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June 29, 2007

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

Re: Electronic Delivery of Disclosures: Docket No. R—1284 (Regulation Z); Docket No. R—1285 (Regulation DD); Docket No. R—1281 (Regulation B); Docket No. R-1283 (Regulation M); and Docket No. R-1282 (Regulation E)

Dear Ms. Johnson:

The Electronic Signature and Records Association (“ESRA”) is a trade association founded in 2006 to help educate the public on the use and acceptance of electronic signatures and records and to promote a legal and regulatory environment that remains friendly to electronic commerce as it grows in importance.¹ ESRA 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 (“Proposed Rules”) for the electronic delivery of disclosures under the five consumer protection regulations: Regulations B,² E,³ M,⁴ Z⁵ and DD⁶.

In 2001, the FRB published interim final rules (“Interim Final Rules”) to establish uniform standards for the electronic delivery of disclosures.⁷ However, the mandatory compliance date for these rules was later lifted and institutions have not been required to comply with the Interim Final Rules.⁸

The Proposed Rules intend to revise and amend the Interim Final Rules by:

(i) withdrawing certain portions of the Interim Final Rules that restate or cross-reference provisions of the Electronic Signatures in Global and National Commerce Act (“ESIGN”),⁹ (ii) withdrawing provisions of the Interim Final Rules that may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection, and (iii) retaining certain provisions of the Interim Final Rules that provide guidance on the use of electronic disclosures. The Proposed Rules would also implement certain

¹ Current ESRA members are: Adobe Systems, AIG, AlphaTrust, DealerTrack, DocuSign, eOriginal, Fidelity National Title, Genworth Financial, Interlink Electronics, LandAmerica Lender Services, Silanis, Topaz Systems, USAA, Voice Signature, and Wells Fargo Home Mortgage. More information regarding ESRA can be found on the ESRA website at www.esignrecords.org.

² 72 Federal Register 21125 (Apr. 30, 2007).

³ 72 Federal Register 21131 (Apr. 30, 2007).

⁴ 72 Federal Register 21135 (Apr. 30, 2007).

⁵ 72 Federal Register 21141 (Apr. 30, 2007).

⁶ 72 Federal Register 21155 (Apr. 30, 2007).

⁷ 66 Federal Register 17322 (Mar. 30, 2001) (Regulation M); 66 Federal Register 17329 (Mar. 30, 2001) (Regulation Z); 66 Federal Register 17786 (Mar. 30, 2001) (Regulation E); 66 Federal Register 17779 (Mar. 30, 2001) (Regulation B); 66 Federal Register 17795 (Mar. 30, 2001) (Regulation DD).

⁸ 66 Federal Register 41439 (Aug. 8, 2001).

⁹ 15 U.S.C. § 7001 *et seq.*

provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which mandates certain disclosures for online credit card solicitations.

We support the Board's efforts to continue to facilitate the electronic delivery of financial services. We believe that most of the proposed revisions will be beneficial to consumers and the industry alike.

COMMENTS

The 2001 interim final rule allowed creditors to provide certain disclosures to consumers electronically, without regard to the consumer consent or other provisions of ESIGN, for disclosures provided on or with an application or solicitation (the "shopping disclosures") or an advertisement. The Board reasoned that these disclosures, which would be available to the general public while shopping for credit, did not "relate to a transaction," which is a prerequisite for triggering the ESIGN consumer consent provisions, and thus were not subject to those provisions. The Proposed Rules instead, use the Board's authority under Section 105(a) of the Truth in Lending Act ("TILA"),¹⁰ as well as under Section 104(d) of the ESIGN¹¹ to continue the exemption from the ESIGN consumer consent provisions for shopping disclosures.

ESRA applauds the Board's decision to use its authority under Section 104(d) of ESIGN to continue to exempt "shopping" disclosures from the ESIGN consumer consent provisions rather than interpreting the definition of a "transaction." Moreover, ESRA supports the Board's findings that consumers would not be harmed, and in fact would benefit, by having timely access to shopping and advertising disclosures in electronic form when they are shopping for credit online or viewing online credit advertising.

We also support the Board's proposal to eliminate the Interim Final Rule's requirements: (1) for creditors who posted disclosures to a designated website, to provide a notice to consumers alerting them to the availability of the disclosures; (2) that disclosures posted on a website would have to be available for at least 90 days; and (3) to make a good faith attempt to redeliver electronic disclosures that were returned undelivered, using the address information available in the creditors files.

ESRA agrees with the Board's findings that there are significant operational and information security concerns with respect to the requirement to send in the first instance or in the event of redelivery, an alert notice to an e-mail address designated by the consumer, and that making disclosures available for at least 90 days would increase costs and would not be necessary for consumer protection.

ESRA would like to emphasize that purpose of the enactment of ESIGN was to place electronic records and signatures on an equal footing with traditional pen and ink-based documents and signatures. It was not the intent of the drafters of ESIGN to create a law that would be used to burden the electronic medium. The provisions in 15 USC § 7004(b) specifically state that regulations issued interpreting ESIGN may not add to the requirements of ESIGN, and must be substantially equivalent to the requirements imposed on equivalent writings.

¹⁰ Section 105(a) of TILA provides that regulations prescribed by the Board under TILA "may provide for such adjustments and exceptions * * * as in the judgment of the Board, are necessary or proper to effectuate the purposes of [TILA], * * * or to facilitate compliance [with the requirements of TILA]."

¹¹ Section 104(d) of ESIGN authorizes federal agencies to adopt exemptions for specified categories of disclosures from the E-Sign notice and consent requirements, "if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers."

ESRA encourages the Board to continue to ensure that electronic records are not disadvantaged in its rulemakings and other regulatory actions. Electronic commerce has fostered, and will continue to foster, innovation in the financial services markets, lowering costs and providing consumers with more choices in both financial services and financial service providers. These benefits will not be realized, however, if electronic records and signatures are held to higher standards than other media.

That being said, we would urge the Board in its final rule to encourage companies to employ prudent procedures and practices to address some of the policy considerations that led to the Board to include these delivery provisions in the Interim Final Rules in the first instance. Creating a trusted medium in which consumers can feel comfortable engaging in electronic business transactions is an important objective. Many industries in the financial services sector have adopted SPeRS (Standards and Procedures for Electronic Records and Signatures) as their guide when implementing strategies for delivery and other issues associated with doing business electronically. We would encourage the Board to recommend in its final rule that companies utilize resources such as SPeRS as they continue to employ their online programs.¹²

We would also like to note that there are some specific provisions of the Proposed Rules that may conflict with other provisions of ESIGN and have unintended consequences that will burden the electronic medium. More specifically, our concerns are as follows:

- (1) The Board's proposed requirement that certain disclosures be given electronically merely because an application is taken electronically may, if construed to apply to in-person transactions, (i) prohibit existing industry practices that have proven highly effective and beneficial to consumers, and (ii) conflict with ESIGN;
- (2) The Proposed Rules do not accommodate the emerging use of compact mobile devices and ATMs to facilitate applications for certain products and other transactions, especially with consumers who are existing customers of the discloser; and
- (3) The Board's proposed statement in the Official Staff Interpretations to Regulation Z that certain application disclosures may be provided via hyperlink without first obtaining ESIGN consumer consent, but only so long as the disclosures cannot be "bypassed," (i) conflicts with ESIGN and (ii) is ambiguous.

We recognize that the Board has broad power to interpret its regulations to implement the underlying statutes. However, we encourage the Board to conform the Proposed Rules to the standards set forth in ESIGN, for three reasons:

- (1) 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.
- (2) 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 asserted by the Board are required to live within ESIGN, while the Board and other regulators with arguably broader authority may avoid its procedures and limitations.

¹² SPeRS www.spers.org for business strategies for complying with ESIGN. Specifically, see SPeRS Section 3, Standard 3-2 at 3-31 (2003).

- (3) Since the use of parallel or alternative authority will not supplant or supersede ESIGN, institutions wishing to avail themselves of electronic notices and disclosures will be forced to select between two different disclosure and consent schemes, creating the potential for both conflicting approaches to delivery and confusion for consumers as they encounter widely differing practices.

DISCUSSION

1. The Requirement to Deliver Electronic Disclosures with Every Electronic Application will Impair the Use of Electronic Records.

The Board proposes under Regulations B and Z that certain disclosures must be given electronically at the time a credit application is taken electronically. As written, this provision could be construed to apply whether the electronic application is submitted remotely or as part of an in-person transaction. If applied to in-person transactions, this provision of the Proposed Rules may be read to (i) prohibit a widely-adopted existing practice that has proven beneficial to consumers and to industry, and (ii) conflict with ESIGN.

Existing Practice

Presently, lenders often consider it desirable to take the consumer's loan application electronically even when the customer appears in person at the lender's offices. The application information may be entered by an employee or agent of lender and then be electronically reviewed and signed by the consumer, or it may be entered by the consumer directly via a terminal or kiosk. Electronically generated and submitted applications are easier, less expensive, and faster to process and store. In such circumstances, the lender often delivers the required disclosures to the borrower on paper, in order to (i) facilitate retention of the disclosures by the consumer, (ii) accommodate consumers who do not wish to receive the disclosures electronically, and/or (iii) avoid forcing the customer to go through the ESIGN consumer consent disclosure process.¹³ As a result, requiring Regulation B and Z disclosures to be delivered electronically in these circumstances would actually impair the use of electronic records as part of an in-person application process.

Conflict with ESIGN

In addition, requiring the disclosures to be delivered electronically appears to conflict with two separate provisions of ESIGN:

- (1) The provision in 15 USC § 7001(b) that ESIGN does not require any person to accept or use electronic records in lieu of paper, and
- (2) The provisions in 15 USC § 7004(b) that regulations issued interpreting 15 USC § 7001 may not add to the requirements of § 7001 and must be substantially equivalent to the requirements imposed on equivalent writings.

¹³ We note, in passing, that even if the Board grants an exemption from the ESIGN consumer consent process for certain disclosures, this exemption does not extend to disclosures provided under other federal or state laws. As a result, a lender wishing to take in an in-person electronic application, but avoid forcing the consumer through the ESIGN consumer consent process, would find itself in the awkward position of being required to give the Regulation B and Z disclosures electronically, and any other required disclosures on paper. In addition, the same bifurcated scenario (electronically provided federal disclosures and paper state disclosures) would occur in states that have disclosure requirements that are difficult to translate into the electronic medium with certainty (e.g., color or single document rules).

ESIGN specifically states that the law does not require any person to agree to use or accept electronic records or electronic signatures. 15 USC § 7001(b)(2). In addition, ESIGN stipulates that a federal agency issuing any regulation or guidance that interprets 15 USC § 7001 must satisfy the standards set forth in 15 USC § 7004(b), including that:

- (1) The regulation or guidance must be consistent with § 7001;
- (2) The regulation or guidance must not add to the requirements of § 7001; and
- (3) The agency must find, in connection with the issuance of the regulation or guidance, that—
 - (i) There is a substantial justification for the regulation or guidance;
 - (ii) The methods selected to carry out that purpose—
 - (a) Are substantially equivalent to the requirements imposed on records that are not electronic records; and
 - (b) 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.

The Board's proposal would require lenders electing to proceed under the Proposed Rules, rather than ESIGN, to provide -- and consumers to accept -- electronic disclosures any time an application is submitted electronically, even when the application is submitted as part of a face-to-face transaction. In addition, it would place requirements on any person electing to deliver or accept an electronic application which differ from the requirements applying to a paper application. A lender taking a paper application would have the option of delivering the disclosures on paper or, with the consumer's consent, in electronic form. The Board proposes to eliminate that discretion for both the consumer and the lender when the application is electronic, to the detriment of both and in contravention of the limits ESIGN places on regulatory discretion.

Recommendation

We recommend that the Board drop this requirement. This provision of the Proposed Rules does not address any known problem or objectionable practice. Nothing in ESIGN changes the timing or delivery requirements that otherwise apply to disclosures under the Proposed Rules. 15 USC §§ 7001(b)(1) and (c)(2)(a). Whether it is appropriate to deliver disclosures triggered by an electronic application in electronic or paper form should be left to the specific circumstances, the applicable timing requirements, and the preferences of the parties to the transaction. We note that lenders would have the option of proceeding under ESIGN and providing the covered disclosures in paper form, to the extent otherwise permissible under applicable timing and delivery requirements, potentially rendering this provision of the Proposed Rules a nullity.

In the alternative, to the extent it was the Board's intent to exclude in-person transactions from the mandatory electronic disclosure requirement, we recommend that the Board make it clear in the Proposed

Rules that the requirement applies only when the electronic application is submitted remotely, and not as part of an in-person transaction.

2. The Proposed Rules Should Accommodate the Emerging Use of Compact Mobile Devices and ATMs to Take Applications and Initiate a Broad Range of Transactions.

The widespread adoption and use of cellular telephones and other compact mobile devices, and the deployment of enhanced ATMs capable of a wider range of transactions, blur the traditional line between transactions entered into via “telephone” and transactions entered into “electronically,” as those terms are used in the Proposed Rules. Compact mobile devices¹⁴ are emerging as the “tool of choice” for electronic communication by some consumers. They may be used to submit applications or conduct transactions by voice, text, voice recognition, touch pad, or touch screen.

For example, financial institutions may find it desirable in the near future to permit existing customers to submit “short form” applications for new accounts or products via compact mobile devices or ATMs. These same products, if applied for through a traditional telephone banking channel, often enjoy special disclosure delivery and timing rules that recognize the limitations of the communication medium. These same limitations apply to compact mobile devices and ATMs – they are able to deliver information only in small increments, often slowly, and they have either no, or highly limited, ability to print or retain disclosures long-term. Board action recognizing that these limitations of the medium apply whether the interaction is by voice, text, or some other method of communication would (i) promote continued innovation and expansion of their use, and (ii) prevent what will otherwise be an artificial distinction between voice communications and text or visual communication using the same device.

Recommendation

We urge the Board to recognize that any special timing or delivery rules that apply to disclosures resulting from telephone applications or transactions should also apply to any transaction initiated over a compact mobile device or ATM, whether by voice, text, voice recognition, touch screen or other electronic interaction.

3. The Board’s Official Staff Interpretation Asserting a “No Bypass” Rule for Certain Hyperlinked Disclosures Under Regulation Z is Ambiguous, Conflicts with ESIGN and May Lead to Disparate Presentation Practices among Disclosers

In the Official Staff Interpretations for Regulation Z, the Board proposes to retain the assertion that a lender may provide certain initial disclosures without first obtaining ESIGN consumer consent only if the disclosures “cannot be bypassed” by the consumer before submitting an application for the account of product being advertised. This interpretation is ambiguous and conflicts with ESIGN.

It is not Clear When a Disclosure “Cannot be Bypassed”

The Official Staff Interpretations include the following discussion for presentation of disclosures under Reg. Z §§ 226.5a, 226.5b, and 226.19:

¹⁴ By “compact mobile device”, we mean a communication device that a consumer may elect to use to initiate an application or transaction, but on which it is not feasible to efficiently display, or permanently store or print, the related disclosures.

...the disclosures could be located on the same web “page” as the application or reply form without necessarily appearing on the initial screen, if the application or reply form contains a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable. Or, card issuers could provide a link to the electronic disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. Whatever method is used, a card issuer need not confirm that the consumer has read the disclosures.

This discussion is susceptible to multiple interpretations and creates the potential for anomalous treatment of disclosures. For example, if an extended disclosure is presented in a scroll box behind a hyperlink, is the disclosure “bypassable” if the borrower is required to click on the link and view the scroll box window, but is not required to scroll completely from top to bottom of the disclosure before continuing? As another example, the Staff Interpretation suggests that if the same disclosure is placed on the initial webpage presented to the borrower it may be treated differently – If the disclosure appears “below the fold,” it may be bypassed by the consumer so long as the information presented “above the fold” contains a clear and conspicuous reference to the fact that the additional disclosures are available below. The disparate treatment of hyperlinked disclosures and those appearing “below the fold” seems an odd distinction, made even more so by the Staff Interpretations’ acknowledgment that the card issuer is not required to assure that the consumer reads the disclosures at all.

Conflict with ESIGN

The assertion that a hyperlinked disclosure must not be “bypassable” conflicts with ESIGN, which prohibits regulatory requirements for electronic disclosures that add to the requirements of ESIGN. In addition, the provision in ESIGN permitting regulators to exempt certain disclosures from the ESIGN consumer consent process expressly states that any exemption must be granted “without condition.” See 15 USC § 7004(d)(1). Adding a “no bypass” requirement as a condition for waiver of the ESIGN consumer consent process appears to conflict with that prohibition.

Finally, we note that the “no bypass” rule would not apply if the lender proceeds under ESIGN, first obtaining the borrower’s ESIGN consumer consent and then presenting the disclosure using appropriately labeled and conspicuous hyperlinks.

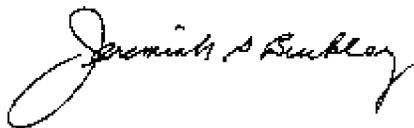
Recommendation

We recommend that the Board drop the references to “non-bypassable” hyperlinks from the Staff Interpretation. The appropriate standard for evaluating hyperlinked disclosures should be whether, case by case, the link, or accompanying text, clearly and conspicuously gives accurate notice of the disclosures that may be viewed behind the link. The consumer may then decide, just as with paper disclosures, when the disclosures should be read and reviewed.

CONCLUSION

ESRA thanks the Board for the opportunity to comment on the Proposed Rules. We urge the Board, in finalizing the Proposed Rules, to resolve the issues we have listed in a way that is consistent with ESIGN, will not add to the requirements of ESIGN or otherwise disadvantage the use of electronic records.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeremiah S. Buckley". The signature is written in a cursive style with a large initial "J".

(Signed Electronically)
Jeremiah S. Buckley
General Counsel