

the implementation of the amended Rule through the next Rule Review, making any modifications as necessary.

The record reflects a variety of viewpoints on whether dispute resolution rights are essential to the determination of whether a payment method should be excluded from the requirement of obtaining express verifiable authorization.<sup>319</sup> The Commission continues to believe that dispute resolution protection is a key predicate for excluding a payment method from coverage under the express verifiable authorization provision, to ensure that consumers are not unduly burdened during the investigation of any claim of unauthorized billing. The Commission believes that, although the substantive dispute resolution protections of Regulation E are somewhat less extensive than those of Regulation Z,<sup>320</sup> the core protections provided by Regulation E—allowing a consumer to report an unauthorized electronic fund transfer and to receive a provisional credit of the disputed amount within ten business days of the financial institution's receipt of such notice—will afford sufficient basic protection to consumers who choose to use debit cards to pay for goods or services or charitable contributions in telemarketing transactions.

Furthermore, the Commission notes that its decision not to require express verifiable authorization for payments made by debit card is based in part on the practical reality that it is currently impossible for merchants to distinguish

credit cards from debit cards, particularly in distance transactions. The Commission believes that the appropriate balance of protecting consumers without unduly burdening industry is best met by excluding debit cards from the requirements of the express verifiable authorization provision, for to do otherwise would result in requiring express verifiable authorization for all credit card payments, an unnecessary and costly burden.<sup>321</sup> The core dispute resolution protection provided by Regulation E, in conjunction with its critical protection against unauthorized charges, will provide a vital safety net for consumers who choose to pay by debit card. Thus, the Commission has determined that express verifiable authorization will be required only in instances when the payment method is not a credit card subject to the protections of Regulation Z or a debit card subject to the protections of Regulation E.<sup>322</sup>

*Express written authorization.* Section 310.3(a)(3)(i) of the proposed Rule states that authorization will be deemed verifiable if it is by “express written authorization . . . which includes the customer's or donor's signature.” The footnote to this section of the Rule notes that “the term ‘signature’ shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.”

The Commission received few comments on this provision overall. AARP reiterated its long-standing position that all express verifiable authorizations should be in writing.<sup>323</sup> The Commission maintains its position that to require written authorization in every instance would unduly burden sellers and telemarketers, potentially impede the growth of new payment mechanisms, and not provide meaningful benefits to consumers above and beyond those ensured by the other two means of obtaining authorization under the Rule. Therefore, the Commission declines to require written authorization of a transaction in every instance. Another commenter requested

clarification that a signed check would meet the requirements of § 310.3(a)(3)(i) of the amended Rule.<sup>324</sup> The original Rule's express verifiable authorization only pertained to demand drafts; and, as the Commission noted in the TSR Compliance Guide, “[a]ny form of written authorization from a consumer is acceptable,” including “a ‘voided’ signed check.”<sup>325</sup> While the language of the amended Rule is arguably broad enough to cover payment methods such as check and money order, the customer's or donor's signed check or money order would, in every instance, be sufficient to serve as written authorization pursuant to 310.3(a)(3)(i).

A handful of commenters addressed the interplay between the E-SIGN Act<sup>326</sup> and the Rule. One industry commenter urged that the Commission explicitly state that the E-SIGN Act governs transactions under the TSR,<sup>327</sup> and another requested the amended Rule expressly adopt the definitions of “electronic record” and “electronic signature” used in the E-SIGN Act.<sup>328</sup> In particular, commenters expressed concern over the Commission's use of the term “verifiable”<sup>329</sup> as a modifier in discussing what would constitute a valid signature under the Rule. While the Commission declines at this time to expressly incorporate the E-SIGN Act's definitions into the Rule, it has determined that deleting the term “verifiable” from the amended Rule will alleviate the concerns expressed by industry, without compromising the protections afforded to consumers.<sup>330</sup>

NCLC suggested that the Rule incorporate the procedures set forth in § 101(c) of the E-SIGN Act for using electronic records to provide a consumer with written disclosures

<sup>319</sup> See ABA-NPRM at 5, 7 (encouraging the Commission to delete from the express verifiable authorization provision the requirement that any exempt payment mechanism include dispute resolution procedures); Collier Shannon-NPRM at 11-15 (noting that the dispute resolution protections under Regulations E and Z are similar).

<sup>320</sup> For example, unlike Regulation Z, Regulation E does not provide that a consumer may assert against a financial institution all claims (other than tort) and defenses arising out of the transaction and relating to the failure to resolve the dispute. See Regulation Z, 12 CFR 226.12(c). However, Collier Shannon argued that, in some instances, Regulation E provides greater consumer dispute resolution rights. For example, Collier Shannon noted that investigations under Regulation E must be completed within ten days of the financial institution's receipt of the consumer's complaint, or a provisional credit must be issued. Collier Shannon also noted that the coverage of the regulations diverges in some instances because some of the dispute resolution protections available under Regulation Z only make sense in the context of a credit transaction, such as the provision that a creditor may not seek to collect funds or issue a negative statement on a consumer's credit report). See Collier Shannon-NPRM at Appendix F. The Commission notes, in regard to the argument made by Collier Shannon regarding the shorter time period allowed for investigations under Regulation E, that a shorter time frame is entirely appropriate because the funds at issue are the consumer's, not the funds of a credit card lender.

<sup>321</sup> See June 2002 Tr. III at 11 (DMA) (noting that requiring express verifiable authorization in all instances would be “highly expensive.”).

<sup>322</sup> Cendant requested that the Commission explicitly note in the Rule that the marketer can rely upon the statement by the consumer identifying the type of billing mechanism that the customer is using to pay. Cendant-NPRM at 9. The Commission believes that its modified approach, exempting from the express verifiable authorization provision both credit and debit cards, obviates the need for such a statement to be included in the Rule.

<sup>323</sup> AARP-NPRM at 7.

<sup>324</sup> Tribune at 7.

<sup>325</sup> TSR Compliance Guide at 19.

<sup>326</sup> Electronic Signatures in Global and National Commerce Act (“E-SIGN Act”), Pub. L. No. 106-229, 106th Cong. 2d Sess., 114 Stat. 464 (2000), codified at 15 U.S.C. § 7001 *et seq.*

<sup>327</sup> EFSC-NPRM at 9-10.

<sup>328</sup> Intuit-NPRM at 22.

<sup>329</sup> 67 FR 4542. In the NPRM, the Commission noted, in a footnote to § 310.3(a)(3)(i), that “[f]or purposes of this Rule, the term ‘signature’ shall include a verifiable electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.” (emphasis added).

<sup>330</sup> The Commission believes that the remaining language regarding signatures makes plain that sellers and telemarketers who choose to obtain express verifiable authorization using the express written authorization method, and who wish to use digital or electronic signatures, will need to comply with applicable federal law and state contract law. The Commission believes, by way of example, that a seller or telemarketer who obtained a signature that would be valid under the E-SIGN Act's standards would meet its burden under this provision of the Rule.