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June 22, 2007

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

*Submitted via e-mail to [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov)*

Re: Final Rules on Regulation B; Docket No. R-1281  
Final Rules on Regulation E; Docket No. R-1282  
Final Rules on Regulation M; Docket No. R-1283  
Final Rules on Regulation Z; Docket No. R-1284  
Final Rules on Regulation DD; Docket No. R-1285

Dear Ms. Johnson:

Wells Fargo & Company ("WFC") is a diversified financial services company providing banking, insurance, investments, mortgage and consumer finance services and products through more than 6,000 stores, the Internet and other distribution channels across North America and internationally. WFC has \$486 billion in assets and 159,000 team members across its 80+ businesses. WFC's national banking subsidiary, Wells Fargo Bank, N.A., operates over 3200 banking stores in 23 states, and was the first bank in the United States to offer online account access. Wells Fargo Bank, N.A. is pleased to offer these comments on behalf of itself and WFC.

We appreciate the opportunity to submit our views regarding the proposed final rules (the "Proposed Rules") of the Board of Governors of the Federal Reserve System (the "Board") for electronic delivery of disclosures under five consumer protection regulations: B (Equal Credit Opportunity), E (Electronic Funds Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings). The Proposed Rules are intended to revise and simplify the interim rules for electronic delivery of disclosures, which were issued by the Board on March 30, 2001 but were never made mandatory (the "Interim Rules").

We strongly support the Board's efforts to facilitate electronic disclosure delivery. We believe that most of the provisions in the Proposed Rules will be helpful to both consumers and industry. We support the Board's proposal to simplify and partially eliminate the rules for electronic communication originally set forth in the Interim Rules, many of which were cumbersome or ambiguous. We also support the Board's proposal to exempt certain disclosures from the special consumer consent requirements of the Electronic Signatures in Global and National Commerce Act ("ESIGN" or the "Act"), 15 USC 7001 *et seq.*, as expressly authorized by 15 USC § 7004(d)(1) of ESIGN itself.

We note, however, that specific provisions of the Proposed Rules may conflict with other provisions of ESIGN. We also note that certain provisions of the Proposed Rules may have unintended consequences and discourage or prohibit existing practices that have been beneficial to both industry and consumers. More specifically, we are concerned that:

- (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 Board's informal interpretation of the "equal prominence" requirement for certain paired disclosures potentially creates (i) a trap for the unwary, (ii) a technological impossibility, and (iii) a potential disadvantage for the visually impaired;
- (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; and
- (4) 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.

We recognize that the Board believes it has authority to establish rules for electronic disclosures independent of ESIGN, and therefore is not necessarily bound by the limits placed on regulatory authority under 15 USC § 7004(b)(2). 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 operate within ESIGN, while the Board and other regulators with arguably broader authority may avoid its procedures and limitations.
- (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 electronic transaction. If applied to in-person transactions, this provision of the Proposed Rules potentially may (i) prohibit an

already widely adopted 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 the lender, then electronically reviewed and signed by the consumer; or the application 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.<sup>1</sup> 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 interpreting 15 USC § 7001 may not add to the requirements of § 7001 and must be substantially equivalent to the requirements imposed on equivalent writings.

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

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<sup>1</sup> 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.

- (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 entirely. 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 is 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 Board's Informal Interpretation of the "Equal Prominence" Rule Presents a Technological Problem, a Trap for the Unwary, and an Obstacle to the Visually Impaired.**

In its introductory comments to the Proposed Rules under Regulations M, Z and DD, the Board states that lessors, lenders and depository institutions must assure that paired disclosures (*e.g.*, interest rate and APR), which must be advertised with "equal prominence" under the regulations, must be visible together when displayed electronically – the consumer should not be required to "scroll" a screen or window to view one half of the paired disclosure while viewing the other half. However, the Board proposes to eliminate its existing statement in the Official Staff Commentaries and Interpretations (as applicable) to this effect. Interpreting the "equal prominence" rule to forbid the need to scroll from one of the paired disclosures to the other creates a serious technological issue, and a potential disadvantage for the visually impaired. At the same time, to the extent the Board views the "equal prominence" rule as mandating a "no scroll" rule, removing the relevant Staff Commentaries and Interpretations seems likely to promote confusion and disparate practice.

#### *Preventing Scrolling Is a Technological Problem*

To the extent the Board intends to discourage electronic advertisements that widely separate "paired" disclosures, its informal interpretation makes perfect sense and we endorse that intent. However, as

written, the Board's informal interpretation reaches too far, and leads to a set of unintended consequences for which there is no manageable technological solution. The situations under which a consumer may have to scroll a window or screen to see both parts of a paired disclosure depends not only on their placement by the discloser, but also on the size of the consumer's window, the screen resolution the consumer has selected, and the text size and/or magnification settings that the consumer has applied to the display.

For example, a set of paired disclosures that would display with equal prominence in the same window, assuming Internet Explorer ("IE") is set to medium text size in a standard 1280 x 800 display with a half-screen window, may not display together without scrolling if IE is set to its largest text size in a 800 x 600 display. As another example, the settings and special magnification utilities used by the visually impaired may also prevent display of paired disclosures without scrolling. Assuming that disclosers could develop technological controls to prevent screen adjustment that would result in scrolled display of the disclosures, which we do not believe is currently feasible, the visually impaired may be unable to access the disclosures and proceed with the transaction at all.

The informal interpretation also fails to take into account the emerging popularity of mobile devices with certain population segments. These devices usually have small screens and can deliver only limited information at one time – individuals using these devices to access the Internet or review electronic advertising do so voluntarily, and actively expect to page or scroll to receive full information.

#### *Removing the Staff Commentaries and Interpretations*

Because of the technological challenges associated with preventing the need to scroll to view both parts of a paired disclosure, the prohibition on scrolling in the Board's informal interpretation is neither intuitive nor obvious. If the Board intends to maintain its current interpretation of the "equal prominence" rule, then it should retain the existing Staff Commentaries and Interpretations.

#### *Recommendation*

We recommend that the Board (i) remove the existing Official Staff Commentaries and Interpretations on this subject, and (ii) drop the informal interpretation appearing in its introductory comments to the Proposed Rules. Proper application of the "equal prominence" rule to electronic communications should be determined on a common-sense basis and on consideration of all the relevant circumstances, including the impact of display and communication elections made voluntarily by the consumer outside the discloser's control.

### **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 the 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 Regulation Z §§ 226.5a, 226.5b, and 226.19:

...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 fold.” 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 remove the references to “non-bypassable” hyperlinks from the Staff Interpretations. The appropriate standard for evaluating hyperlinked disclosures should be whether, on a case by case basis, the link or accompanying text, clearly and conspicuously provides accurate notice of the disclosures that may be viewed behind the link. The consumer may then decide, just as with paper disclosures, whether and to what extent the disclosures should be read and reviewed.

#### **4. 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 devices<sup>2</sup> 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.

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<sup>2</sup> 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.

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For example, financial institutions may find it desirable in the near future to permit 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 trigger 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 in the 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 communications using the same device.

*Recommendation*

We urge the Board to clarify 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.

**CONCLUSION**

We strongly support the Board's actions in promulgating the Proposed Rules, and revising or withdrawing a number of the Interim Rules. The Proposed Rules provide valuable guidance on the delivery of electronic disclosures and notices. We urge the Board, in finalizing the Proposed Rules, to resolve the issues we have discussed in this letter and, where ESIGN does not authorize exemption, to conform the Proposed Rules to the requirements of ESIGN.

Wells Fargo Bank, N.A. appreciates the opportunity to comment on the Proposed Rules.

Very truly yours,

WELLS FARGO BANK, N.A.

By [SIGNED]

R. David Whitaker  
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