

require that the seller or telemarketer obtain the customer's express verifiable authorization in any telemarketing transaction where the method of payment lacks the protections provided by, or comparable to those available under, the Fair Credit Billing Act ("FCBA") and the Truth in Lending Act ("TILA"). In addition, the proposed amendment would have required that the customer receive two additional pieces of information in order for authorization to be deemed verifiable: the name of the account to be charged and the account number, which would have been required to have been recited by either the customer or donor, or the telemarketer. The Commission also proposed to delete § 310.3(a)(3)(iii), which allowed a seller or telemarketer to obtain express verifiable authorization by confirming a transaction in writing, provided the confirmation was sent to the customer prior to the submission of the customer's billing information for payment. Finally, the Commission proposed in the NPRM, pursuant to the USA PATRIOT Act, to bring charitable contributions within the coverage of the express verifiable authorization provision.²⁸¹

Based on the record in this proceeding, the Commission has decided to modify the proposed express verifiable authorization provision. The amended Rule prohibits "[c]ausing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the TILA and Regulation Z,²⁸² or a debit card subject to the protections of the Electronic Fund Transfer Act ("EFTA") and Regulation E."²⁸³ This modified language draws a "bright line" to simplify compliance. The amended Rule retains the express written authorization and oral authorization provisions (§§ 310.3(a)(3)(i) and (ii) of the original and proposed Rules), with slight modifications, and has reinstated the provision of the original Rule allowing written confirmation, with certain additional requirements and limitations.

In addition, certain modifications to this express verifiable authorization provision have been adopted in the

amended Rule pursuant to the mandate of the USA PATRIOT Act. First, where the term "customer" appeared in the original Rule, that term has been replaced in the amended Rule with the phrase "customer or donor" (including, where applicable, the plural form). Similarly, where the phrase "goods or services" had been used in the Rule, it has been replaced with the phrase "goods or services or charitable contribution" to reflect the expansion of the Rule to cover charitable solicitations. And, the term "telemarketing transaction" has been substituted for the term "sales offer," again to reflect the expansion of the provision to cover authorization in the context of a charitable solicitation.

The Commission received numerous comments addressing the proposed amendments to § 310.3(a)(3). In addition, the topic was the subject of extensive discussion at the June 2002 Forum.²⁸⁴ The major themes that emerged from the record are summarized below.

Express verifiable authorization for novel payment methods. In the NPRM, the Commission noted two separate rationales in support of the requirement that a customer's express verifiable authorization be obtained any time the payment method used lacks certain protections against unauthorized charges and fails to provide dispute resolution rights. First, the Commission stated its belief that the use of novel payment methods may lead to unauthorized billing.²⁸⁵ If consumers fail to understand that a telemarketer has the ability to place a charge using a novel payment method (such as utility or mortgage account billing), based on this misperception, they may be induced to divulge billing information that enables such charges. Second, the Commission noted that many emerging payment methods lack both dispute resolution rights and protection against unlimited liability for unauthorized charges.²⁸⁶ These two facts—that consumers can be charged unwittingly by means of novel payment methods and that the resulting injury due to unauthorized charges is magnified when dispute resolution procedures and liability limits are absent—persuaded the Commission that it was appropriate to require express verifiable authorization when protections

pursuant or comparable to TILA and FCBA are absent.²⁸⁷

Comments on the requirement for express verifiable authorization in novel payment method scenarios were many and varied. Some industry commenters—with the notable exception of DialAmerica—rejected the notion that novel payment methods should be subject to more stringent requirements under the Rule, arguing that, as long as the consumer has a clear understanding that he or she is purchasing a particular product or service and that the purchase will be charged to a particular account, nothing further should be required of the telemarketer.²⁸⁸ NACHA advocated scaling back the proposed express verifiable authorization requirement, which it argued was "overly broad" in its coverage of payment methods, such as debit cards, with protections comparable to TILA and FCBA.²⁸⁹ EFSC noted its concern that emerging payment methods would be disadvantaged because they would be subject to the express verifiable authorization provision.²⁹⁰

NAAG, on the other hand, supported the Commission's proposed approach.²⁹¹ Some consumer groups urged the Commission to take an even more stringent approach than it did in the NPRM, and require express verifiable authorization in *all* telemarketing transactions. For example, NCL argued that since most telemarketers use audio recordings to verify authorizations anyway, it would hardly be burdensome to require express verifiable authorization, which

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Aegis-NPRM at 4; Green Mountain-NPRM at 27 ("there is little danger that consumers will give their [debit card] account numbers to telemarketers without knowing that their accounts will be debited"); ITC-NPRM at 5; NATN-NPRM at 4; Noble-NPRM at 4; NSDI-NPRM at 4; and Technion-NPRM at 5. *But see* June 2002 Tr. III at 22 (DialAmerica representative noting that his company declines to use novel payment methods because it "had experience with charging people's bank accounts and [] also [with] LEC billing, and they have not been good experiences.").

²⁸⁹ NACHA-NPRM at 2.

²⁹⁰ EFSC-NPRM at 7. *See also* NATN-NPRM at 4; June 2002 Tr. III at 39. The Commission notes that it was in part because of this concern that the original Rule did not require written authorization in every instance for demand drafts. *See* 60 FR at 43850-51. The amended Rule's allowance for obtaining express verifiable authorization by any of three means, including written confirmation, should obviate concerns about the burden imposed on sellers who choose to accept novel payment methods. Further, the Commission believes, for the reasons stated above, that it is precisely when such novel methods—unfamiliar to the consumer and devoid of legally-mandated consumer protections—are used that express verifiable authorization of a consumer's acquiescence to the transaction is critical.

²⁹¹ *See* NAAG-NPRM at 48.

²⁸¹ Proposed Rule § 310.3(a)(3), 67 FR at 4542.

²⁸² TILA, 15 U.S.C. 1601 *et seq.* (including the FCBA amendments, at 15 U.S.C. 1637 *et seq.*), and Regulation Z, 12 CFR part 226.

²⁸³ EFTA, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

²⁸⁴ *See* June 2002 Tr. III at 4-52.

²⁸⁵ *See* 67 FR at 4507. This concern was also articulated by the Commission in the original rulemaking in connection with the use of demand drafts as a payment method. 60 FR at 43850-51.

²⁸⁶ *See* 67 FR at 4507.