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# ***CONSUMER MORTGAGE COALITION***

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June 29, 2007

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, D.C. 20551

**Re: Electronic Delivery of Disclosures: Docket Nos. R-1281 (Regulation B); R-1282 (Regulation E); and R-1284 (Regulation Z)**

Dear Ms. Johnson:

The Consumer Mortgage Coalition (CMC), a trade association of national mortgage lenders, servicers, and services providers, appreciates the opportunity to submit our views to the Board of Governors of the Federal Reserve System (the Board) regarding the Board's proposed revisions (Proposals) for the electronic delivery of disclosures under three consumer protection regulations: Regulations B, E, and Z<sup>1</sup>.

In 2001, the FRB published Interim Final Rules<sup>2</sup> to establish uniform standards for the electronic delivery of disclosures in light of the Electronic Signatures in Global and National Commerce Act (ESIGN).<sup>3</sup> In response to comments, the Board decided later in 2001 to suspend the mandatory compliance date for the Interim Final Rules, and institutions have not been required to comply with them.<sup>4</sup>

The current Proposals would withdraw those portions of the Interim Final Rules that restate or cross-reference portions of ESIGN, as well as additional portions of those rules that the Board believes may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection. They would retain certain other portions of the Interim Final Rules that provide regulatory relief or guidance on providing electronic disclosures.

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<sup>1</sup> 72 Fed. Reg. 21125 (Regulation B), 21131 (Regulation E), and 21141 (Regulation Z) (Apr. 30, 2007). The Board is also proposing similar revisions to Regulations M and DD that are not addressed in these comments.

<sup>2</sup> 66 Fed. Reg. 17779 (Regulation B), 17786 (Regulation E), and 17329 (Regulation Z) (Mar. 30, 2001).

<sup>3</sup> 15 U.S.C. § 7001 *et seq.*

<sup>4</sup> 66 Fed. Reg. 41439 (Aug. 8, 2001).

The CMC strongly supports the apparent goals of the Proposals to (1) eliminate provisions from the Interim Final Rules that create confusion about institutions' obligations when making disclosures electronically or that add to regulatory burden, while (2) at the same time, exercise the Board's authority under ESIGN and the underlying statutes to make it clear that institutions may meet the requirements of the regulations by delivering certain information electronically without obtaining consumer consent under ESIGN. In repealing certain provisions of the Interim Final Rules, however, the Proposals could create uncertainty about whether an institution that has been complying with those provisions is still in compliance with the regulations.

Specifically, CMC believes that:

- The Board should make clear that the procedures provided in the Interim Final Rules are a safe harbor for compliance with the underlying regulations. For example, rather than delete the provisions entirely, the Board could move them to the respective Official Staff Commentaries and make it clear that they are only examples of how to deliver electronic disclosures.
- The Board should make it optional rather than mandatory for creditors to provide electronic application-related disclosures when they receive an application electronically. Creditors that take applications in person often input the information with a laptop computer or personal digital assistant (PDA) but prefer to provide disclosures in hard-copy form.
- To be consistent with allowing application-related disclosures to be provided electronically when the application is submitted in electronic form, the Board should also allow creditors in that situation to assume that the consumer can retain those disclosures without making the case-by-case determination that would otherwise be required by ESIGN.
- The provisions of Regulation Z that allow creditors to deliver one copy (rather than the normal two) of rescission documents to a consumer who has consented to receive electronic disclosures should be clarified to address technical questions raised by the redrafting. For example, the Official Staff Commentary to Regulation Z should make clear that only one copy need be delivered if the consumers have specified a single email address.

### ***Deletion of Specific Requirements for Electronic Disclosures***

The Board is proposing to eliminate the specific disclosure requirements for electronic transactions under Regulations B, E, and Z. The detailed requirements of the Interim Final Rules that apply to all electronic disclosures would be repealed.<sup>5</sup>

These provisions have stated that a disclosure that must otherwise be provided in writing may, consistent with ESIGN, be provided either by e-mailing the disclosure to the consumer or by making it available at another location such as on the institution's web

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<sup>5</sup> See 12 C.F.R. §§ 202.16, 205.17, 226.36.

site, notifying the consumer by e-mail or postal mail that it is available, and retaining it on the web site or other location for at least 90 days after the later of the date of the notice or the date the disclosure first becomes available. CMC agrees with the Board that mandating specific timing and delivery requirements is inappropriate. As the Board appears to have recognized when it suspended the mandatory compliance date for the Interim Final Rules, ESIGN provides that regulations interpreting it may not add to the substantive requirements set out in 15 U.S.C. § 7001 and must be substantially equivalent to the requirements imposed on equivalent writings.<sup>6</sup> In addition, as the Board notes in the preambles to the Proposals, some consumers do not wish to receive e-mail alerts and sending some information by e-mail can raise concerns about data security, identity theft, and phishing.

While we agree that it is inappropriate, and inconsistent with ESIGN, to mandate specific timing and delivery requirements, the Board never required compliance with the provisions that would now be repealed. Therefore, these provisions have functioned as a safe harbor, protecting an institution that complies with them from liability for failing to make the disclosures required by the underlying regulations. An e-mail notice can be the most convenient and efficient way for an institution to comply with the requirements of the regulations, such as, for example, the requirement of Regulation E to provide a notice when a preauthorized payment varies in amount, such as a change in a mortgage payment reflecting a change in the escrow payment.<sup>7</sup> Such a notice can be provided with little or no security risk by, for example, truncating the account number. Providing a notice electronically can also be more useful to the consumer than the traditional postal notice, which may be delayed in the mail or may not be accessible to a consumer who is traveling.

If the Board adopts its proposal to repeal the timing and delivery requirements in the Interim Final Rules, it should emphasize that institutions are free to continue to follow them, and if they do so, they will continue to be in compliance with the underlying regulations. For example, rather than delete the provisions entirely, the Board could move them to the Official Staff Commentaries to the regulations and make it clear that they are simply examples of procedures that comply.

### ***New Electronic Disclosure Requirements***

The Proposals would amend the regulations to provide, in general, that any disclosure that the regulation permits to be provided in writing may be provided in electronic form, subject to compliance with applicable consumer consent and other provisions of ESIGN. Regulations B and Z would be amended to provide that certain disclosures provided at the time of application may be provided electronically without obtaining the consumer's consent under ESIGN, if the consumer submits an application electronically. These disclosures include, for example, the disclosures under Regulation B that the designation of a title is optional; and that income from alimony, child support, or separate maintenance payments need not be revealed if the applicant does not want it considered in determining creditworthiness; as well as disclosures in connection with requests for

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<sup>6</sup> See 15 U.S.C. § 7004(b).

<sup>7</sup> See 12 C.F.R. § 205.10(d).

government monitoring information. Regulation Z disclosures that could be provided electronically without consumer consent in the context of an electronic application would include the initial disclosures for home equity lines of credit (HELOCs) and adjustable-rate mortgages (ARMs). The Interim Final Rules also provide that these disclosures may be made electronically without ESIGN consumer consent, although the Proposals would expand the list of disclosures required by Regulation B that explicitly may be provided electronically without consent.<sup>8</sup>

CMC strongly supports allowing these disclosures to be provided electronically notwithstanding the consent and other requirements of ESIGN. It makes no sense to require separate consumer consent to receive electronic disclosures that relate to the application when the consumer has implicitly consented by submitting the application electronically. As drafted, however, these provisions of the Proposals could be construed to mandate electronic disclosures whenever the consumer applies electronically, whether the application is submitted remotely or as part of an in-person transaction.

It is becoming more and more common for lenders to complete the loan application electronically in person at the lender's or consumer's office or at another convenient location. The application information may be entered into a terminal, laptop, or PDA by an employee or agent of the lender and then electronically reviewed and signed by the consumer, or the consumer may enter it directly. Electronically-submitted applications are easier and cheaper to prepare and process, less prone to entry errors, and result in faster decisions than their paper equivalents. But lenders that accept electronic applications in person often choose to provide required disclosures in paper form, to make it easier for the consumer to retain the disclosures and to accommodate customers who do not wish to receive them electronically.

As a result, requiring Regulation B and Z disclosures to be delivered electronically in all cases where the application is submitted electronically would actually impair the use of electronic technology as part of a face-to-face application process. Lenders would have an incentive to require a paper application so that they could continue to deliver the disclosures on paper.

In addition, requiring the disclosures to be delivered electronically appears to conflict with the provision of ESIGN noted above, 15 U.S.C. § 7004(b), that prohibits regulations from adding to the substantive requirements of 15 U.S.C. § 7001 and requires that any regulation be substantially equivalent to the requirements imposed on equivalent writings. It also appears to conflict with the provision in 15 U.S.C. § 7001(b) stating that ESIGN does not require any person to accept or use electronic records in lieu of paper.

Rather than require that application-related disclosures be made electronically when an application is submitted in electronic form, the Board should give creditors the option of providing them electronically, without explicit ESIGN consent, when the consumer submits an electronic application. The proposed Commentary language providing

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<sup>8</sup> Because Regulation B does not require that the disclosures that would be added to the list of permissible electronic disclosures be provided in writing, the ESIGN consent requirement would appear not to apply to those disclosures, and there should be no need to recognize explicitly that they may be provided electronically without consent.

examples of how electronic disclosures may be made should be retained, but it should be made clear that the creditor also has the option of providing the information in hard-copy form. This approach would be consistent with industry practice in capturing information electronically in in-person transactions, while providing paper disclosures, and would not conflict with ESIGN.

#### Disclosures in a Form That the Borrower Can Keep

A related issue is the requirement of the regulations that most disclosures must be in a form that the consumer may keep.<sup>9</sup> To be consistent with allowing application-related disclosures to be delivered electronically, the Board should also make it clear that the creditor can assume that if disclosures for which ESIGN consent is not required are in a form that can be downloaded, saved to disk, or printed, such as a standard HTML or PDF file, the consumer can retain them. Therefore, the creditor need not follow the ESIGN “reasonable demonstration” procedures.<sup>10</sup> In virtually all instances, if the consumer is able to access a web site, the consumer will be able to print electronic disclosures or download them to a disk drive or other storage medium. It would defeat the purpose of allowing application disclosures to be made electronically without consent to require institutions to make a case-by-case determination of whether the consumer can retain them.

#### ***Retention of Other Electronic Disclosure Provisions***

The proposal to amend Regulation Z and the Official Staff Commentary to Regulation Z would retain the substance of provisions of the Interim Final Rules that:

- Provide that only one copy of the notice of the right to rescind and the Truth in Lending Act disclosures need be delivered to each consumer if the notice is delivered electronically, as opposed to the two copies that are otherwise required; and
- Provide rules for providing disclosures in web advertising that are analogous to the rules for catalogs and multi-page print advertisements.

We support the retention of these provisions, which allow creditors to adapt their procedures to the differing circumstances presented by the electronic environment. The redrafting of the Commentary provisions on rescission, however, raises some issues of interpretation that should be clarified:

- Deletion of the statement that “[e]ach co-owner must consent to receive electronic disclosures and each must designate an electronic address for receiving the disclosure” could be misconstrued. The regulation should make clear that each co-owner who is entitled to the right to cancel must receive the disclosures, and that each co-owner must individually consent to receiving them electronically.

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<sup>9</sup> See 12 C.F.R. §§ 202.4(d), 205.4(a)(1), 226.5(a)(1).

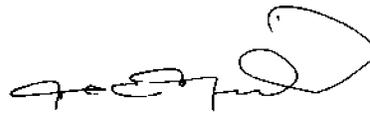
<sup>10</sup> See 15 U.S.C. § 7001(c)(1)(C).

- Where some, but not all, co-owners consent to electronic disclosures, it should be clear that the creditor can provide a single electronic copy of the documents to each of those who consent and two paper copies each to those who do not.
- The Commentary should make clear that the creditor may provide a single set of documents to co-owners who have the same e-mail address or other electronic point of contact. It should also make clear that a creditor may require that consumers who wish to receive disclosures electronically provide such a single contact point.

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The CMC appreciates the opportunity to comment on these important issues. Please call me at (202) 742-4366 with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne Canfield". The signature is fluid and cursive, with a large loop at the end.

Anne Canfield  
Executive Director