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March 17, 2001

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Sallianne Fortunato
National Telecommunications and Information Administration
Room 4716
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: ESIGN Study - Comment P004102

To the Federal Trade Commission ("FTC"):

These comments are provided in response to your Request for Comment and Notice of Public Workshop on the Electronic Signatures in Global and National Commerce Act ("ESIGN"). The Electronic Financial Services Council ("EFSC") is a national trade association promoting legislation and regulation designed to ensure that electronic commerce continues to revolutionize the availability and delivery of financial services.

The EFSC welcomes the opportunity to comment on the benefits and burdens of requiring consumer consent to receive information electronically pursuant to Section 101(c)(1)(C)(ii). The EFSC believes that as a general matter the rules set forth in ESIGN have tremendous potential for assisting the growth of electronic commerce. Furthermore, the EFSC is firmly committed to the proposition that consumers are entitled to timely and meaningful information concerning their options and all the methods available to them for receiving required notices and disclosures. Electronic commerce cannot reach its full potential without the consumer's complete comfort with, and confidence in, both the process and the medium. Effective delivery of the ESIGN

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consent disclosures as set forth in Section 101(c)(1) (“ESIGN consent disclosures”) will materially contribute to that comfort and confidence.

The EFSC strongly supported the original package of consumer protection provisions added to ESIGN in the House of Representatives (sometimes called the “Inslee Amendments”). The EFSC supports both (i) the requirement under Section 101(c)(1)(A) that consumers give affirmative consent to electronically receive information otherwise required to be in writing, and (ii) disclosure of the information currently mandated by Section 101(c)(1)(B).

However, the EFSC also believes that the current rules regarding the *timing and methodology* for delivering the ESIGN disclosures and obtaining consumer consent could be substantially improved. Certain elements of ESIGN’s rules concerning effective consumer consent in Section 101(c)(1)(C)(ii) were not part of the original Inslee Amendments. Instead, they were added at the very end of the legislative process and so were, perhaps, unavoidably subjected to a less rigorous level of analysis than the rest of the statute. In particular, the consent process described in Section 101(c)(1)(C)(ii) can create unanticipated, and unintended, obstacles to the effective use of electronic commerce by both consumers and businesses. This letter will respond to a number of the questions the FTC has addressed to the financial services industry concerning the ESIGN consent procedure.

The consumer consent provisions in ESIGN Section 101(c) lay out four principal procedural requirements:

- The consumer must be provided the “ESIGN consent disclosures”;
- The disclosures must be conspicuously displayed prior to the consumer’s first receipt of information which otherwise would be required to be delivered in writing (“required information”);
- Having received the ESIGN consent disclosures, the consumer must consent electronically to receive the required information in electronic form; and
- There must be a “reasonable demonstration” of the consumer’s ability to receive and access the file formats that will be used during the transaction.

EFSC’s members are now in the process of designing and implementing a variety of products and services intended to benefit from and implement ESIGN. For the most part, these products and services are still in the planning and design stage, so that at this time the EFSC has little empirical data available concerning consumer acceptance and practical application of the ESIGN consent disclosure requirements “in the field.” However, the EFSC’s members do have experience in design and implementation of electronic commerce applications that are not dependent on ESIGN for validity (e.g. online lending applications, commercial data, aggregation and exchange, and agreements for provision of certain financial services), as well as significant experience

with consumer reaction to those designs. Based on this experience, the EFSC's members believe that implementation of the consumer consent provisions, and in particular the electronic consent and "reasonable demonstration" requirements of Section 101(c)(1)(C)(ii), impose the following potential burdens (discussed in more detail below):

- The combination of the timing and ESIGN consent disclosure requirements may, in a number of instances, force presentation of the ESIGN consent disclosures before the customer has committed to the transaction in any form, and before the customer is prepared to choose either an electronic or written medium. An example would be the delivery of pre-application disclosures in connection with certain types of consumer credit products.
- The reasonable demonstration test requires interruption of the contracting process to establish, based on a subjective standard, the consumer's ability to access documents that are provided in formats in common use for which viewing software is freely available. The test also provides an incentive to favor certain file formats over others in order to streamline the testing process.
- The requirement of electronic consent, combined with the reasonable demonstration test, impairs the use of electronic contracting and disclosure in business models where the relationship begins with a face-to-face meeting in a commercial setting or via telephone (or some combination of the two), but both parties wish to communicate and exchange required information electronically.
- Technical violations of the rules for ESIGN consent disclosures may result in disproportionate penalties.

As noted earlier, the members of EFSC have not, in general, had a chance yet to fully test consumer acceptance of, or reaction to, the systems and processes they are designing. It is conceivable that additional issues may arise as testing continues.

It is the view of the EFSC that the information communicated to consumers in the ESIGN consent disclosures is of significant benefit to both consumers and businesses; it empowers consumers to make educated decisions regarding the transaction of business and the receipt of legally required disclosures electronically. However, the benefits associated with some of the technical and procedural requirements outlined above for the delivery of the ESIGN consent disclosures and the process for obtaining consumer consent are significantly outweighed by the burdens they impose on electronic transactions involving financial services and products. The balance of this letter will explore each of these burdens in more detail and suggest statutory solutions that would retain the most meaningful benefits of the consent provisions, while reducing the burdens. The letter will also indicate the FTC questions that are addressed in the course of the discussion.

EVALUATING THE BURDENS

Timing (Responds to FTC Questions 1, 3, 5, 6, 12, 15)

As a general matter, both ESIGN and the Uniform Electronic Transactions Act (“UETA”) require the parties to an electronic transaction to agree to replace any required writings or traditional signatures with electronic equivalents. The consent can be express or implied from the circumstances. Timing is left to the parties under the UETA for all transactions and for business-to-business transactions under ESIGN. Consent may be given before the electronic records and signatures are utilized, or the use of electronic methods may be ratified at any time during the transaction or even after the transaction is concluded.

In contrast, Section 101(c) requires the ESIGN consent disclosures to be given before the required information is provided. In some financial transactions (particularly certain types of consumer credit transactions) required information must be delivered before the consumer is committed to conclude the transaction. The presentation of the full ESIGN consent disclosures while the consumer is still evaluating the proposed transaction can be intrusive and confusing. Introducing the burden of reviewing and absorbing the ESIGN consent disclosures too early in the “shopping” process may cause consumers to reflexively opt out of efficient, cost effective electronic delivery and signature systems that could benefit them. This is particularly true in the context of an online transaction initiated by the consumer, who is actively and intentionally seeking out the required information electronically. The forced display of the detailed ESIGN consent disclosures while the consumer is still shopping interrupts the consumer’s evaluation of the proposal, and may lead to the erroneous belief that the consumer is being asked to commit to the transaction itself, when all that is being sought is consent to use electronic records to effect delivery of pre-transaction required information.

Past experience with consumer reactions to online contracting strongly suggests that under these circumstances many consumers will become either frustrated or confused and abandon the transaction entirely. As a consequence, some lenders designing online systems are actively seeking ways to delay the ESIGN consent disclosures until the consumer is at the point of committing to the transaction. One way this is being done is by invoking the rules relating to telephone loan applications, so that initial delivery of required information may occur shortly after the consumer has completed the application process. In this way, the ESIGN consent disclosures do not interrupt or interfere with the consumer’s evaluation of the offered loan and completion of the application. The result is that the timing of information flow to the consumer is being determined, not by consumer preference, need or convenience, but by the strictures of the timing requirements for consumer consent.

Reasonable Demonstration Test (Responds to FTC Questions 1, 3, 7, 12, 15, 26, 27)

The requirement of a “reasonable demonstration” of the consumer’s ability to receive file formats is already having an impact on electronic financial services, both by (i) discouraging the use of widely available, reliable file formats, such as Adobe Acrobat PDF (“PDF”) in favor of HTML and other formats native to the software delivering the ESIGN consent disclosures, and (ii) discouraging some major lenders from utilizing ESIGN at all.

One of the principal goals of any electronic information delivery process is to keep the flow of information as streamlined as possible. Experience has shown that frequent extended interruptions and downloads increase the likelihood that the consumer will abandon the transaction. As a result, EFSC members and representatives have observed a growing pattern over the last few months: a number of system designers are selecting the native file format of the software delivering the ESIGN consent disclosures (such as HTML for a web browser) as the *exclusive* file format for delivering all required information. This choice is made because it simplifies completion of the reasonable demonstration test, without regard to whether it is the best format for handling the documents in the transaction. Financial service providers reason that in many cases consumers will initiate electronic contact over the Internet, using a web browser, or using proprietary software provided for the specific purpose (such as bill payment or money management software). If the ESIGN consent disclosures are delivered in the software’s native format, and the consumer reviews the ESIGN consent disclosures and affirmatively consents, that should constitute a “reasonable demonstration” of the consumer’s ability to receive records. The consumer and service provider have not had to deal with multiple formats, and the consumer has not had to endure a complex “download and response” test.

Essentially, the reasonable demonstration test provides a disincentive to use alternative file formats such as PDF and Microsoft Word, despite the fact that these formats are highly reliable, print and store accurately across a wide variety of platforms and printers, provide an excellent medium for delivering information with the formatting intact, and may be viewed using software that is distributed free of charge and is widely available. As a result, the file format of choice is being selected by some designers based on its unobtrusive “fit” into the reasonable demonstration test, and not on an evaluation of the most appropriate and useful format for the transaction. This is ironic, given Congress’ clear general intent that ESIGN be technologically neutral and not favor any one process or format for doing business electronically to the detriment of others.

In addition, uncertainty as to what constitutes a “reasonable demonstration” is persuading some businesses to avoid the use of electronic documentation entirely. The test is subjective and fact-based. This means that even if the required information is

actually received and reviewed, consumers may at a later date challenge the effectiveness of the required information based on whether the *test* was reasonable. Furthermore, because the reasonableness of the test will usually be a question of fact, not law, there will be little opportunity for the industry to shape its testing process based on reported judicial decisions and prior case law. Representatives of the EFSC have been present at public forums where counsel to large, sophisticated lenders stated that they have advised their clients against using ESIGN because of these uncertainties.

Electronic vs. written consent (Responds to FTC Questions 1, 3, 12, 13)

The primary benefits of substituting electronic records and signatures for traditional paper-and-ink documents are the ability to better manage data, workflow, quality control, speed of delivery, and document management (storage, retrieval and transmission). These benefits accrue whether a transaction is initiated online, or initiated in person. In the financial services industry, many customers still prefer to establish a relationship with an in-person visit, but are fully prepared to accept electronic delivery of the required information that is part of the ongoing relationship. Because of the electronic consent and reasonable demonstration requirements, businesses cannot rely on a consumer's consent obtained during the initial in-person meeting. Instead, the business must provide instructions for giving consumer consent, which the consumer must keep and remember to follow at a later date. In some instances, the time for providing certain required information may be running while the business is waiting for the consumer to complete the consent process. As a result, the business must continue to send paper documents to a consumer who is slow to complete the consent procedure, even though the consumer may be ready, willing and able to receive electronic documents.

Disproportionate Penalties (Responds to FTC Questions 1, 3, 5, 11, 12, 14)

Under Section 101(c)(1)(A) and (B), a technical failure to comply with the ESIGN consent disclosure and timing requirements may result in ineffective delivery of the required information, even if the violation was not intentional and did not prevent receipt and review of the required information. If the required information is not considered effectively delivered, or consent is deemed ineffective, the provider of the required information may be exposed to significant statutory damages and other remedies associated with the substantive law underlying the transaction. For example, it might be argued that an unintentional misstatement of the fees for paper copies, or a technically incorrect statement of hardware or software requirements, invalidates both the consent and delivery of the required information, even though the inaccurate disclosure had no impact on the transaction and the required information was actually received and reviewed successfully. In the same vein, it may be argued that both consent and delivery of required information is invalidated if the presentation of the ESIGN consent

disclosures is not correctly timed, even though the consumer wished to consent and actually received and reviewed the required information.

EVALUATING THE BENEFITS

Each of the consent timing and methodology requirements discussed above generates some benefit. However, upon examination it is clear that the benefits are not as significant, or as certain, as might be thought at first glance.

Timing (Responds to FTC Questions 3, 5, 17)

The object of the ESIGN consent disclosures timing rule is to prevent the use of ESIGN to force the consumer to accept electronic delivery of required information. It is also intended to prevent the use of ESIGN to render required information ineffective either because it is delivered in an obscure manner or in file formats the consumer is unable to view, download or print. In the context of required information delivered before the consumer is committed to the transaction, however, the need for such protection is attenuated, so long as the consumer has initiated the transaction online and has been notified that important information is about to be delivered electronically. If the information is delivered in an inaccessible format, or is garbled in transmission, or is otherwise unreadable, the consumer has the option of simply terminating the transaction. The past experience of EFSC members strongly indicates that consumers routinely terminate unconsummated transactions when they become frustrated or confused by the on-line process.

Reasonable Demonstration Test (Responds to FTC Questions 3, 17)

The “reasonable demonstration” test is intended to establish the ability of a consumer to receive and view the file formats being used to deliver required information. The significance of the test is diluted, however, because of other protections available to the consumer. Intentional use of obscure or unstable file formats will run afoul of state and federal laws governing deceptive trade practices and fraud. In addition, even in the case of unintentional delivery problems the consumer retains the right to rescind consent and either terminate the transaction or demand delivery of required information on paper.

In addition, the effectiveness of the test is, by definition, limited to the computer the consumer is using at the time the test is administered. Many consumers have Internet access both at home and at work, and may have multiple computers in their home. The various computers may use different operating systems, different versions of key software, or even competing software to perform the same functions. The relevancy of the test is diminished because it only establishes the ability to receive and view the files on one computer, which may not even be the computer on which the consumer

principally relies. In cases where the proposed file formats are in common use, and software for viewing the file format is freely available, the test will often be no more than an unnecessary annoyance for all parties.

Electronic vs. written consent (Responds to FTC Questions 3, 17)

The primary purpose of the electronic consent requirement is to prevent consumers who do not have the ability to receive electronic records from unwittingly or unwillingly agreeing to their use for required information. This is perceived as a particular problem with respect to the homebound and the elderly. However, it is not clear what benefit this adds to a transaction initiated in a commercial establishment or by telephone, if the full ESIGN consent disclosures are provided at the time of the election. In most cases, if the transaction is occurring at a place of business it means that the consumer sought out the transaction. If the consumer is unwilling or unable to accept electronic delivery of required information, or is feeling undue pressure to accept electronic delivery, then the consumer can simply terminate the exchange.

Disproportionate Penalties (Responds to FTC Questions 3, 5, 17)

The imposition of penalties for intentional and material non-compliance with ESIGN's consent and timing requirements is both necessary and appropriate; it provides an incentive for compliance and a remedy for injured consumers. However, penalties do not accomplish either of those goals in situations where a good faith attempt at compliance has occurred, the violation is inadvertent and non-material, and the required information was actually delivered. Penalties will not prevent unintentional technical violations, and offering remedies to consumers who were not harmed by the error results in a windfall, not relief from an injury. Furthermore, the cost of settlement of actions brought in connection with unintentional technical violations is borne by all consumers.

RECOMMENDATIONS

(responds to FTC questions 2, 4, 17)

In light of the foregoing evaluation, the EFSC recommends that the following four changes be made to the ESIGN Act:

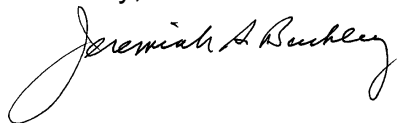
- a. In circumstances where a consumer is initiating a transaction electronically and required information must be given before the consumer is obligated on the transaction, it should not be necessary to display the full ESIGN consent disclosures before providing the required information. An alternative procedure should be available, permitting the display of a brief statement requesting consent to deliver the information electronically, advising that the

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- full ESIGN consent disclosures are available for review, and providing the consumer voluntary access to the full disclosures before proceeding. Conspicuous display of the full ESIGN consent disclosures would still be required before the consumer becomes bound to complete the transaction.
- b. It should be possible to give consent either electronically, or on paper if the transaction is being initiated at a commercial location, or over the telephone. Written or telephonic consent should be preceded by the full ESIGN consent disclosures, including a disclosure of the file formats and delivery methods that will be used to provide required information to consumers.
 - c. The “reasonable demonstration” test should not be required when information is being provided in file formats for which free viewing software is available (examples would include HTML, PDF, or Microsoft Word), if the consumer is given notice of the availability of the viewing software as part of the ESIGN consent disclosures (this would mirror the practice on a number of federal websites, including the FTC and Internal Revenue Service sites, where files are made available for downloading in PDF format and hyperlinks are provided to obtain free PDF viewing software).
 - d. The consumer’s consent and effective delivery of required information should not be invalidated as a result of technical violations of the ESIGN consent disclosure or timing requirements, where the required information is actually received and reviewed.

By its nature, a comment letter of this type can sometimes seem to focus on the negative. The members of the EFSC wish to emphasize that they are enthusiastic supporters of the ESIGN legislation and its potential contribution to efficiency, economic expansion, and consumer convenience. The fact that large-scale implementation of ESIGN has not yet occurred should not be read as a lack of enthusiasm for the statute or a waning of industry interest in electronic commerce. Rather, the deliberate pace reflects the determination of many responsible members of the financial services industry to act thoughtfully and to roll out ecommerce applications that are well designed and well implemented.

Sincerely,



Jeremiah S. Buckley
General Counsel