

required by the Rule.³³¹ Under § 101(c), the consumer must, among other things, affirmatively consent to such use of electronic records and acknowledge that he or she has the hardware and software necessary to access the requisite information electronically. The Commission is deferring any determination at this time as to the specific manner in which the Rule should incorporate these statutory procedures until it has clearer evidence or experience from which to develop an appropriate and effective regulatory interpretation, consistent with the E-SIGN Act, to ensure that written disclosures required under the Rule are provided clearly and conspicuously to consumers if and when a seller or telemarketer uses electronic means to provide such disclosures.³³²

Finally, NCLC suggested that the Commission require that the information set forth in § 310.3(a)(3)(ii)(A)-(G), be required when the written method of express verifiable authorization is used.³³³ The Commission declines to adopt this suggestion because the record does not support the argument that such a requirement is necessary in instances when the consumer controls the method of payment, and provides written authorization, including a signature, to the seller or telemarketer prior to the submission for payment of the consumer's billing information.

Oral authorization. The proposed Rule modified and expanded the list of information that must be recited in order for oral authorization to be deemed verifiable. In particular, the proposed Rule added the requirement that the specific billing information of the customer or donor, including the name of the account and the account number that will be used to collect payment for the transaction, must be identified as part of the express verifiable authorization process. Finally, certain wording changes were proposed to address the expansion of the express verifiable authorization provision to cover not just demand drafts, but all methods of payment that lacked specific protections under TILA and FCBA. In

addition, the information was reorganized.³³⁴

In § 310.3(a)(3)(ii) of the amended Rule, the Commission has retained the proposed oral authorization provision, with three minor wording changes. First, the broader term "other billing entity" replaces the term "credit card company," which was included in the proposed Rule as an example of an entity to whom a seller or telemarketer would need to make available a recording of a customer's or donor's express oral authorization. Second, the phrase "authorization of payment for goods or services or charitable contribution" is inserted to reflect the expansion of this provision to reach charitable solicitations. Third, the term "sales offer" has been replaced with "telemarketing transaction." These last two changes are intended to conform this provision to the mandate of the USA PATRIOT Act.

Few comments were prompted by this section generally, or by any of the specific proposed disclosures required to satisfy the oral authorization provision. One commenter noted that the audio recording method of obtaining express verifiable authorization may require the consent of the customer or donor in states that require two-party consent to record telephone calls.³³⁵ The Commission notes that determining compliance with state law taping requirements has been and will continue to be the responsibility of those sellers and telemarketers who choose to use this method of authorization. Another commenter asked the Commission to state explicitly that "a telemarketer cannot circumvent a writing requirement [such as required by EFTA for recurring drafts] by holding up the express oral authorization in the [TSR]."³³⁶ Clearly, compliance with the EFTA and compliance with the TSR are separate obligations, and to the extent that an entity is subject to both regulations, it must determine how best to comply with both. Therefore, the Commission declines to modify the Rule to include such guidance.

Another commenter, ARDA, requested that § 310.3(a)(3)(ii)(A), which requires disclosure of the number of debits, charges or payments, be

modified. ARDA requested that the parenthetical phrase "if more than one" be reinstated in the Rule to ensure that this disclosure is only made in instances where there will be multiple debits, charges, or payments; to do otherwise, ARDA argued, would be a burden on industry to state what would likely be presumed by consumers—that is, that only a single payment will be required.³³⁷ The Commission agrees that the benefit to consumers of disclosing that there will only be a single payment does not outweigh the burden on sellers and telemarketers to have to make such a disclosure. Therefore, the Commission has reinstated the phrase "(if more than one)" at the end of § 310.3(a)(3)(ii)(A). No comments in the record suggest modification of proposed § 310.3(a)(3)(ii)(C) (requiring disclosure of the amount of the debit(s), charge(s), or payment(s)); (D) (disclosure of the customer's or donor's name); (F) (the disclosure of a telephone number for customer or donor inquiry); or (G) (the date of the customer's or donor's oral authorization). Therefore, these sections are retained in the amended Rule without alteration.

Proposed § 310.3(a)(3)(ii)(B) required that "the date of the debit(s), charge(s), or payment(s)" be recited for oral authorization to be deemed verifiable. This proposal drew criticism from members of industry, including MasterCard and KeyCorp, who noted that, in many instances, telemarketers would not possess this information, and suggested that the frequency of the payment could be recited instead.³³⁸ The Commission agrees that in at least some instances the exact date of payment—that is, the date on which the charge will appear on a customer's or donor's billing statement or be debited from a customer's or donor's account—may be unknown at the time of the transaction. Therefore, the amended Rule provision requires instead that the seller or telemarketer recite the date on which the debit(s), charge(s), or payment(s) will be submitted for payment. The Commission believes that this piece of information is, or without much burden can be, known to a seller or telemarketer, and that providing this date to the customer or donor will supply a means for determining approximately when such debit(s), charge(s), or payment(s) will be posted to the customer's or donor's account.

Several commenters also expressed concern about the requirement, in § 310.3(a)(3)(ii)(E), that, as part of oral authorization, a customer or donor

³³¹ NCLC-NPRM at 3.

³³² See generally FTC and Dept. of Commerce, *Report to Congress on the Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, June 2001 (noting that nearly all participants in a workshop held to discuss the provision agreed that further study of the provision and its role in the marketplace was necessary). See also E-SIGN Act § 104 (preserving agency authority to interpret § 101).

³³³ NCLC-NPRM at 10-11.

³³⁴ See Proposed Rule § 310.3(a)(3)(ii)(A)-(D), (F)-(G). For example, the term "draft," used in the original provision, was replaced with the phrase "debit(s), charge(s), or payment(s)" in the proposed version, to reflect that methods of payment other than demand draft would now be covered by the Rule. For the same reason, and because of the mandate of the USA PATRIOT Act, the term "payor's" was replaced by the phrase "customer's or donor's."

³³⁵ Worsham-NPRM at 6.

³³⁶ NCLC-NPRM at 11.

³³⁷ ARDA-NPRM at 5-6.

³³⁸ MasterCard-NPRM at 6-7; KeyCorp-NPRM at 5.