

can be evidenced by such a recording, in every instance.²⁹² In support of this position, NCL offered statistics showing that complaints to the NFIC for 2001 show that 60 percent of the payments for fraudulent buyers club offers—a “category in which nearly all of the consumers said they never agreed to purchase the service”—were made by credit card.²⁹³ According to NCL, even when the payment method used by consumers may be subject to legal protections, “all consumers whose accounts will be billed should have the basic protections that such [express verifiable authorization] provides.”²⁹⁴ LSAP concurred, suggesting that the Rule would better serve all consumers if express verifiable authorization were required in every purchase.²⁹⁵ Similarly, NCLC urged the Commission to extend the express verifiable authorization requirements to cover all transactions, or at least those not subject to the protection of FCBA and TILA.²⁹⁶

The Commission declines to require in every transaction that a seller or telemarketer obtain the express verifiable authorization of a customer or donor prior to submitting billing information for payment. As it made clear in the original rulemaking, the Commission believes that the burden of requiring express verifiable authorization is justified in limited circumstances; namely, when consumers are unaware that they may be billed via a particular method, when that method lacks legal protection against unlimited unauthorized charges, and when the method fails to provide dispute resolution rights.²⁹⁷ However, the Commission agrees that consumers could benefit from a more explicit Rule provision mandating what should be obvious: a transaction is valid only when the telemarketer has obtained the consumer’s express informed consent to be charged, and to be charged using a

particular account. Therefore, as is discussed in detail below, new § 310.4(a)(6) of the Rule explicitly requires, in every telemarketing transaction, that the seller or telemarketer obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution that is the subject of the transaction. This more explicit treatment will achieve the goals of consumer groups without unduly burdening industry members with the recordkeeping required by the express verifiable authorization provision.

The comments from consumer groups addressing the express verifiable authorization issue opposed the “comparability” standard set out in the proposed amended Rule, *i.e.*, the provision which would have exempted from the requirement to obtain express verifiable authorization any payment method with protections comparable to those available under FCBA and TILA. Some commenters stated that it would be too difficult for merchants to determine, during the course of each telemarketing transaction, whether a given payment method had protections comparable to those available under TILA.²⁹⁸ NCL and NCLC argued that the impermanent nature of voluntary policies, such as the “zero liability” guarantees made by MasterCard and VISA, makes them a poor substitute for legal protection.²⁹⁹ NCLC further argued that such an amendment would “invite sham internal review procedures,”³⁰⁰ thereby making it deleterious to consumers, by placing the power of determining which transactions required express verifiable authorization in the hands of the merchant.³⁰¹

Industry commenters, on the other hand, urged the Commission to clarify that “comparable protection,” whether in the form of a business rule or private contract, should be sufficient to relieve sellers and telemarketers of requirement to obtain express verifiable authorization.³⁰² In this regard, some industry commenters noted the “zero

liability” protection for unauthorized charges provided by the two main issuers of debit cards, VISA and MasterCard, as a voluntary initiative.³⁰³ MasterCard and VISA noted that their respective “zero liability policies” provided greater protection to cardholders than is provided by federal law.³⁰⁴ Similarly, Fleet urged the Commission to take note of the unauthorized use liability provisions that VISA and MasterCard offer for debit cards.³⁰⁵ Other commenters requested that the Commission explicitly state that certain other protections are “comparable.”³⁰⁶

Based on the record evidence, the Commission has decided to eliminate the “comparability” language from the express verifiable authorization provision. The comments made clear that it is far more desirable to

³⁰³ *Id.*

³⁰⁴ See MasterCard-NPRM at 4; VISA-NPRM at 5. The Commission notes, however, that the “zero liability” protection offered by MasterCard and VISA does not come into play in all circumstances. For example, MasterCard extends this protection only to a consumer whose account is in good standing and who has not reported two or more instances of unauthorized use in the past year. See http://www.mastercard.com/general/zero_liability.html. VISA offers its coverage only for “VISA credit and debit card transactions processed over the VISA network,” and allows the financial institution that issued the card to determine liability for transactions processed over other networks. See http://www.usa.visa.com/personal/secure_with_visa/zero_liability.html?it=f2_/personal/secure_with_visa/.

³⁰⁵ See Fleet-NPRM at 5. See also KeyCorp-NPRM at 5; June Tr. III at 11 (DMA) (endorsing voluntary protections).

³⁰⁶ See Capital One-NPRM at 7 (exempt transactions subject to the UCC); CMC-NPRM at 12 (state that protections under the Real Estate Settlement Procedures Act (“RESPA”) and EFTA are comparable to those under the FCBA and TILA); Fleet-NPRM at 5 (exempt transactions where the goods or services are subject to a “liberal refund policy”); KeyCorp-NPRM at 5 (exempt transactions subject to the UCC); NACHA-NPRM at 2 (exempt transactions subject to the NACHA Rules); VISA-NPRM at 5 (exempt transactions subject to UCC when the revisions to Article 4 are complete). The Commission declines, at this time, to exclude from the express verifiable authorization requirement transactions subject to RESPA. While the Commission recognizes that RESPA provides important protections for consumers, it does not believe that most real estate transactions would be subject to the TSR at all. And, in instances of mortgage billing, which *would* be subject to the Rule, the Commission believes that consumers, unfamiliar with this method of billing for anything other than their mortgage payment, need the protections of the express verifiable authorization provision. The Commission also declines to exclude transactions subject to the UCC from the requirements of express verifiable authorization, but may revisit this issue when modifications to the UCC are completed. The Commission also declines to exempt transactions subject to the NACHA Rules or for which the seller provides a liberal refund policy, believing that it is preferable to limit exemptions and thus maintain a “bright line” rule to simplify compliance.

²⁹² NCL-NPRM at 5.

²⁹³ *Id.*

²⁹⁴ *Id.* (noting that even when legal protections exist to protect consumers from unauthorized charges, consumers must still bear the burden to “contest the charges in the required manner and time frame to assert their rights”); see also LSAP at 10.

²⁹⁵ LSAP-NPRM at 9-11.

²⁹⁶ NCLC-NPRM at 8.

²⁹⁷ See 60 FR at 43850-51. The Commission notes that despite its request for detailed evidence regarding the cost of obtaining express verifiable authorization and the prevalence of each of the three methods allowed by the original Rule, *see, e.g.*, 67 FR 4537; June Tr. III at 32, there remains a dearth of specific record evidence regarding such costs. Industry commenters who did address the cost merely stated that creating and maintaining audio recordings of express verifiable authorization was “expensive.” *See, e.g.*, Capital One-NPRM at 7; June Tr. III at 38 (CCC).

²⁹⁸ See NCLC-NPRM at 2, 4 (noting the exemption from express verifiable authorization for methods of payment with protections comparable to TILA and FCBA “essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue. . .”). Some industry members also noted that the comparability standard was too vague to be useful. *See, e.g.*, CMC-NPRM at 12; EFSC-NPRM at 4 (noting that the vagueness could inhibit the use of novel payment methods).

²⁹⁹ See NCL-NPRM at 5; NCLC-NPRM at 8.

³⁰⁰ NCLC-NPRM at 7.

³⁰¹ See NCLC-NPRM at 4-5.

³⁰² See, *e.g.*, ABA-NPRM at 7-8; BofA-NPRM at 6; Capital One-NPRM at 7; Citigroup-NPRM at 10; DMA-NPRM at 56-57.