

implement a “bright line” rule in this instance to avoid the costs to businesses and consumers of requiring a telemarketer to make a real-time determination of whether a payment method provides adequate protection while on the telephone with a consumer. Moreover, the Commission is persuaded that the impermanent nature of voluntary consumer protections makes them ill-suited as a predicate for circumventing the express verifiable authorization provision.<sup>307</sup> Therefore, the amended Rule requires express verifiable authorization in all transactions where payment is made by a method other than a debit card subject to Regulation E, or a credit card subject to Regulation Z.

Several industry commenters specifically urged the Commission to ensure that express verifiable authorization not be required when a consumer uses a debit card to pay for goods and services offered, or a charitable contribution solicited, through telemarketing. Commenters raised several arguments in support of this position. First, commenters noted that debit cards are not “novel” payment methods.<sup>308</sup> Commenters contended that, on the contrary, debit cards are widely accepted and used by consumers, who understand that by providing their debit card number in a telemarketing transaction, the account with which the card is associated will be debited.<sup>309</sup> Second, commenters argued that debit cards are subject to the protections of the EFTA and its implementing regulation, Regulation E, which provide similar, although not identical, protection to that available under TILA.<sup>310</sup> Third, commenters

argued that distant sellers cannot distinguish between a debit and credit card until, in the best case scenario, the consumer reads the entire number.<sup>311</sup> Finally, commenters noted that VISA has an “honor all cards” policy that would prohibit a merchant from declining to accept VISA-branded debit cards if it accepted VISA-branded credit cards.<sup>312</sup> These commenters contended that the practical result of requiring express verifiable authorization for debit cards would be that express verifiable authorization would have to be obtained in all transactions—whether payment was made by credit or debit card, demand draft, or any other method.<sup>313</sup>

Based on the extensive record on this issue, and on the Commission’s law enforcement experience, the Commission has determined to modify the express verifiable authorization provision in the amended Rule. The Commission is persuaded that debit cards should not be subject to the express verifiable authorization provision, based on their wide consumer acceptance and the fact that they are subject to the protections of the EFTA and Regulation E. The Commission believes that debit cards are so commonly used that it cannot persuasively be argued that consumers do not understand that when they provide their debit card account number to a telemarketer, their account can be debited by using that number.<sup>314</sup>

<sup>311</sup> BofA-NPRM at 6; Collier Shannon-NPRM at 6 (“Merchants who process credit and debit card transactions over the phone do not have the ability to differentiate between credit cards and debit cards.”); ERA-NPRM at 48; June 2002 Tr. III at 11 (DMA) (noting that “it is impossible for a marketer to know whether it’s a debit card or a credit card, in the best instance, until after the entire number has been given”); June 2002 Tr. III at 18 (NRF) (stating that “remote sellers cannot distinguish a debit card from the credit card with any great degree of reliability pre-purchase”).

<sup>312</sup> June 2002 Tr. III at 19-20 (NRF) (noting that VISA and MasterCard “have what’s called an Honor-All-Cards rule” that requires that merchants accept any card branded with these issuers’ logos as a condition of being able to accept the VISA and MasterCard branded credit cards).

<sup>313</sup> Collier Shannon-NPRM at 6-7; June 2002 Tr. III at 11 (DMA) (noting that “[i]n some instances you don’t even know [whether a number provided by a consumer is for a debit or credit card] when the number is given, which would force marketers to have express verifiable authorization for everything. . .”). Some commenters argued that such a provision would have the effect of eliminating or reducing the use of debit cards as a form of payment. See Gannett-NPRM at 1-2; Intuit-NPRM at 19.

<sup>314</sup> This is not to say, of course, that an unscrupulous telemarketer could not misrepresent the purpose for which it needed such an account number, leading to consumer injury. Section 310.3(a)(4) of the Rule, which prohibits making a false or misleading statement to induce any person to pay for goods or services, would come into play in such situations. Moreover, the record and the Commission’s consumer protection experience

Moreover, the Commission is persuaded that the practical result of requiring express verifiable authorization when a consumer pays using a debit card would be to require it in all instances when a debit or credit card is used, because it is not currently possible to distinguish these methods in a distance transaction.<sup>315</sup>

Regulation E provides protections that are similar, though not identical, to those provided under TILA. Some commenters argued that express verifiable authorization should be required for debit cards because Regulation E’s three-tiered liability scheme for unauthorized use, with increasing liability when the unauthorized use is reported after two business days, is less advantageous for consumers than the TILA protections, which cap a consumer’s losses, in all instances, at \$50.<sup>316</sup> The Commission believes that this disparity will not disadvantage consumers who face unauthorized charges pursuant to a telemarketing transaction. Both Regulation Z and Regulation E provide that, in a situation where the consumer retains control of the card, no liability shall attach; Regulation Z does so unconditionally,<sup>317</sup> while Regulation E provides such protection on condition that the consumer reports the unauthorized charge within 60 days of transmittal of the consumer’s statement.<sup>318</sup> The Commission believes that, despite the reporting requirement imposed by Regulation E, consumers who face unauthorized charges due to telemarketing fraud have important fundamental protections whether they use a debit or credit card. The Commission will continue its campaign to educate consumers about their varying obligations in reporting unauthorized charges involving both debit and credit cards, and will monitor the effectiveness of this provision from

suggest that, while consumers do understand that their debit cards can be used as a method of payment, it is not clear that consumers understand the varying degrees of consumer protection afforded by credit versus debit cards. See June 2002 Tr. III at 24-25. The Commission has issued consumer education materials to reinforce the material differences in protection under federal law for debit and credit cards. See, e.g., FTC Facts for Consumers, Credit, ATM and Debit Cards: What to do if They’re Lost or Stolen, <http://www.ftc.gov/bcp/online/pubs/credit/atmcard.htm>.

<sup>315</sup> See note 311 above.

<sup>316</sup> Compare Regulation E, 12 CFR 205.6(b) to Regulation Z, 12 CFR 226.12(b).

<sup>317</sup> See Regulation Z, 12 CFR 226.12(b)(2)(iii), Official Staff Interpretation, Suppl. I.

<sup>318</sup> See Regulation E, 12 CFR 205.6(b)(3). The 60-day notification period is somewhat flexible. Section 205.6(b)(4) notes that “[i]f the consumer’s delay in notifying the financial institution was due to extenuating circumstances, the institution shall extend the [time limit] to a reasonable period.”

<sup>307</sup> See June 2002 Tr. III at 29 (NCL) (noting receipt of complaints about the enforceability of these voluntary protections).

<sup>308</sup> See, e.g., ABA-NPRM at 6; DMA-NPRM at 57; and ERA-NPRM at 47.

<sup>309</sup> See, e.g., Collier Shannon-NPRM at 16; Green Mountain-NPRM at 27; June 2002 Tr. III at 24 (ERA).

<sup>310</sup> See, e.g., ABA-NPRM at 2-7; AFSA-NPRM at 18-19; BofA-NPRM at 5-6; Citigroup-NPRM at 10; Collier Shannon-NPRM at 11; KeyCorp-NPRM at 5; MasterCard-NPRM at 4; NACHA-NPRM at 2. Some commenters suggested that any method of payment subject to Regulation E be exempted from the express verifiable authorization requirements. See Citigroup-NPRM at 10 (exempt all electronic fund transfers, including wire transfers); EFSC (exempt automated clearinghouse (“ACH”) transactions, as well as other novel payments, such as prepaid smart cards). The Commission declines to exempt all electronic fund transfers subject to Regulation E. The record does not support exclusion of other methods of payment subject to Regulation E; and the Commission believes that, despite any consumer protections available, many emerging payment methods covered by Regulation E are still relatively unknown to consumers who will thus benefit from express verifiable authorization when these payment methods are used.