties, and sufficiently flexible to adapt over time to changing payment needs, changing technology and changing merchant practices and needs. For example, the card networks have placed prohibitions on merchant acceptance of a credit card payment for repayment of certain outstanding uncollectible debt and for payment of a returned check.⁵

ECCHO is concerned that a ban on RCCs by the FTC under the TSR would over time unnecessarily stifle the use of RCCs in general for all merchants beyond just telemarketers. As the FTC is aware, the payments industry is undergoing a wave of innovation as a result of a number of recent technological developments, including check deposit via smartphone and person-to-person payments. These developments have provided new conveniences and new payments-related products and services for consumer and business users. If adopted as a final rule by the FTC, a ban on RCCs for telemarketers could be interpreted by the public, the merchant community and financial institutions as indicating that the government views RCCs in general as an inherently "flawed" payment option. Such a public position by a federal agency would discourage further market-based innovation for use of RCCs, or derivations of the RCC technology, as a check payment product to meet the legitimate payment needs of merchants, consumers and financial institutions.

The FTC ban would have the ancillary effect of driving volume to the payment methods that are deemed "approved" by government fiat rather than from relative efficiencies or other market-derived benefits to payments users or providers. This government-mandated shift in the volume of payments would in turn lead to substantial inefficient changes in the U.S. payment system. We believe this proposed ban on a payment method, and the ancillary effects such a ban would have, strays from the intent of the TSR to regulate abusive practices associated only with the underlying telemarketing transaction itself. Such a ban would deny consumer and business users the benefits that they would have enjoyed from the discouraged market-driven payment innovations.

The FTC's ban on the use of RCCs in telemarketing transactions also might cause other federal and state regulators to take unnecessary actions to ban RCCs for other classes

⁵ See e.g., Visa Operating Regulations, ID #0006945; MasterCard Operating Rules 5.11.5.

of merchants, further limiting payment innovation. Examples of innovation occurring today that may use features of RCCs include efforts in the check system to develop a process for fully electronic checks which could benefit consumers and other payers and payees through faster payments while reducing costs from printing and transportation. In the early days of check image exchange, action by a federal agency to ban imaging of checks or to require original paper checks to be returned to consumers would have impeded development and adoption of check image technology and the benefits of check images currently enjoyed by all stakeholders, including consumers. We encourage the FTC to consider the unintended consequences this proposed ban on the use of RCCs in telemarketing transactions may have on the use of RCCs generally as to all classes of merchants and payees, not just telemarketers.

C. FTC Has Not Established A Factual Basis For Concluding That The Proposed Ban On RCCs For Telemarketing Transactions Is A Reasonable, Tailored Approach To Addressing Problems With Fraudulent Telemarketers

Given the unprecedented nature of the FTC's proposed ban on RCCs, we believe that the FTC must first establish that such a ban is a reasonable, tailored approach to addressing the problem raised by fraudulent telemarketers; that there is no reasonable alternative to address the identified problem; and that the FTC's approach will directly advance the FTC's stated goal of eliminating abusive acts or practices of certain telemarketers. It is ECCHO's view that the FTC's Proposal has not met these three criteria, and accordingly, ECCHO does not support the FTC's proposed ban on the use of RCCs in telemarketing transactions.

Based on the Proposal, it is unclear whether the FTC has established a sufficient factual basis to support a conclusion that a ban on RCCs (i) is needed by the FTC to continue its enforcement activities against fraudulent telemarketing merchants, or (ii) would reduce instances of merchants engaging in fraud by initiating unauthorized payments to accounts of consumer customers. The FTC has not provided evidence of a deterrent effect of this RCC ban on a telemarketer who is already violating the TSR by not obtaining customer authorization for a debit transaction of any type—ACH, card or RCC. The Proposal does not assure us that a telemarketer who overlooks an authorization for RCCs would on the other hand obtain proper authorization for another payment type. ECCHO believes that banning use of RCCs by telemarketers without shutting down telemarketers that refuse to comply with authorization requirements in general under the TSR will not prevent any consumer fraud, as these telemarketers will simply continue to ignore the TSR authorization requirements for whatever method they use to collect payment from the consumer. At best, the ban on RCCs may serve as an additional basis for the FTC to bring an enforcement action against a merchant engaging in fraud, but that merchant already would be violating one or more of the other provisions of the TSR which is a basis for enforcement. Given that the FTC has amply demonstrated its enforcement capability, and given the unprecedented nature and potential consequences of the proposed ban, adding another basis for enforcement of the TSR is not a sufficient result to justify the Proposal.

ECCHO recommends that the FTC consider a tailored alternative approach that more reasonably fits the intended goal of protecting consumers while not limiting payment options and innovation. The FTC should use its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act to suggest alternative approaches that address the illegal activity at issue—namely, merchants that are not compliant with the current requirements of the TSR. These alternative approaches should be focused on the actions of the telemarketer that give rise to unfair or abusive practices and not on the use of a particular payment instrument. For example, the FTC could impose additional disclosure and consent requirements under the TSR on telemarketers in connection with obtaining the customer's authorization for payment. Other alternatives could include the FTC setting up a program for required or voluntary reporting to the FTC by merchant processors of each telemarketer's return rates to assist the FTC in early identification of potential fraud by telemarketers. The FTC should propose for public comment these and other potential alternative methods of addressing fraudulent telemarketing practices.

3. FTC Proposal Does Not Fully Evaluate Consumer Protections for RCCs

One of the four key bases the FTC cites in its Proposal to ban RCCs is that consumers do not have federal consumer protection rights vis-a-vis their account holding bank (also referred to herein as the "paying bank") when disputing the payment of an unauthorized RCC. At one point in the Proposal, the FTC states that consumers have "no meaningful protection" against RCC-related fraud with respect to their account holding banks. (See 78 Fed. Reg. 41205). This statement begs the question whether the FTC has evaluated fully the consumer protections against unauthorized RCCs available under the Uniform Commercial Code Article 4 and whether those protections have been effective. This apparent lack of a full evaluation of consumer protections seems to lead the FTC to an unfounded conclusion that an outright ban on RCCs is necessary to protect consumers.

A. UCC Protection Against Unauthorized RCCs

Article 4 of the Uniform Commercial Code ("UCC") has been adopted in all fifty states and provides a national law governing the collection and payment of checks by banks and other depository institutions. Under UCC Article 4, a consumer is protected against loss arising from any unauthorized check transaction, including an unauthorized RCC, that is posted to his/her account. Section 4-401 of the UCC provides that a paying bank can charge the account of its customer for a check only if the check is "properly payable". An item is "properly payable" if it is "authorized by the customer" and is in accordance with any agreement between the paying bank and its customer. If a merchant telemarketer deposits an RCC that is not authorized by the customer, this RCC is not "properly payable" on the customer account at the time of presentment. Since there is no signature of the consumer customer on the RCC itself and the paying bank does not have access to the oral authorization (if any) obtained by the merchant, the paying bank would not be able to establish that the RCC was authorized. As such, the paying bank is liable to its customer under UCC Article 4-401 for the full amount of the paid RCC based on the customer's allegation that the RCC is unauthorized.

As described more fully below in Section 3(C) of this letter, UCC and payment system rules permit the paying bank to shift to the bank of first deposit (the telemarketer's bank, for example) the full responsibility for that unauthorized RCC. Put another way, the risk of loss arising from an unauthorized RCC will ultimately rest with the bank where the merchant deposited the RCC. This allocation of loss for the unauthorized RCC to the bank of first deposit supports the paying bank in its decision to credit its customer for the full amount of the unauthorized RCC on a prompt basis.

In terms of protection from the full dollar amount of a potential loss, the UCC and other check law protections against unauthorized RCCs are arguably better for consumers than Regulation E and Regulation Z. As recognized in the FTC Proposal (footnote 52), consumers are liable for unauthorized transactions under Regulation E for up to \$50, \$500, or in an unlimited amount, depending on when the consumer reports the lost card or unauthorized transaction. For credit card transactions, a consumer is liable for unauthorized credit card transactions under Regulation Z also up to \$50. The UCC, on the other hand, does not hold the consumer liable for any amount. Rather, the UCC establishes that the paying bank is responsible for the full dollar amount of an RCC that was not properly payable, and the paying bank is obligated to provide a *complete* reimbursement to its consumer or business customer for such an RCC.

B. Notice and Recredit Timing Protections

We do agree with the FTC that the UCC-provided protections for consumers against unauthorized RCCs differ in certain aspects from consumer protections under Regulation E (for payments made by debit card or an ACH debit) and Regulation Z (for payments made by credit card). In particular, UCC Article 4 does not mandate the provisional recrediting of funds to the consumer's account if the account holding financial institution is not able to complete the investigation into the consumer claim within ten business days, as is provided in Regulation E for disputes involving a debit card or ACH debit payment. In addition, the UCC does not provide a uniform period in which a consumer may raise a claim of unauthorized debit with his/her account holding bank, and this period may vary across financial institutions. By comparison, Regulation E provides for a 60 calendar day period from the date an account statement is sent for the consumer to raise the claim with the account holding bank.

While there are differences between consumer remedies under the UCC and Regulation E, the FTC Proposal does not demonstrate that these differences under the UCC have an adverse effect on a consumer in practice when disputing an unauthorized RCC with his/her account holding bank. That is, the FTC Proposal has not demonstrated that consumers are materially burdened by banks in seeking to exercise the substantive consumer protection under UCC Section 4-401, as described above, against loss arising from an unauthorized RCC.

Moreover, ECCHO's research suggests that financial institutions have implemented customer service policies for check and RCC related claims that are either equal to or better than the Regulation E provisions described above. ECCHO's research has indicated that in many cases financial institutions provisionally credit funds to the consumer customer's account quickly during the RCC claim investigation phase. Given the short time frame to comment on the FTC Proposal, ECCHO's research regarding its financial institution members' practices for crediting customer funds for unauthorized RCC claims has been limited in scope. However, the financial institutions that were part of ECCHO's research cover a majority of deposit accounts in the United States, and also represent institutions of varied asset sizes and charter types. Specifically, this research data shows that these financial institutions provisionally or finally credit funds to their consumer customers' accounts in less than ten business days after receipt of a claim of an unauthorized RCC. This compares favorably with the ten business day time period designated under Regulation E after which the bank must provide a provisional recredit of funds to the customer account in order to continue the investigation of the disputed ACH debit or debit card transaction.

This ECCHO research data supports a conclusion that financial institutions are not imposing additional delays or burdens on consumers who make a claim that an RCC is unauthorized, beyond the requirements that are imposed on consumers under regulatory schemes for other types of unauthorized debits. This research data is consistent with our understanding that paying banks are motivated to credit funds to their customers for unauthorized RCCs within time frames consistent with or better than the Regulation E time frame in order to meet the customer service expectations as well as to establish uniform internal processes for dealing with claims of unauthorized payments for all types. Furthermore, paying banks are motivated to resolve these claims of unauthorized check payments promptly because the paying bank has the potential for additional liability under the UCC. A paying bank is liable to the customer for losses that arise due to dishonor of subsequent presented checks for insufficient funds (also referred to as "wrongful dishonor") as a result of the earlier improper payment of the unauthorized RCC.⁶ So the longer the time period before the paying bank recredits the customer for the unauthorized RCC, the greater the likelihood that the paying bank will incur additional damages. These additional damages under the UCC can include consequential damages, from wrongful dishonor of subsequent presented checks.

In light of this research data, the FTC should undertake additional primary research to validate the statements in the Proposal regarding the relative burdens associated with a consumer obtaining a credit of funds to his/her account when making a claim of an unauthorized payment of any type (card, ACH or check). As it stands, the FTC Proposal cites no primary sources and mentions only secondary sources (see 78 *Fed. Reg.* n. 58-59) for support for its proposition that consumers have more difficulty when seeking to resolve check disputes compared to other debit disputes. For example, there is no data in the Proposal regarding customer complaints about bank recrediting practices for debit card or ACH claims with which to compare to banks' practices with RCC claims.

⁶ UCC Article 4-402.

It is our view that the FTC overstates the burden on a consumer when making a claim related to an unauthorized RCC, as compared to a claim for an unauthorized ACH debit or debit card transaction. As an example, the FTC cites an expert report prepared in connection with litigation that states that consumers must file affidavits with their banks when making an RCC claim. (See *78 Fed. Reg.* n. 59.) The FTC Proposal fails to consider that financial institutions impose substantially the same written statement or affidavit requirement for any customer allegation of an unauthorized payment, including unauthorized ACH debits, debit card transactions and credit card charges. In particular, the FTC Proposal does not consider that the NACHA Operating Rules specifically require that the account holding bank obtain a signed written statement from its customer for a claim alleging an unauthorized ACH debit and provide that written statement to the originating financial institution upon request.⁷

C. Check System Interbank Return and Adjustment Process Supports Paying Bank's Prompt and Final Resolution of Customer Claims Involving Unauthorized RCCs

As noted in the FTC Proposal, since 2006 Regulation CC has provided an interbank warranty from the merchant's bank of deposit (the "BOFD") to the paying bank that an RCC is authorized by the consumer in the amount reflected on the RCC. See Regulation CC, 12 C.F.R. § 229.34(d). This Regulation CC warranty is based in part on a similar interbank warranty that numerous states have adopted as amendments to their versions of Uniform Commercial Code Articles 3 and 4.⁸

The FTC Proposal cites the FFIEC Retail Payment Systems Booklet (*78 Fed. Reg.* at 41204, n. 53), which states that the Regulation CC warranty applies only to financial institutions and does not provide new rights to the customer, as support for the FTC's conclusion that no federal consumer protection laws or regulations apply to RCCs. The Regulation CC interbank warranty does not flow to the consumer customer because the customer does not need this warranty in order to make a claim to his/her account holding bank. As noted above, the customer is already protected against payment of an unauthorized RCC under UCC Section 4-401, because the unauthorized RCC was not properly payable.

⁷ See NACHA Operating Rules 3.12.4 and 3.12.6.

⁸ Based on currently available information, at least 18 states have adopted this warranty as non-uniform amendments to their UCC Articles 3 and 4, and an additional 11 states have adopted this warranty as part of uniform amendments to the UCC recommended by the National Conference of Commissioners on Uniform State Laws. See Website of the National Conference of Commissioners on Uniform State Laws. [http://uniformlaws.org/Act.aspx?title=UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits \(2002\); and Supplementary Information to the Federal Reserve Board's Final Rule amending Regulation CC, footnote 12, 70 Federal Register 71218 \(Nov. 28, 2005\).](http://uniformlaws.org/Act.aspx?title=UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits (2002); and Supplementary Information to the Federal Reserve Board's Final Rule amending Regulation CC, footnote 12, 70 Federal Register 71218 (Nov. 28, 2005).) <http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20051121/attachment.pdf>.

Rather, the Regulation CC interbank warranty provides a basis for the paying bank to obtain reimbursement from the BOFD that has as its customer the merchant who deposited the RCC. Without this Regulation CC interbank warranty, the consumer would be reimbursed, and the financial loss would stay with the paying bank, since the UCC places responsibility on the paying bank (not the BOFD) for the unauthorized item. There is a secondary benefit to this Regulation CC warranty for RCCs. The fact that the paying bank knows that it will receive funds from the BOFD based on a breach of the RCC warranty gives the paying bank incentive to credit funds to the consumer's account more promptly to resolve the consumer's claim.

The banking industry has taken numerous steps to provide efficient mechanisms for paying banks to obtain financial reimbursement under this Regulation CC warranty. ECCHO, for its member financial institutions, has adopted an interbank rule that allows the paying bank to make a warranty claim against the BOFD with immediate financial settlement of that claim as part of the return item settlement process. In addition, both ECCHO and the Federal Reserve have established adjustment rules that allow these RCC warranty claims from a paying bank to the bank of first deposit ("BOFD") that presented the item for payment, rather than through an intermediary collecting bank that was involved in the collection of the item. Both the ECCHO adjustment rule⁹ and Federal Reserve adjustment rule¹⁰ provide that the adjustment of an RCC warranty claim will "stick" with the BOFD, and the BOFD cannot challenge the RCC warranty claim even if the BOFD or its merchant customer has evidence or otherwise believes that the RCC was in fact authorized by the consumer. This means that the BOFD cannot reject or reverse an adjustment claim from a paying bank relating to an unauthorized RCC. This "strict liability" on the part of the BOFDs within the check system for RCC unauthorized items is intended to ensure the paying bank knows that RCC warranty claims will be processed quickly and with financial finality to the BOFDs, and thereby support the paying bank's prompt crediting of funds to the account holder to resolve the customer claim.

4. Centralized Monitoring of RCCs Within The Check System

The FTC Proposal asserts that the ban on RCCs is needed because the check system lacks a central network operator that could track return rates associated with RCCs

⁹ The relevant section of the ECCHO Operating Rules provides that for an adjustment claim relating to a RCC warranty, "a receiving Member shall not, pursuant to subsection (E)(3)(e), reject a request for settlement for the Adjustment Claim or initiate a second timely Adjustment Claim to reverse the settlement on the first Adjustment Claim on any basis relating to the effectiveness or validity of the payor customer's authorization for the creation of the Remotely Created Check, **including without limitation on the basis that the receiving Member (or its depositing customer) has evidence of the payor customer's authorization for the Remotely Created Check.** See ECCHO Operating Rules, "*Adjustment Claims*," Section XII(E)(3).

¹⁰ See Federal Reserve Operating Circular #3, "*Adjustments for Certain Warranty Claims; Errors*," Section 20.10(f).

in order to identify potential merchant fraud. ECCHO believes this view of the check processing system is incomplete and deserves more discussion and consideration in balancing whether a ban on RCCs would be appropriate. Current limitations on centralized monitoring derive from technical challenges due to the nature of the check system and certainly not from any desire on the part of banks or the check networks to turn a blind eye to misuse of check payments by unscrupulous merchants. In addition, as discussed below, there are alternative means that the banks rely upon to screen for merchants who may be depositing RCCs improperly.

A. Operational Reasons for Lack of Centralized Monitoring of RCC Return Volumes

There are three significant reasons that the check exchange networks and collecting banks are currently unable to monitor RCC volume in the check system. These reasons are due to technical and operational challenges arising from the nature of the check system.

First, RCCs do not have a unique identifier that would allow systematic monitoring such that an RCC could readily be distinguished from another form of a check. The most predictable location for an identifier would be the check MICR line, which runs across the lower horizontal edge of the check and includes coded information identifying the bank and the customer account number. However, there are limited spaces available within MICR line formats.¹¹ ECCHO and others in the banking industry have discussed and will continue to monitor this issue of an RCC identifier to determine whether codes should be allocated on the MICR line to identify RCCs. ECCHO participates in the technical standards committee, X9, that is responsible for the establishment of MICR line information standards on checks. The X9 Committee discussed the potential for a MICR line identifier for RCCs at its June 2013 meeting and plans to continue deliberations on this topic throughout the year. In addition, in order to build consensus in the payments industry, which is needed to change the current standards to include an identifier, ECCHO plans to discuss this topic with its various operational committees in the coming months. While ECCHO cannot unilaterally determine that an RCC identifier will be established within the check standard, ECCHO can assure the FTC that the issue of an RCC identifier will be considered at appropriate industry standards meetings.

¹¹ According to the standards for check printing, the MICR line on the check must contain ten characters for the amount field when encoded, nine characters for the routing field and up to nineteen characters for the on-us field (this contains account number and other codes or numbers as specified by the financial institution on which the check is written). There are also special symbols (at least four more characters) that aid in the proper electronic reading of the MICR line. For small size consumer checks (six inch checks) this leaves one character known as the External Processing Code (EPC) that is used to convey special information regarding the correct handling or routing of a check or check data to financial institutions and other processors. There are ten potential field values that can be assigned to the ECP field. There are currently four digits unassigned; but certain MICR digits tend to have read issues and are avoided, when possible. Reference: American National Standard for Financial Services ANSI X9.100-160-1-2009 Magnetic Ink Printing (MICR) Part 1: Placement and Location and American National Standard for Financial Services ANSI X9.100-160-2-2009 Magnetic Ink Printing (MICR) Part 2: EPC Field Usage.

The second technical drawback to centralized monitoring is the lack of an electronic or systematic identifier on the RCC of the merchant who deposited the RCC. A check that is passing through multiple banks in the collection process does not carry with it information that identifies the merchant depositor. While the merchant may be identified in the endorsement on the back of the check, there is no electronic data file of the merchant depositor name that would allow the collecting banks, check networks or paying bank to interrogate the item on an automated basis in order to track return rates of RCCs for specific merchant depositors. Even if a MICR line identifier were established within the check system operating standards for RCCs discussed above, and collecting banks and networks could track the return rates of items with the unique RCC identifier, these technical challenges will remain to tracking merchant specific return rate percentages.

Finally, the decentralized nature of forward check presentment and check return presents operational challenges for any one network or collecting bank to see the totality of volume associated with a particular merchant. Checks do not travel through the payment system in such a way that allows all checks to be monitored at one central point. Rather, a single BOFD may use multiple check networks or clearing banks to collect its deposited checks. In addition, a paying bank may return a check, when it refuses payment, through more than one different return channel back to the BOFD. Since there is no single operator or network that sees all check transit volumes, it is difficult for any one collecting bank or network to determine relative return rates associated with a BOFD's check volume.

B. BOFD Responsibility to Monitor Merchants and Merchant Return Volumes

Instead of monitoring return rates at the network level or collecting bank level, due to the system challenges discussed above, the banking industry relies upon the BOFD to serve as the gateway to the check collection system for merchants and processors, by approving and then monitoring the merchants and processors depositing items through the BOFD. The BOFD is in the best position to monitor its own merchant customers' return rates since it sees all of the volume associated with a particular depositing merchant. The FTC suggests in the Proposal, at 78 *Fed. Reg.* at 41206, that merchants and merchant processors are able to access the check image collection system directly. This is not correct. All check deposits, paper and image, must enter the collection system through the BOFD, which is responsible for endorsing the check as BOFD and for receiving settlement of the checks from the paying banks. Merchants and processors do not directly access check exchange networks or collecting banks and cannot participate in check image exchange networks directly.

Since the merchant and/or the merchant processor is the customer of the BOFD, the BOFD is required under federal law to apply its "Know Your Customer" policy to its merchant and merchant processor customers to understand their business and ensure that their business is and continues to be legitimate.¹² Suspicious activity of merchant or merchant

¹² 31 CFR Section 1020.210 (Customer Identification Programs for Banks).

processor customers must be reported to the federal authorities by the BOFD.¹³ Furthermore, since 2008, the federal banking agencies have made it clear that the BOFDs are responsible for monitoring payment processors that bring merchants to the BOFD for processing. In particular, this federal supervisory guidance recommends that the BOFDs monitor the merchant return rates on check, ACH and credit card payments that are deposited by the processor.¹⁴

The ability of BOFDs to efficiently and timely monitor return and adjustment rates for its merchant customers has improved significantly in recent years. In the last five years, the volume of checks that are imaged and sent to paying banks for payment through electronic image exchanges has grown to nearly 100 percent of all check transit items. As a result, the electronic data associated with checks has grown and consequently improved the ability of BOFDs to monitor returns and adjustment reasons across all check images. Under the historical paper check exchange system, in contrast, each paper item had to be physically handled and manually reviewed in order to locate the reason for the return or adjustment which was printed on the paper check.

Finally, the BOFD also has financial incentives to appropriately monitor its merchant and merchant processor customers because, as discussed above, under check law and the ECCHO and Federal Reserve rules, the BOFD is responsible for RCC returns and adjustments to their merchant and merchant processor customers. The BOFD will bear a loss for these returns and adjustments arising from unauthorized RCCs if the BOFD is not able to obtain reimbursement for these returns from the merchant, as is often ultimately the case with merchant or merchant processor fraud.

5. Discussion of Relative Volume of Unauthorized RCCs

Prior to determining whether or not to ban RCCs, we recommend that the FTC consider the relative volume of unauthorized RCCs that are returned or adjusted back to BOFDs against the total number of RCCs (legitimate and illegitimate) that were presented to paying banks for payment. As discussed below, ECCHO's research and estimation of the volume of interbank adjustment/return claims associated with unauthorized RCCs suggests that the volume of unauthorized RCCs is relatively low compared to the total number of paid RCCs.

A. Volume of Total Checks and RCCs

To obtain the total number of check payments and relative percentage of RCCs within the total number of checks paid in a particular year, data from the Federal Reserve's public report was used. That report is issued every three years and includes information about the

¹³ 31 CFR Section 1020.320 (Report by Banks of Suspicious Transactions).

¹⁴ See Office of the Comptroller of the Currency, Payment Processors Risk Management Guidance, Bulletin No. 2008-12 (Apr. 24, 2008).

volume of payments in the U.S.¹⁵ For 2010 that report showed payments volumes during 2009 and specifically reported a total paid check volume of 24.5 billion and an estimated volume of RCCs of 515 million (2.1 percent of total check volume).¹⁶

B. Estimates of the Percentage of Unauthorized RCCs Interbank Claims Processed by Key ECCHO Sources

In the absence of regularly collected and compiled data relative to the volume of unauthorized RCC claims and given the short response time for the FTC Proposal, ECCHO used estimates of these volumes based on selected industry sources. Since 2005 ECCHO has been collecting from the major check image networks and exchange entities the volume of interbank check images that are transmitted to paying banks for payment.¹⁷ These volumes represent a substantial portion of the total interbank check image presentments to paying banks.

Among the sources that provide check volume information to ECCHO each month are three parties that provide both interbank check exchange services and adjustment processing services to their members/customers. Among these three entities, estimated percentages of the number of unauthorized RCC adjustment claims to total number of RCCs processed on a forward basis through these entities (sampled during different time periods varying from 5 weeks to 18 months depending on the entity) ranged from .00119% to .02628% for an overall estimated average of .01264%.¹⁸ This works out to be an aggregate total of about 150 unauthorized RCC claims per day for all three check entities.¹⁹

C. Estimates of Total Unauthorized RCCs for Interbank and On-us Checks

Using the assumptions discussed above, it is possible to create a representative estimate of the volume of unauthorized RCCs across the entire industry including interbank and on-us²⁰ checks in the 2009 period. The 2010 Federal Reserve Payments Study reported that during 2009 approximately 97.2 million checks were paid on average per day

¹⁵ See footnote 3 of this letter above.

¹⁶ The 2010 Federal Reserve Payments Study is the most current study available from the Federal Reserve and the percentage of total number of RCCs to total number of paid checks was assumed to remain constant for other time periods.

¹⁷ ECCHO publishes this image exchange volume information on its website and on the CheckImage Collaborative website, <http://www.checkimagecentral.org/industryAdoptionUpdates/#key>.

¹⁸ This number uses the Federal Reserve's report estimate that RCCs equal 2.1% of all checks.

¹⁹ We would note that the sampling that was conducted for this purpose was limited to RCCs handled by banks in the adjustment process. It is possible that during this sampling period there were also a material number of additional unauthorized RCC claims/items that were handled by paying banks as returns rather than adjustments.

²⁰ An "on-us" check is a check that is deposited at the same bank on which the check is drawn. In this case, the BOFD and the paying bank are the same bank.

and of those 2.04 million per day were RCCs.²¹ Applying the percentage of unauthorized RCCs from the ECCHO sources described above to this daily volume of paid RCCs yields an estimate of 258 unauthorized RCCs per day industry wide.²²

D. Relatively Small Volumes of Unauthorized RCCs to Total RCCs Does Not Support the FTC's Proposed Ban

This relatively small number of unauthorized RCC claims (approximately 258 per day), compared with the total volume of RCC payments (2.4 million RCCs per day) suggests that the vast majority of the merchants, both telemarketers and non-telemarketers, are using RCCs in a legitimate manner pursuant to effective authorizations from their customers to make payments. There does not appear, from this data analysis, to be a chronic elevated number of unauthorized RCCs claims within the check system.

This data analysis is consistent with anecdotal reports from ECCHO member financial institutions that unauthorized RCC claims tend to spike from time to time as the result of actions of a particular fraudulent telemarketer or merchant processor. If this is the case, the better approach to dealing with unauthorized RCC volume is for the FTC to continue its enforcement efforts against fraudulent telemarketers and for BOFDs to continue their efforts to screen fraudulent telemarketers as part of the BOFD's "Know Your Customer" review, discussed in Section 4(B) of this letter.

6. Issues Associated With Remotely Created Payment Orders

The comments provided above with respect to the issues associated with monitoring and processing RCCs would generally apply to Remotely Created Payment Orders ("RCPOs"). RCPOs are currently handled by banks in the check system in the same manner as RCCs that started out as paper items. This is because these RCPOs are typically not detectable as distinguishable from an image of a paper item.

The FTC Proposal correctly points out that the legal framework for RCPOs has not been expressly established and that, as a practical matter, the paying bank and its customer cannot tell if a disputed item is an RCPO or an RCC. However, this does not mean that no dispute rules or loss allocation rules are being applied to RCPOs. It is ECCHO's understanding that, from an operational perspective, banks are handling RCPOs as check items and applying check law to interbank disputes. Accordingly, paying banks are also applying the same UCC check law consumer protection provisions discussed above to the benefit of a consumer that disputes an RCPO item posted to their account.

Under the ECCHO Rules today, RCPOs are considered ineligible for collection as check images in exchanges governed by the ECCHO Rules. This is due to the uncertain

²¹ 24.5 billion checks divided by 252 banking days = 97.2 million checks per day and 97.2 times 2.1% equals 2.04 million RCCs per day.

²² 2.04 million RCCs per day times .01264% yields 258 unauthorized RCCs per day.


legal status of items, including RCPOs, that never existed in paper form prior to conversion to a check image. The paying bank is protected under the warranty provision of the ECCHO Rules in the event the BOFD submits an RCPO in violation of the ECCHO eligibility rules. ECCHO is aware of financial services industry efforts to remedy this legal gap such that RCPOs may be processed in the future in a manner consistent with applicable law. For example, the Federal Reserve Bank of Atlanta has announced that it will form working groups to study electronic items, including potentially fully electronic RCCs.

Given the efforts underway to develop a legal framework for fully electronic items, such as RCPOs, ECCHO believes that the proposed FTC ban on RCPOs is premature and therefore ECCHO does not support it. If an appropriate legal framework is established through the efforts of the Federal Reserve, together with payment industry input, it may be that RCPOs have potential as an innovative payment option. As discussed in Section 2(B) of this letter, a precipitous FTC ban may well discourage the development of RCPOs and thus deprive consumers and others from the benefits they may in the future enjoy from RCPOs.

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ECCHO appreciates this opportunity to provide its comments to the Federal Trade Commission regarding the Proposal. Please contact the undersigned regarding any questions concerning this letter.

Sincerely,



David Walker
President