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June 1, 2001

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Interim Final Rules on Regulation B; Docket No. R-1040
Interim Final Rules on Regulation E; Docket No. R-1041
Interim Final Rules on Regulation M; Docket No. R-1042
Interim Final Rules on Regulation Z; Docket No. R-1043
Interim Final Rules on Regulation DD; Docket No. R-1044

Dear Ms. Johnson:

The Electronic Financial Services Council (“EFSC”) is a national trade association which seeks to promote legal and regulatory changes designed to facilitate electronic delivery of financial services. The EFSC appreciates the opportunity to submit its views regarding the interim rules (the “Interim Rule”) of the Board of Governors of the Federal Reserve System (the “Board”) concerning the use of electronic communications to provide required notices under five consumer protection regulations: B (Equal Credit Opportunity), E (Electronic Fund Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings). Although we recognize that there are differences among the interim rules, the EFSC is submitting its comments in this single letter in order to address certain concepts common to all of the proposals. This letter will direct specific comments to the interim rule under Regulation Z.

We strongly support the Board’s efforts to facilitate electronic applications and believe that several of the provisions of the Interim Rule could be helpful to both consumers and industry. We are concerned, however, that in promulgating the Interim Rule, the Board has adopted certain interpretations of the meaning of the Electronic Signatures in Global and National Commerce Act (the “ESIGN” or “Act”), Pub. L. No. 106-229, 106th Cong., 2d Sess., 114 Stat. 464 without going through the procedures prescribed under ESIGN, exceeding its authority under the Act. The Board’s interpretations, while providing sound practical solutions to

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important problems, may have the unintended effect of creating future legal uncertainty for financial service providers seeking to make disclosures electronically.

Our most serious concerns are (1) that the Board's Interim Rule in interpreting the word "transaction" in Section 101(c) of ESIGN did not comply with the standards and limitations on rulemaking required by Section 104(b) of ESIGN and (2) that the Board interprets the consumer consent provisions without making the appropriate findings and otherwise complying with the requirements under Section 104 and (3) that the Board misinterprets the timing and delivery exclusion contained in Section 101(c)(2) to permit it to establish differing timing and content requirements for electronic communications than for those provided on paper. If other state or federal agencies adopt similar interpretations of their authority under ESIGN, the Act's effectiveness could be seriously compromised.

The EFSC recognizes that the Board has broad power under TILA to interpret Regulation Z in a way that furthers the goals of the statute. Based on the analysis used to support the Board's 1998 revisions to Regulation E permitting electronic disclosures, it is possible that the Board can support the Interim Rule without reference to ESIGN. However, the EFSC strongly believes that before promulgating a final version of the Rule, the Board should follow the procedures set forth in Section 104 of ESIGN, for three reasons:

- The history and provisions of ESIGN make it clear that Congress intended to provide baseline rules, and regulatory procedures, for replacing writing and signature requirements across the whole range of federal laws and regulations affecting consumer disclosures and notices.
- The use of parallel or alternative authority by the Board will result in a regulatory "double standard", in which federal regulators without the broad interpretive authority of the Board are required to live within ESIGN, while the Board and other regulators with arguably broader authority may avoid its procedures and limitations.
- Since the use of parallel or alternative authority will not supplant ESIGN, institutions wishing to avail themselves of electronic notices and disclosures will be forced to select between two potentially different schemes, creating the potential for both competitive inequalities and confusion for consumers as they encounter widely differing practices.

DISCUSSION

I. The Board Would Interpret Section 101 of E-SIGN without Making the Findings Required by Section 104(b).

Our first concern is that the Interim Rule in interpreting the word “transaction” in Section 101(c) of E-SIGN does not comply with the standards and limitations on rulemaking required by Section 104(b) of E-SIGN.

A. E-SIGN’s General Rules

E-Sign applies to the use of electronic records and signatures relating to a “transaction in or affecting interstate or foreign commerce.”¹ A transaction is defined as any “action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons.”² E-Sign is a statutory “overlay.” It sets up uniform rules revising traditional writing and signature requirements in the law, permitting the use of electronic records and electronic authentication methods instead. Section 101(c) of E-SIGN applies a modified rule to any “statute, regulation, or other rule of law [that] [1] *requires* that information relating to a *transaction or transactions* . . . [2] be provided or made available to a *consumer* [3] *in writing*” (emphasis added).

B. Required Findings

As a condition of issuing any regulation, order, or guidance that interprets Section 101 of E-SIGN, an agency must satisfy the standards set forth in Section 104(b) of E-SIGN, including that:

- (A) such regulation, order, or guidance is consistent with section 101;
- (B) such regulation, order, or guidance does not add to the requirements of such section; and
- (C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that—
 - (i) there is a substantial justification for the regulation, order, or guidance;
 - (ii) the methods selected to carry out that purpose—

¹ E-SIGN § 101(a).

² E-SIGN § 106.

- (I) are substantially equivalent to the requirements imposed on records that are not electronic records; and
- (II) will not impose unreasonable costs on the acceptance and use of electronic records; and
- (iii) the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

We also note that the Board can exempt certain types of disclosures under Section 104(d)(1) of ESIGN, which provides that the Board may:

. . . with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category of record or type of record from the requirements relating to consent in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

C. The Board Used its Interpretive Authority Inappropriately

The Interim Rule authorizes certain disclosures to be provided electronically without first obtaining consumer consent under ESIGN.³ The disclosures exempted from consent are sometimes referred to collectively as the “shopping disclosures,” and include advertisements (§ 226.16 and § 226.24), Home Equity Line of Credit (“HELOC”) and Adjustable Rate Mortgage (“ARM”) loan application disclosures (§ 226.5b and § 226.19(b)), and disclosures under §§ 226.17(g)(1)-(5) (“Shopping Disclosures”). The exemption is based on a finding by the Board that these disclosures are “deemed not related to a transaction.”⁴ This is presumably a reference to the provision in Section 101(c) of ESIGN that requires consumer consent to be obtained before presenting “information relating to a transaction” that is otherwise required to be presented in writing.

The result under the Interim Rule makes perfect sense. The consumer has consciously sought out the information in an electronic environment. If the Shopping Disclosures, which are

³ Interim Rule §226.36(c).

⁴ Interim Rule §226.36(c).

provided before the consumer has entered into any binding obligation, are not delivered in a satisfactory form, the consumer may simply abandon the transaction. Furthermore, interrupting the delivery of these disclosures with E-SIGN consent process may create confusion and frustration for the consumer. The consent process may create the impression that a binding commitment to proceed with the transaction is being forced before the Shopping Disclosures are provided, causing the consumer to abandon the process. Ironically, such a result would inhibit, rather than promote, the effective dissemination of the shopping disclosures to potential borrowers.

Unfortunately, however, the approach taken by the Board in implementing the exemption does not appear to conform with either (i) a reasonable interpretation of the term “transaction” as it appears in E-SIGN, or (ii) the requirements of Section 104(d) of the Act for exempting disclosures from the consent requirement.

As noted above, the definition of “transaction” in the Act is extremely broad. It covers “any ...set of actions relating to the conduct of...consumer...affairs between two or more persons.”⁵ Note that the definition does not require that an exchange of value occur, nor that the actions result in a binding agreement.⁶ The fact that the borrower has not yet become bound to complete

⁵ E-SIGN § 106(13).

⁶ Although the language of the statute is clear, it is also supported by the legislative history of the E-Sign Act. As shown in the following colloquy from the Senate floor debate on the bill, in enacting the E-Sign Act, Congress intended to establish broad application of the Act:

“MR. GRAMM. As to its coverage, does the Senator agree that *this act is intended to operate very broadly to permit the use of electronic signatures and electronic records in all business, consumer and commercial contexts? This breadth is accomplished through the use of the term ‘transaction,’ which is defined broadly to include any action or set of actions by one of the parties to the underlying transaction, or by any other person with any interest in the underlying transaction, or a response by one party to the other’s action, all are covered by the act. In this regard, it is the nature of the activity, rather than the number of persons or the identity or status of the person or entity involved in the activity, that determines the applicability of the act. Have I stated the matter correctly?*”

“MR. ABRAHAM. Yes, this act applies to all actions or set of actions related to the underlying business, consumer, or commercial relationship which is based on the nature of the activity and not the number of persons involved in the activity. The act is also intended to cover the related activities of those persons or entities who are counterparties to, or otherwise involved in or related to, the covered activity.”

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the transaction does not mean that a transaction has not been initiated. By making contact with the lender and seeking out the shopping disclosures, a consumer has begun a process that is related to any loan ultimately made. Even if no loan is made as a result of the disclosures, there has still been a transaction within the meaning of E-SIGN; the choice to proceed or not proceed, based on the information provided, is a significant consumer choice that affects both the consumer and the lender. It directly impacts the conduct of the consumer's affairs.

This view of the relevance of pre-obligation communications is consistent with commercial law generally. For example, the express warranties covered by Article 2 of the Uniform Commercial Code include affirmations of fact made by the seller during the advertising and negotiation cycle, well before any commitment is made to purchase or sell. Terms of sale may also include communications made prior to any commitment. All of these communications are viewed as related to the final transaction, because they form part of the foundation for the mutual understanding of the parties. The shopping disclosures fulfill the same function.

Even though the result reached by the Board is both reasonable and desirable, the reasoning used to support it is of grave concern. A narrowing of the term "transaction" as defined in E-SIGN constitutes an invitation to other regulators to conclude that various consumer disclosures within their jurisdiction are not "related to a transaction," and so are not covered by E-SIGN at all, permitting the reintroduction of paper requirements that otherwise would be prohibited under E-SIGN.

As an alternative to attempting to narrow the statutory definition of "transaction" the Board has the option of making an explicit decision to exempt the shopping disclosures from E-SIGN's consent requirement. Applying the consent process to the Shopping Disclosures, which were deliberately sought out by the consumer in an electronic environment, is both burdensome and largely pointless. Because the consumer has no obligation to proceed, if the disclosures are not effectively delivered or cannot be read, the consumer may simply abandon the transaction, so that no material harm will result from the lack of consent.

By narrowing the scope of the definition of transaction in reaching its conclusion, the Board interprets Section 101(c) of E-SIGN as not applying to certain disclosures. In such cases, the Board must satisfy the requirements of Section 104(b) of E-SIGN before reaching a conclusion about the applicability of Section 101 of E-SIGN to these disclosures. On the other hand, the Board could have exempted such categories of disclosures from Section 101(c) of E-SIGN by following the procedures set forth in Section 104(d)(1). Given the burdens that the consumer consent provisions impose on shopping disclosures, the Board could have used either its interpretive or exceptive authority under the Act to eliminate such burdens without taking the extraordinary step of excluding shopping activities from the definition of a transaction under Section 101(c).

The Board fails to reconcile its conclusion that shopping is not related to a transaction for purposes of Section 101(c) with its apparent intent to include such activities within the scope of the definition of transaction in Section 106. Our concern with this line of reasoning is that it opens the door to excluding certain commercial activities such as shopping from the definition of transaction under both Sections 101(c) and 106, thus denying such activities both the burdens and the benefits of ESIGN. Such a line of reasoning in the hands of a regulator not favorably disposed to electronic commerce might consign shopping disclosures to a paper environment only. Clearly Congress did not intend such a result when it established detailed procedures for exercise by a regulator of its interpretive and exemptive authority under ESIGN.

II. Any Regulation Must be Consistent with the Broad Purposes of ESIGN.

A. Interpretation of the Consumer Consent Provisions

The Board interprets the consumer consent provisions without making the appropriate findings and otherwise complying with the requirements under Section 104. As noted above, in order to interpret the consumer consent provisions, the Board must find among other things, that there is a substantial justification for the Board's action, the resulting requirements for electronic disclosures will be substantially similar to the requirements for paper disclosures, and the requirements for electronic disclosures will not impose unreasonable cost.

We believe that the Interim Rule imposes delivery-related requirements on electronic disclosures that (i) add to the requirements of Section 101, and (ii) are not substantially equivalent to the requirements for equivalent writings. In addition, to the extent these requirements do not otherwise violate ESIGN, the Board has still failed make specific findings that (i) the regulation is substantially justified, (ii) the methods used to implement it are substantially equivalent to those for non-electronic records and will not impose unreasonable costs, and (iii) the methods are technology-neutral.⁷

E-mail notice for disclosures displayed in real time

The Interim Rule provides that, for disclosures other than the Shopping Disclosures, if a disclosure is posted on a website the consumer must be sent an e-mail (or postal mail) informing the consumer of the location at which the disclosure is available for review. The disclosure must remain available for at least ninety days from the delivery date. The requirement to deliver an e-mail (or postal) notification appears to apply even if the disclosure is being displayed and viewed at the website as part of an interactive real time session with the consumer. Under ESIGN, an electronic disclosure is the operative disclosure. In the case where a disclosure or notice is being reviewed on a website in real time, that disclosure is effective when it is displayed, just as it

⁷ See ESIGN § 104(b).

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would be effective when handed across a desk or delivered in the mail. If the consumer is offered the opportunity to retain a copy by printing or download at the time of display, then the record retention rules of ESIGN have been satisfied.⁸ Requiring additional notification constitutes a burden that is not equivalent to any imposed for paper documents. The Interim Rule should be revised to clarify that the e-mail notice is not required when the disclosure or notice is being displayed to the consumer electronically in real time as part of an interactive session.⁹

Redelivery

The Interim Rule requires a creditor to take “reasonable steps” to attempt redelivery of an electronic communication if the disclosure is returned undelivered. The Commentary indicates that such steps must include sending the disclosure to a different e-mail or postal address that the creditor has “on file.” No such requirement is imposed when disclosures are initially made through postal mail.

The redelivery issue is an example of an area in which the Board might be permitted to issue regulatory interpretations under ESIGN if it could make the required findings, including a determination that the methods chosen in the regulation are “substantially equivalent” to those that apply to non-electronic records and that they “will not impose unreasonable costs.” Due to the limitations of current technology, it may be more likely that e-mail will be returned as undeliverable than that a postal letter will be, which could provide a basis for regulatory action. But the method that the Board has chosen—requiring the creditor to send a second notice to another address that the creditor has “on file”—has the potential to be burdensome, because the creditor may have other addresses for the applicant “on file” but have no way to connect those addresses with the applicant.

⁸ See ESIGN § 101(e).

⁹ For disclosures that are not made in real time (other than Shopping Disclosures), the Interim Rule requires that those disclosures either be (i) delivered to an e-mail address or (ii) made available at another location (such as an Internet website) with an accompanying notification of availability delivered to an e-mail address or a postal address. It is the experience of the EFSC’s members that a certain small percentage of those consumers moving past the “shopping” phase of a transaction do not have, or are not willing to provide, an electronic address. The use of a postal address as a substitute for notification effectively eliminates any efficiencies derived from electronic disclosures. If those consumers unable or unwilling to provide an electronic address have agreed to receive electronic disclosures and have not withdrawn their consent, then it seems reasonable that other alternatives should be available for delivering disclosures. For example, the approximate timetable for delivery of specified disclosures, and the location at which they will be posted, could be provided to the consumer at the time of application if an e-mail address is not available. The Board may wish to consider offering such consumers the opportunity to participate in e-commerce by authorizing alternatives to e-mail notice, including the provision of a timetable and location for disclosures as an alternative for consenting consumers who have not provided an e-mail address.

B. Interpretation of the Timing and Content Exclusion

The Board misinterprets the timing exclusion contained in Section 101(c)(2) to permit it to establish different timing requirements for electronic communications than for those provided on paper.

Section 101(c)(2) of ESIGN states that—

Nothing in this title affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

Although the Board's rulemaking authority gives it power to issue regulations effecting content and timing, ESIGN overrides *any* other statute, regulation, or rule of law that may be inconsistent with ESIGN. As the Board acknowledges in the Preamble, regulatory agencies have limited authority to interpret ESIGN. The Act gives the Board no power to undermine the safe harbor that the Act creates.¹⁰ Thus, any regulations issued by the Board must be consistent with the broad purpose of ESIGN.¹¹ Regulation effecting electronic disclosures that exceed those for written ones should not be issued until the Section 104(b) findings are made to ensure that the intent of Congress and the purpose of ESIGN are upheld.

By purporting to impose requirements beyond those in ESIGN, the Board's Interim Rule undermines ESIGN's fundamental purpose. If the Board's Interim Rule is allowed to stand, then

¹⁰ This notion is clearly documented in the legislative history of ESIGN:

The conference report is designed to prevent Federal and State Regulators from undermining the broad purpose of this Act, to facilitate electronic commerce and electronic record keeping. *To ensure that the purposes of the Act are upheld, Federal and State regulatory authority is strictly circumscribed.* It is expected that Courts reviewing administrative actions will be rigorous in seeing that the purpose of this Act, to ensure the widest use and dissemination of electronic commerce and records are not undermined. [Cite to Congressional Record – House H4355 (emphasis added).]

¹¹ The legislative history of the ESIGN is again helpful:

As the bill makes clear, each agency will be proceeding under its preexisting rulemaking authority, so that the regulations or guidance interpreting section 101 will be entitled to the same deference that the agency's interpretations would usually receive. *This is underlined by the bill's requirements that regulations be consistent with section 101,* and not add requirements of that section, which restate the usual Chevron test that applies to and limits an agency's interpretation of a law it administers. [Cite to Congressional Record—House H4358-9 (emphasis added)].

the intent of Congress—“to facilitate e-commerce and to provide legal certainty for electronic signatures, contracts and records where such certainty [did] not exist”¹²—will be defeated.

C. Delivery of Forced Disclosures using “Multiple Screens”

The Board’s interpretation of §226.36(b) includes the following analysis of methods for forcing the review of certain disclosures:

When a creditor permits the consumer to consummate a closed-end transaction on-line, the consumer must be required to access the disclosures required under § 226.18 before becoming obligated. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before becoming obligated. Or the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure.

The methods for forcing disclosure described in the Staff Interpretation are instructive. However, it is not clear from the Staff’s comments whether the methods described are intended to be examples, or to constitute the exclusive methods for deploying a forced disclosure. In particular, the reference to “multiple screens” could be read as a rejection of the use of scroll boxes to deliver disclosures that require more than a single screen for full display. Prohibiting the use of scroll boxes for the delivery of important information would be contrary to both current practice and would set a different standard than the guidelines for conspicuous disclosure provided by the FTC in connection with the delivery of online privacy notices, which permit the use of scroll boxes for delivering disclosures.¹³ The Board should consider revising the Staff Interpretation to reflect that there are a broader range of delivery solutions available, beyond the examples provided in the Interpretation.

CONCLUSION

The EFSC strongly supports the Board’s actions in formulating and promulgating the Interim Rule. The Interim Rule provides valuable guidance on the delivery of electronic disclosures and notices. It is at least arguable that the Board has the authority to issue the Interim Rule without regard to the requirements of E-SIGN. However, the law of electronic records and signatures is in its infancy. E-SIGN creates a new environment for delivering notices and disclosures. It is intended to foster both efficiency and innovation. Congress clearly intended E-SIGN to provide an across-the-board set of guidelines for federal regulation of electronic notices and disclosures

¹² 146 Cong. Rec. S5282 (June 16, 2000) (emphasis added).

¹³ See 16 CFR Part 313.

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used in place of required writings. The Board is a highly influential and well-regarded regulator, and the Interim Rule represents the first comprehensive attempt to interpret ESIGN as it applies to specific federal disclosure requirements. The EFSC believes it is essential that the Board's final Rule complies with the procedural requirements and limitations of ESIGN, in order to promote a uniform environment for electronic transactions and clear early guidance to other regulators addressing the same issues. The EFSC looks forward to working the Board Staff to achieve these goals.

The EFSC appreciates the opportunity to comment on the Interim Rule.

Very truly yours,

[SIGNED]

Jeremiah S. Buckley