



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

August 18, 2008

David A. Starr, Esq.
Williams & Jensen, PLLC
1155 21st Street, N.W.
Washington, DC 20036

Re: *Federation of Exchange Accommodators' Petition for Rulemaking*

Dear Mr. Starr:

This is in response to the above-referenced Petition requesting that the Federal Trade Commission initiate a trade regulation rulemaking proceeding in an effort to address what the Federation of Exchange Accommodators ("FEA") believes are unfair or deceptive acts or practices by individuals who act as Qualified Intermediaries ("QIs") or "facilitators" of like-kind exchanges pursuant to Internal Revenue Code Section 1031, 26 U.S.C. § 1031 ("IRC § 1031"). In reaching its decision, the Commission has considered the Petition and the additional material presented by the FEA.

The Commission recognizes that the Petition identifies a valid concern: the potential for QIs to mismanage the assets that taxpayers entrust to them during the course of a § 1031 transaction. The Petition asserts that, in certain recent incidents, some QIs have harmed consumers by improperly using customer assets held in escrow for personal use or risky business or personal investments. The Petition also asserts that there is an additional risk of harm if these recent events cause customers to lose confidence in the 1031 exchange industry and decline to engage in § 1031 exchanges. To address this problem, the Petition seeks promulgation of a trade regulation rule ("TRR") that would impose a mandatory registration process and operational standards for entities acting as 1031 exchange facilitators.

The Commission has authority, under Section 18 of the FTC Act, to commence a rulemaking to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(B). In determining whether to conduct a rulemaking proceeding, the Commission considers a number of factors including: the nature of the practices at issue; the prevalence of such practices; the cost and feasibility of challenging enforcement of those practices; the extent of the harm caused by those practices; and the likely reduction of harm should the proposed rule be adopted. In addition, the Commission compares the likely costs of undertaking rulemaking and ultimately enforcing the proposed rule to the benefits of the proposed rule.

The Petition expresses concerns over the potential for harm to consumers who rely upon the services of QIs to execute like-kind exchanges. The concern is that, due to the lack of regulation of QIs, consumers' assets are at risk when entrusted to 1031 exchange facilitators for the period of time in between selling one business or investment property and closing on a like-kind property. The Commission recognizes that certain QIs have caused significant harm to consumers both individually and in the aggregate. However, this harm must be considered within a framework that includes other factors as well. Viewed within this framework, and measured against the proposed regulation's likely prevention of future harm, the substantial cost to the industry, and the overall incidence of malfeasance, the Commission has determined that a rulemaking proceeding is not appropriate.

The Petition identifies twenty-three incidents since 1989, where individuals have stolen exchange funds or improperly used customer assets to fund unsuccessful personal investments or business ventures. The Commission independently verified sixteen of those twenty-three incidents. Of the seven incidents the Commission could not verify, the Petition fails to provide information regarding the nature of the losses in four of them (all of which occurred more than ten years ago). In sum, these events are isolated instances of embezzlement, theft, or other criminal conduct, and the vast majority of them resulted in criminal investigations or prosecutions, as well as civil suits for recovery.

A registration system and operational standards are unlikely to reduce the type of criminal conduct or violations of civil contract and fiduciary duty law identified in the FEA's Petition. The nature of the conduct suggests that the bad actors at issue knowingly and willfully violated the criminal laws and, therefore, these types of actions are not likely to be prevented by a registration process. Few, if any, of the events identified by the Petition were committed by individuals with prior criminal records, so a background check would not provide a basis for screening out such individuals during the proposed registration process.

Moreover, the proposed registration requirements, which would be unprecedented under the FTC Act, would impose significant costs on the industry – costs that could be significantly greater than the benefits of such a remedy. The costs, ultimately borne by consumers and taxpayers, of implementing and maintaining such a registration system, and of ongoing review and enforcement of such operational standards, also would be significant.

Notwithstanding the significant losses that some consumers have sustained, neither the petition nor the staff's additional inquiry demonstrates that the harm is likely to be reduced should the proposed rule be adopted, that the likely benefits of the proposed remedy would outweigh the potential costs of the rulemaking and proposed registration process, or that the incidence of the problem practices warrant a rulemaking proceeding. We will continue to monitor consumer complaints and make appropriate referrals to criminal authorities.

Although the information and analysis provided by the FEA has contributed significantly to the Commission's consideration of the issues raised in the Petition, the Commission denies the Petition for the reasons stated above. The Commission appreciates the concerns raised by the FEA and looks forward to the FEA's continued cooperation with law enforcement efforts in this area.

By direction of the Commission.

Donald S. Clark
Secretary

cc: Mary Cunningham, Chicago Deferred Exchange Company
Hugh E. Pollard, First American Exchange Company
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