

**BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580**

IN THE MATTER OF:

**TELEMARKETING RULEMAKING – COMMENT
FTC FILE NO. R411001**

**COMMENTS
of the
NATIONAL CONSUMER LAW CENTER
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
U.S. PUBLIC INTEREST RESEARCH GROUP**

I. Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC),¹ as well as the National Association of Consumer Advocates, the Consumer Federation of America, Consumers Union and the U.S. Public Interest Research Group² appreciate the

¹ **The National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. We publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions. Four treatises, in particular, are relevant to this proceeding, “Truth in Lending” (Fourth Edition), “Consumer Banking and Payments Law,” “Unfair and Deceptive Acts and Practices” (Fifth Edition) and “Access to Utility Service” (Second Edition). These comments are written by Olivia Wein, Staff Attorney, Carolyn Carter, Staff Attorney and Margot Saunders, Managing Attorney in NCLC's D.C. office.

² **The National Association of Consumer Advocates** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

The Consumer Federation of America is a nonprofit association of over 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

Consumers Union, publisher of Consumer Reports magazine, is an independent nonprofit testing, educational and information organization serving only the consumer. We are a comprehensive source of unbiased advice about products and services, personal finance, health, nutrition and other consumer concerns. Since 1936, CU's mission has been to test products, inform the public and protect consumers.

The U.S. Public Interest Research Group is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

opportunity to provide the following comments regarding the Federal Trade Commission's proposed amendments to the Telemarketing Sales Rule.³

First, we would like to commend the FTC for addressing both the emerging telemarketing scams as well as the abusive practices in the new forms of payment methods. The Telemarketing Sales Rule, promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, has been instrumental in efforts to combat telemarketing fraud and abuse. However, as the Commission recognizes, further protections are necessary. The emergence of new technologies has facilitated the ability of unscrupulous telemarketers to abuse elderly and low-income consumers, as has been documented by the Commission and other commenters in this proceeding.⁴

Despite the positive steps proposed by the FTC, there are still some serious problems in the proposed rule. **We are very opposed to the proposal that allows telemarketers to avoid obtaining express verifiable authorization where the payment method contains consumer protections which are only *comparable* to those in the Truth in Lending Act and the Fair Credit Billing Act.** The proposed amendments to §310.3(a)(3) which would expand the exemptions for “express verifiable authorization” will undoubtedly be the loophole through which many of the new payment mechanisms will fall – taking with them important consumer protections including the disclosure of the customer's billing information. As explained in these comments, this exemption essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue – the degree to which the protections provided by different payment methods actually are comparable to those in the Truth in Lending Act and the Fair Credit Billing Act. This is an inappropriate, and very dangerous, determination to leave to the telemarketer.

Our analysis of the hazards of this proposed amendment to §310.3(a)(3) is detailed in these comments as follows:

1. The commission should not permit telemarketers to avoid the express verifiable authorization requirement for a payment mechanism in any instance.
 - a. The Commission should delete the words “or comparable to those available under” because it will exempt the very payment mechanisms at issue in this proposed amendment.
 - b. The “or comparable to those available under” standard seriously weakens an important consumer protection under the Rule.

³ 67 Fed. Reg. 4492 – 4546, January 30, 2002.

⁴ See 67 Fed. Reg. 4492-4546; Telemarketing Sales Rule Forum, Matter No. P994414 July 27, 2000; AARP's Comments in FTC File No. P994414, May 30, 2000; AARP's Comments 16 C.F.R. Part 310, March 29, 2002; Legal Services Advocacy Project's Comments in FTC File No. P994414, April 20, 2000; Legal Services Advocacy Project's Comments in FTC File No. R411001 March 25, 2002; National Consumers League's Comments in FTC File No. P994414, May 30, 2000.

- c. The benefits to consumers of requiring express verifiable authorization for all payment methods outweigh the burden on the telemarketing industry.
2. Even if the Commission retains the “or comparable to those available under” exemption, it must clarify that both a limitation on liability for unauthorized charges and a dispute resolution procedure are required.
3. As a separate matter, the Commission should require that written express verifiable authorizations contain the same disclosures that are required for oral express verifiable authorizations.
4. The amended rule should not *inadvertently* impart legality to a payment method where specific legal authority for the payment method otherwise may not exist.
5. The Commission should consider implementing requirements for electronic records and signatures under E-Sign in a manner similar to the FCC’s incorporation of E-Sign in its slamming rule.

Finally, on behalf of our clients, we support many of the Commission’s proposed amendments to strengthen the Rule and we offer three specific recommendations to strengthen proposed amendments dealing with preacquired account telemarketing, the proposed National “Do-No-Call” Registry, and disclosure of total costs.

II. The Commission Should Not Permit Telemarketers To Avoid the Express Verifiable Authorization Requirement in Any Instance

The Commission proposes to allow telemarketers to avoid obtaining express verifiable authorization when certain types of payment methods are used. The Commission’s proposed amendment to §310.3(a)(3) exempts telemarketers from obtaining express verifiable authorization if the payment mechanism used has limited liability for unauthorized charges and dispute resolution procedures “pursuant to, *or comparable to those available under*,” the Fair Credit Billing Act (FCBA) and the Truth in Lending Act (TILA).⁵ While we do not oppose the exemption for payment mechanisms which have these protections under the FCBA and the TILA, **we are very opposed to any exemption of payment mechanisms which have consumer protections only “comparable to” those in FCBA and TILA.**

⁵ 67 Fed. Reg. 4542, §310.3(a)(3) “Submitting billing information 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 when the payment method used to collect payment does not impose a limitation on the customer’s or donor’s liability for unauthorized charges nor provide for dispute resolution procedures pursuant to, **or comparable to those available under**, the Fair Credit Billing Act and the Truth in Lending Act, as amended.” (emphasis added)

A. The Commission should delete the words “or comparable to those available under” because it will exempt the very payment mechanisms at issue in this proposed amendment.

Section 310.3(a)(3) of the Rule currently protects consumers in telemarketing sales involving demand drafts or similar negotiable paper by deeming such transactions a deceptive practice and a violation of the rule if the telemarketer fails to obtain express verifiable authorization from the consumer. The Commission seeks to expand the scope of these §310.3 (a)(3) protections to cover “a much larger class of transactions where an unauthorized charge is likely to present a particular hardship to the consumer because of the lack of TILA and FCBA protections.”⁶

In light of the Commission’s goal of thwarting “deceptive practices often associated with the growth of new payment systems,”⁷ we strongly urge the Commission to delete the words “or comparable to those available under” so that the protections, which are basically a check by the telemarketer to ensure that the consumer is clearly agreeing to the transaction,⁸ are applied to all transactions that are not subject to the Truth in Lending Act and the Fair Credit Billing Act. Consumers who use credit cards have limited liability for unauthorized charges under TILA⁹ as implemented by the Federal Reserve Board in Regulation Z¹⁰ and a billing dispute procedure pursuant to the Fair Credit Billing Act¹¹ as implemented by the Federal Reserve Board in Regulation Z.¹²

The Commission’s exemption for “comparable” payment methods essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex and much disputed legal issue – the degree to which the protections provided by different payment methods actually are comparable to those in the Truth in Lending Act and the Fair Credit Billing Act. This is an inappropriate, and very dangerous, determination to leave to the telemarketer. As a practical matter, the “or comparable to those available under” standard does not provide a bright line for telemarketers in determining when express verifiable authorization is required. There will be an array of consumer protection provisions for unauthorized charges and dispute resolution procedures for various new payment methods and it is likely that telemarketers will not want, or may not be able, to expend the time and effort in making such an on-the-spot determination – especially since a wrong determination results in a violation of the Rule. Legitimate telemarketers seeking to avoid a Rule violation will err on the side of caution and always obtain express

⁶ 67 Fed. Reg. 4506.

⁷ 67 Fed. Reg. 4507.

⁸ 67 Fed. Reg. 4507, “As was the case with demand drafts, the Commission believes that express verifiable authorization for novel payment systems will ensure that such systems are only used when the consumers clearly agree to that use.”

⁹ TILA Part B §133, 15 U.S.C. §1643.

¹⁰ 12 C.F.R. §226.12, as amended effective November 21, 1997.

¹¹ TILA Part D §161, 15 U.S.C. §1666.

¹² 12 C.F.R. §226.13, as amended effective November 21, 1997.

verifiable authorization for customers regardless of the payment method or where the payment method is not by credit card.

A much clearer way for the amended Rule to protect consumers from the fraudulent practices attending new payment methods is to delete the words “or comparable to those available under” so that use of payment mechanisms without TILA and FCBA protections will require express verifiable authorization. As noted later in these comments, one means of obtaining express verifiable authorization, the recording of the customer’s authorization and the telemarketer’s disclosure, is currently industry practice. Thus, although there may be some costs to the telemarketing industry to expand the scope of the express verifiable authorization, legitimate telemarketers will likely obtain express verifiable authorization with most non-credit card purchases anyway just because of efficiency and liability concerns.

B. The “or comparable to those available under” standard seriously weakens important consumer protections under the Rule.

The proposed amended §310.3(a)(3) express verifiable authorization attempts to limit fraudulent telemarketing practices by providing a procedure to ensure that, with new payment methods, consumers are clearly agreeing to be billed and understand how they will be billed.¹³ The Commission’s use of “or comparable to those available under” in its proposed amendment to §310.3(a)(3) would make it easier for telemarketers to avoid having to obtain express verifiable authorizations. Much will depend on how the Commission defines “or comparable to those available under TILA and FCBA protections” for unauthorized charges and dispute resolution procedures.

1. TILA and FCBA protections for unauthorized charges

TILA limits cardholder liability of unauthorized use of a credit card.¹⁴ The cardholder is not liable in any amount for unauthorized use unless the card comes within the definition of an “accepted card,”¹⁵ the card issuer has provided the consumer with notice of the limits of liability for unauthorized use,¹⁶ and the issuer has provided a means to identify the cardholder or the authorized user of the account.¹⁷ If the cardholder has complied with the above requirements, the consumer is liable for up to a maximum of the lesser of fifty dollars “or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer”¹⁸ as required by Regulation Z.¹⁹ Under the implementing regulation for TILA, the consumer can choose to notify the credit card issuer of the loss, theft or possible unauthorized use in person, by phone or in writing.²⁰ TILA and FCBA regulations also provide additional provisions for credit card

¹³ 67 Fed. Reg. 4507.

¹⁴ TILA Part B, § 133, 15 U.S.C. § 1643.

¹⁵ 12 C.F.R. § 266.12(b)(2)(i).

¹⁶ 12 C.F.R. § 266.12(b)(2)(ii).

¹⁷ 12 C.F.R. § 266.12(b)(2)(iii).

¹⁸ 12 C.F.R. § 266.12(b)(1).

¹⁹ 12 C.F.R. § 266.12(b)(3).

²⁰ 12 C.F.R. § 226.12(b)(3).

use including, defining when a card's use is unauthorized,²¹ placing the burden of proof on the card issuer to show the use was authorized,²² subjecting the credit card issuer to all claims (except tort claims) and defenses that a consumer has against a merchant when a consumer uses a credit card,²³ protecting consumers from adverse credit reports,²⁴ and prohibiting offsets by the card issuer.²⁵

The Fair Credit Billing Act is TILA's billing error resolution procedure and it has the effect of making the creditor listen to the consumer who has a dispute about a computerized bill or who does not understand bill.²⁶ The procedures give added rights for credit card accounts in that the consumer can also use the procedures for assertion of claims and defenses or for claims of unauthorized use.²⁷

Violations of the TILA and FCBA protections for unauthorized charges and billing dispute procedures at issue in this rulemaking, give rise to several remedies: actual damages, individual statutory damages, class action statutory damages and attorney fees and costs.²⁸ TILA/FCBA also subjects the credit card issuer to all claims (except tort claims) and defenses that a consumer has against a merchant when a consumer uses a credit card.²⁹

While the Commission did not provide examples of what it would deem comparable to those available under TILA and FCBA in terms of limited liability for unauthorized charges and a dispute resolution procedures, we strongly caution the Commission to avoid holding up as "comparable" other payment mechanisms that are not consistent with TILA and FCBA. There are key differences between protections provided under TILA those provided for other payment mechanisms.

2. Other payment mechanisms will likely have weaker protections

As described above, the TILA and FCBA protections shift the burden of loss away from the consumer. However, protections in other laws governing different payment mechanisms are not comparable because they are less protective regarding limited liability protection for unauthorized charges and dispute resolution procedures. For example, the Electronic Funds Transfer Act³⁰ as implemented in Regulation E³¹ applies to electronic fund transfers that authorize a financial institution to debit or credit a

²¹ 15 U.S.C. §1602(o). *See* Reg. Z, 12 C.F.R. §226.12 n.22.

²² 15 U.S.C. 1643(b).

²³ 15 U.S.C. §1666i, *see also* Official Staff Commentary on Reg. Z §226.12(c)(1)-1 (mentions mail and telephone orders specifically).

²⁴ 15 U.S.C. §1666a; Reg. Z, 12 C.F.R. §226.12(c)(2).

²⁵ 12 C.F.R. §226.12(d).

²⁶ 15 U.S.C. §1666. *See also* *Jacobs v. Marine Midland Bank, NA*, 124 Misc. 2d 162, 475 N.Y.S.2d 1003 (Sup.Ct. 1984).

²⁷ Compare Reg. Z §226.13 with Reg. Z §226.12.

²⁸ 15 U.S.C. §1640(a).

²⁹ 15 U.S.C. §1666i, *see also*, Official Staff Commentary on Reg. Z §226.12(c)(1)-1 (mentions mail and telephone orders specifically).

³⁰ 15 U.S.C. §§1693 et seq.

³¹ 12 C.F.R. §205.

consumer's account.³² The EFTA provides three tiers of consumer liability (\$50, \$500, and unlimited) for unauthorized use of debit cards or other access devices, depending upon when the unauthorized transfer occurred and when the consumer reported the loss or theft of an access device.³³ If the payment mechanism used is an EBT account for needs-based benefits, there are even fewer protections.³⁴ These are just some of the differences that make the EFTA protections less than comparable to those set up by TILA/FCBA.

3. Voluntary Protections are Particularly Inferior

Another concern about payment mechanisms deemed comparable under this proposed rule is that it would exempt the type of emerging payment mechanisms that should trigger express verifiable authorization. Payment mechanisms where the consumer protections for limited liability for unauthorized charges and for dispute resolutions procedures stem from the payment mechanism issuer's voluntary inclusion of such terms in the consumer's contract are not comparable to the protections provided under TILA and FCBA.

There is not a level playing field between the consumer and the company behind the payment method because the parties have unequal bargaining power, unequal access to information and, more likely than not, unequal understanding of the terms of the agreement governing the payment method. The TILA and FCBA consumer protections respond to this imbalance in understanding and control between the parties by limiting liability for unauthorized use and providing the consumer with procedures for resolving a billing dispute. With voluntary consumer protections, there is nothing requiring the company to bear the risk of loss with regard to unauthorized charges. The "or comparable to those available under" standard invites sham internal review procedures where the company behind the payment mechanism can hold onto the amount in dispute during the review thus eliminating a major incentive for the company to perform, in a timely and adequate manner, an investigation, correction of billing errors and crediting or refunding a consumer's loss from unauthorized charges. Payment mechanisms with voluntary protections are also not likely to include a private right to sue with attorneys' fees and damages mirroring the statutory damages provided pursuant to TILA and FCBA. Without these rights of action, "comparable" protections could be no more than a window dressing.

³² 15 U.S.C. §1693(a)(6).

³³ 15 U.S.C §1693g, Reg. E §205.6.

³⁴ Electronic Benefits Transfers (EBT) where state-administered benefits such as food stamps and Temporary Assistance to Needy Families are delivered through a debit card, stored value card or other electronic transfer are exempt from the EFTA. In addition, there are no nationwide EBT error resolution procedures. EBT error resolution procedures vary from state to state, as well as from food stamps to cash assistance. In order to see the larger, if somewhat unclear, picture of EBT error resolution procedures, one must consult three separate sources: (1) food stamp regulations, (2) QUEST@operating rules and (3) state laws or EBT contracts. A further wrinkle is that SSI on an EBT card with need-tested benefits, is covered by the Regulation E, but the Regulation E protections would apply only for the federal benefits. (NCLC's Consumer Banking and Payments Law 2nd Edition expected to be released in 2002).

If the Commission decides to restrict the types of payment mechanisms that would trigger express verifiable authorization by retaining the “or comparable to those available under” language, we urge the Commission to sets standards for what is comparable. Payment mechanisms must have consumer protections for unauthorized charges and dispute resolution procedures that are incorporated in a law or a regulation. As discussed above, voluntary protections are not comparable to those pursuant to TILA and the FCBA. The consumer must have a private cause of action with attorneys fees and statutory damages to enforce these protections. In addition, the payment mechanism’s unauthorized use liability must mirror those provided in TILA, limiting liability to some dollar amount.

Ultimately, in light of the emergence and multitude of new payment mechanisms with various degrees of consumer protections for unauthorized charges and dispute resolution procedures, it is less confusing and more protective to require that express verifiable authorization be required at all times -- or at a minimum, where the consumer protections are not consistent with those in TILA and FCBA.³⁵

4. Recommended language for §310.3(a)(3)

We recommend the following language for §310.3(a)(3):

Submitting billing information 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’ express verifiable authorization **unless when** the payment method used to collect payment ~~does not~~ imposes a limitation on the customer’s or donor’s liability for unauthorized charges and ~~nor~~ provides for dispute resolution procedures, **both of which must be** pursuant to, ~~or comparable to those available under,~~ the Fair Credit Billing Act and the Truth in Lending Act, as amended, **or other laws providing the same protections, including a private right of action.** (new text in bold)

³⁵ Cf. California Public Utility Commission’s Interim Opinion Adopting Interim Rules Governing the Inclusion of Noncommunications-Related Charges in Telephone Bills, Decision 01-07-030, July 12, 2001 (The CPUC, charged with developing safeguards to protect the state’s consumers using this newly available payment system concluded that:

[T]he Commission’s rules governing non-communications charges must be consistent with Regulation Z, given the possibility, if not likelihood, that at least some non-communications billing will be subject to that body of law. Clearly, having two distinct sets of rules, one consistent with Truth in Lending, one not, is not workable or desirable. Accordingly, our intent in drafting these rules is to make them consistent with the Truth in Lending Act. Page 9).

C. The benefits to consumers of requiring express verifiable authorization for all payment methods outweigh the burden on the telemarketing industry.

The harm to consumers from fraudulent telemarketing practices is well documented. Consumers are scammed out of billions of dollars each year because of telemarketing fraud.³⁶ According to the U.S. Department of Justice (DOJ), telemarketing is a \$500 billion industry with telemarketing fraud costing around \$40 billion annually.³⁷ The DOJ also notes, “Telemarketing fraud is not a new crime to law enforcement, but never before has it been used so prolifically to target our elderly citizens.”³⁸ The Commission and the commenters in this proceeding have also documented the thriving and evolving business of telemarketing fraud.³⁹ The record developed in the course of this Rule review also reflects that it has become industry practice for telemarketers to tape customers’ oral authorization for a sale.⁴⁰

Express verifiable authorization attempts to limit fraudulent telemarketing practices by providing a procedure to ensure that, with new payment methods, consumers are clearly agreeing to be billed and understand how they will be billed. This is an important protection, especially in light of the fact “that many of the emerging payment systems cited by commenters in this proceeding lack chargeback protection and dispute resolution rights, as well as limited customer liability in the event of unauthorized charges.”⁴¹ This benefit outweighs the incidental costs to the industry of expanding the scope of express

³⁶ FTC’s Telemarketing Fraud: Ditch the Pitch webpage <http://www.ftc.gov/bcp/conline/edcams/telemarketing/> accessed April 9, 2002; DOJ Economic Crime Unit Website http://www.fbi.gov/hq/cid/fc/ec/about/about_tm.htm accessed April 9, 2002; AARP’s Telemarketing Fraud webpage <http://www.aarp.org/fraud/home.htm> accessed April 9, 2002; National Fraud Information Center’s What is Telemarketing Fraud? Webpage <http://www.fraud.org/telemarketing/teleinfo.htm> accessed April 12, 2002. *See also* Legal Services Advocacy Project’s Comments in FTC File No. R411001 March 25, 2002 at 3-4.

³⁷ DOJ Economic Crime Unit Website http://www.fbi.gov/hq/cid/fc/ec/about/about_tm.htm accessed April 9, 2002.

³⁸ DOJ Economic Crimes Unit Website http://www.fbi.gov/hq/cid/fc/ec/about/about_tm.htm accessed April 9, 2002. *See also* Statement of Jonathan J. Rusch, Senior Litigation Counsel, Fraud Section, Criminal Division, US. DOJ on Telemarketing Fraud Before the US Sentencing Commission February 10, 1998 (“telemarketers typically prey on older victims through various identification techniques, often revictimizing those who have already been defrauded, and commonly work as part of well-organized schemes . . . In essence telemarketing fraud in most cases is sustained psychological warfare, waged through ongoing and extensive personal contact by those experienced at deceiving others for personal profit.”) page 3.

³⁹ *See* 67 Fed. Reg. 4492-4546; Transcript of the FTC’s Telemarketing Sales Rule Forum, Matter No. P994414, Vol. 1, July 27, 2000; AARP’s Comments in FTC File No. P994414, May 30, 2000; AARP’s Comments 16 C.F.R. Part 310, March 29, 2002; Legal Services Advocacy Project’s Comments in FTC File No. P994414, April 20, 2000; Legal Services Advocacy Project’s Comments in FTC File No. R411001 March 25, 2002; National Consumers League’s Comments in FTC File No. P994414, May 30, 2000.

⁴⁰ 67 Fed. Reg. 4508, *see also* Transcript of the FTC’s Telemarketing Sales Rule Forum, Matter No. P994414, Vol. 1, July 27, 2000, at 115- 123.

⁴¹ 67 Fed. Reg. 4507.

verifiable authorization, especially when the industry already tapes telemarketing sales in their regular course of business.⁴²

III. Even if the Commission retains the “or comparable to those available under” option, it must clarify that both a limitation on liability for unauthorized charges and a dispute resolution procedure are required.

If the Commission decides to retain the “or comparable to those available under” language, it should at least clarify that in order to avoid express verifiable authorization a payment mechanism must have both a limitation on liability for unauthorized charges and a dispute resolution procedure.

The current phrasing may be interpreted to mean that a telemarketer does not need to obtain express verifiable authorization if the payment method used has either liability limitations for unauthorized charges or dispute resolution procedures. We propose the following language of for §310.3(a)(3) in the event the Commission chooses to keep the comparability language:

Submitting billing information 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 **unless when** the payment method used to collect payment ~~does not~~ imposes a limitation on the customer’s or donor’s liability for unauthorized charges ~~nor~~ **and** provides for dispute resolution procedures, **both of which are** pursuant to, or comparable to, those **provided by available under**, the Fair Credit Billing Act and the Truth in Lending Act, as amended.

IV. As A Separate Matter, The Commission Should Require That Written Express Verifiable Authorizations Contain The Same Disclosures That Are Required For Oral Express Verifiable Authorizations.

The Commission’s proposed language for §310.3(a)(3)(i) allows for authorization to be verified by “express written authorization” before a charge is placed which includes a customer’s signature. Since the Commission has expanded the scope of when express verifiable authorization is required to encompass transactions involving new payment mechanisms, the disclosures required in the use of an “express oral authorization,” especially the new disclosure regarding a customer’s billing information, should also be required in the “express written authorization.” We note that in the current Rule, “§310(a)(3)(iii)(A) involving written confirmation of transactions, requires “All of the information contained in §§310.3(a)(3)(ii)(A)-(F).” The Commission should add such a

⁴² 67 Fed. Reg. 4508, *see also* Transcript of the FTC’s Telemarketing Sales Rule Forum, Matter No. P994414, Vol. 1, July 27, 2000, at 115- 123.

requirement in the use of “express written authorization” to ensure that consumers providing written authorization are provided the same disclosure protections.

V. The Amended Rule Should Not *Inadvertently* Impart Legality To A Payment Method Where Specific Legal Authority For The Payment Method Otherwise May Not Exist.

We urge the Commission to make explicit that the amended Telemarketing Sales Rule does not impart legality to a payment method where specific legal authority for the payment method otherwise may not exist. The amended 310.3(a)(3) deems an authorization verified if the telemarketer obtains:

- (i) Express written authorization by the customer or donor, which includes the customer or donor’s signature; **or**
- (ii) Express oral authorization which is recorded and made available upon request to the customer or donor, and the customer’s or donor’s bank, credit card company or other billing entity, and which evidences clearly both the customer’s or donor’s authorization of payment for the goods and services that are the subject of the sales offer and the customer’s or donor’s receipt [of specific information].⁴³ (emphasis added)

However, with the emergence of new payment methods there is a concern that the Commission may inadvertently weaken existing consumer protections requiring a writing. For example, Regulation E, issued by the Federal Reserve Board pursuant to the Electronic Fund Transfer Act⁴⁴ requires a written instrument signed by the consumer for preauthorized payments.⁴⁵ The Commission should make it clear that a telemarketer cannot circumvent a writing requirement by holding up the express oral authorization option in the Telemarketing Sales Rule.

VI. The Commission should consider implementing requirements for electronic records and signatures under E-Sign in a manner similar to the FCC’s incorporation of E-Sign in its slamming rule.

The Commission seeks comment on the implications of the E-Sign law and whether the requirement that any signature be “verifiable”⁴⁶ is adequate to protect consumers and what, if any, other protections are necessary.⁴⁶ We direct the Commission’s attention to a recent Federal Communications Commission final rule regarding slamming which incorporates Electronic Signatures in Global and National Commerce Act (E-Sign)⁴⁷ provisions.⁴⁸

⁴³ 67 Fed. Reg. 4542.

⁴⁴ 15 U.S.C. §§1693 et seq.

⁴⁵ 12 C.F.R. 205.10(b).

⁴⁶ 67 Fed. Reg. 4537.

⁴⁷ Pub. L No 106-229, 114 Stat.464 (2000)(codified as 15 U.S.C. §§7001-7006, 7021, 7031)(enacted S.761).

⁴⁸ 66 Fed. Reg. 12877 – 12894.

The FCC concluded that an electronic signature used by a telephone service subscriber to change telecommunications service satisfied the signature requirement of 47 C.F.R. §64.1130(b) governing Letters of Agency, and that the information submitted to authorize and verify a carrier change request may be submitted in the form of an electronic record.⁴⁹ However, the FCC also incorporated by reference the requirements in §101(c) of the E-sign Act for carriers who use an Internet letter of agency to sign up subscribers.⁵⁰ §101(c) protections include the requirement that, in the context of this rule the telecom carrier must obtain the consumer's consent to use electronic records as well as an acknowledgement by the consumer that he or she has the hardware and software necessary to access the information electronically. The carrier must also inform the consumer of the procedures for revoking consent and rights to a paper copy of the transactions.⁵¹ The FCC also amended its slamming rule to explicitly require that carriers must give the consumers the option of an alternative to the electronic authorization and verification procedures.⁵² If the consumer suspects he or she has been slammed, the FCC's slamming rule places the burden of proof regarding the authenticity of the electronic signature on the carrier accused of slamming.⁵³

We urge the Commission to explore similar consumer protections with respect to the application of E-Sign to the Telemarketing Sales Rule.

VII. Support For Many Of The Commission's Other Proposed Amendments To Strengthen The Rule.

We support many of the other Commission's proposed amendments to strengthen the Telemarketing Sales Rule. In particular we strongly support the Commission's proposed amendments to address the abusive practice of upselling by treating each transferred call as a separate transaction, thus triggering applicable Rule disclosures; the Commission's proposal to make blocking, circumventing or altering a telemarketer's Caller ID information an abusive practice; and the proposed amendment to require telemarketers selling credit card protection plans to disclose existing protections afforded by federal law. However, we believe the Commission can further strengthen the Rule regarding preacquired account telemarketing, the National "Do-Not-Call" registry and the disclosure of total costs.

A. Preacquired Account Telemarketing

We strongly support the Commission's proposed amendments to curtail the egregious abuses from preacquired account telemarketing and we strongly support the Commission's proposed amendment to ban the receipt of the consumer's billing

⁴⁹ 66 Fed. Reg. 12878.

⁵⁰ 66 Fed. Reg. 2878, 47 C.F.R. §64.1130(i).

⁵¹ Pub. L No 106-229, 114 Stat.464 (2000)(codified as 15 U.S.C. §§7001-7006, 7021, 7031)(enacted S.761), §101(c). *See also* FCC's comments on the application of §101(c) to their slamming rule 66 Fed. Reg. 12878.

⁵² 47 C.F.R. §64.1120(d).

⁵³ 66 Fed. Reg. 12878, 47 C.F.R. §64.1150(d).

information for use in telemarketing from any source other than the consumer. We agree with the changes to the definition of “Billing Information” proposed by the Legal Services Advocacy Project to clarify that the definition also covers payment mechanisms that will emerge in the future. §310.2(c) should read:

Billing information means any data that provides access to a consumer’s or donor’s account, including, but not limited to, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account or debit card.

B. National Do Not Call Registry

We strongly support the Commission’s proposal to establish a national “Do-Not-Call” registry and concurs with AARP that the registry not preempt states’ efforts to establish stronger protections. In accord with AARP, we strongly urge the Commission to facilitate use of the registry by consumers whose primary language is not English.

C. Disclosure of Total Costs

We agree with the comments of the Legal Service Advocacy Project and the National Association of Attorneys General that for sales involving monthly installments, the seller must disclose the total cost of the entire contract, not just the installment. We urge the Commission to adopt LSAP and NAAG’s amended language for §310(a)(1)(i) as follows:

- Before a customer pays for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:
- (i) The total costs to purchase, receive, or use, and quantity of, any goods or services that are subject to the sales offer. In sales involving monthly installments, the total cost to be disclosed is the total cost of the entire contract, not just the installment.

VIII. Conclusion

Despite the positive steps proposed by the FTC, there are still some serious problems in the proposed rule. **We are very opposed to the proposal that allows telemarketers to avoid obtaining express verifiable authorization where the payment method contains consumer protections which are only *comparable* to those in the Truth in Lending Act and the Fair Credit Billing Act.** The proposed amendments to §310.3(a)(3) which would expand the exemptions for “express verifiable authorization” will undoubtedly be the loophole through which many of the new payment mechanisms will fall – taking with them important consumer protections including the disclosure of the customer’s billing information. As explained in these comments, this exemption essentially sanctions an on-the-spot judgment made by telemarketers regarding a complex

and much disputed legal issue – the degree to which the protections provided by different payment methods actually are comparable to those in the Truth in Lending Act and the Fair Credit Billing Act. This is an inappropriate, and very dangerous, determination to leave to the telemarketer.

We recommend the following language for §310.3(a)(3):

Submitting billing information 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' express verifiable authorization ~~unless when~~ the payment method used to collect payment ~~does not~~ imposes a limitation on the customer's or donor's liability for unauthorized charges and ~~nor~~ provides ~~for~~ dispute resolution procedures, **both of which must be** pursuant to, ~~or comparable to those available under,~~ the Fair Credit Billing Act and the Truth in Lending Act, as amended, **or other laws providing the same protections, including a private right of action.** (new text in bold)

In the event the Commission chooses to retain the comparability language, we urge the Commission, at a minimum, to clarify that the payment mechanism used in transactions exempt from the express verification requirement must have limited liability for unauthorized charges and dispute resolution procedures, both of which are comparable to those provided by the Fair Credit Billing Act and the Truth in Lending Act as amended. As a separate matter, the Commission should require that written express verifiable authorizations contain the same disclosures that are required for oral express verifiable authorizations.

We urge the Commission to examine the FCC's recent incorporation of the E-Sign law into its slamming rule. We also urge the Commission to make explicit that the amended rule does not impart legality to a payment method where specific legal authority for the payment method otherwise may not exist.

Finally, we support many of the Commission's proposed amendments to strengthen the Rule and has offered specific recommendations to strengthen three additional proposed amendments dealing with preacquired account telemarketing, the proposed National "Do-No-Call" Registry, and disclosure of total costs.