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SPOTLIGHT ON E-SIGN: CONSUMER DISCLOSURES

Six months after the landmark federal electronic signatures law -- the Electronic Signature in Global and National Commerce Act (E-SIGN) -- became effective, federal regulators are starting to grapple with the consumer disclosure portions of the Act. Here is a brief summary of these developments.

The consumer disclosure provisions of E-SIGN effectively amended every consumer disclosure law and regulation by authorizing the use of electronic means to provide information that was otherwise required to be disclosed to consumers in writing. Critically, the E-SIGN framework requires that consumers be provided with detailed pre-consent notices and that consumers affirmatively consent to receive electronic disclosures in a manner that reasonably demonstrates the consumer's ability to receive them.

The headlines from Washington so far: "steady as she goes." Federal regulators are not (at least not yet) piling up paper, or other, barriers to the E-SIGN revolution. Moreover, it appears that, despite some snags, the new consumer disclosure rules work reasonably well in practice.

The Federal Reserve Board's Consumer Credit Rules

On March 29, the Board of Governors of the Federal Reserve System issued the first comprehensive set of regulations interpreting the impact of E-SIGN. The Fed issued five new rules designed to establish uniform standards for the electronic delivery of required disclosures under a range of consumer credit laws: Regulations B (Equal Credit Opportunity), E (Electronic Funds Transfer), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings). As the first effort to integrate E-SIGN into a body of existing consumer disclosure laws, the Fed's new rules could set the standard for other regulators.

History. The Fed's new rules are built on numerous disclosure proposals that have come out of the agency over the last five years. The Fed first proposed permitting electronic disclosures to satisfy Regulation E in 1996, followed by additional, similar efforts in 1998 and a comprehensive set of proposed rules in 1999. All of these earlier efforts, however, predated E-SIGN. The Fed published its most recent provisions as "interim" rules to allow commentators to present new information or views not previously considered by the Fed in connection with its prior proposals. Comments are due by June 1, 2001.

Punting. Rather than offering guidance, the Fed solicited further comment on a number of important E-SIGN issues: how to interpret the statutory requirement that consumers consent in a way that "reasonably demonstrates" the consumers can receive the electronic disclosures; the effect of consumers withdrawing their consent or requesting paper copies of disclosures; the meaning of the statutory requirement that those making electronic disclosures must advise consumers when a change in hardware or software requirements creates a "material risk" that the consumers will not receive the disclosures; and whether the Fed should exercise its statutory discretion to exempt any categories of consumer disclosures from the E-SIGN consent framework. Nevertheless, the Fed's new rules provide helpful guidance in a number of areas.

Timing. The Fed's new rules clarify how electronic disclosures comply with existing regulatory timing requirements. For example, for disclosures that are required at the time of an application, a link to the disclosures is satisfactory if the applicant cannot bypass the disclosures before submitting his or her application. Disclosures posted on a website are considered timely only if they are posted on time and if a notice regarding the posting is sent to the consumer.

Disclosures posted on a website must remain available to consumers for 90 days. In response to industry comments, however, the Fed dropped a provision from its 1999 proposal that would have required creditors, upon consumer request, to make disclosures available in the same format in which they were initially provided for an additional 25 months.

Verification of Receipt. The Fed's 1999 proposal solicited comment on the need for and feasibility of a requirement that institutions verify that consumers actually received the disclosures that were sent or made available to them. In issuing its new rules, the Fed expressly declined to impose such a verification requirement, explaining that the cost and burden of such a requirement was unwarranted and that E-SIGN already contains a verification provision in its requirement that consumers consent in such a way that reasonably demonstrates their ability to receive the electronic disclosures. When electronic disclosures are returned undelivered, however, the Fed's rules impose a duty to attempt redelivery (either electronically or to a postal address) based on other address information in the institution's files.

Document Integrity. The Fed's prior proposals had also solicited comment on the feasibility of requiring institutions to use independent certification authorities or other systems to detect when disclosure information had been altered. Although consumer advocates expressed concerns that electronic documents can be altered more easily than paper, the Fed declined to impose document integrity standards. The Fed noted that such requirements were not yet practicable given the costs and the embryonic technology involved. The Fed further explained that although E-SIGN specifically authorizes regulators to specify "performance standards" to assure the accuracy, integrity and accessibility of records that are required to be retained, the Act generally bars the agencies from doing so by requiring the use of any particular form of technology.

Stay Tuned. The Securities and Exchange Commission, which has said very little about E-SIGN thus far, announced on February 28 its intention to engage in a rulemaking on record retention performance standards.

FTC - Commerce Workshop

Five days after the new Fed rules were published, on April 3, the Federal Trade Commission and the Department of Commerce hosted a day-long workshop to discuss Section 101(c)(1)(C)(ii) of E-SIGN. This "consent provision" states that if a statute, regulation, or rule of law requires information to be provided in writing to a consumer with regard to a transaction, the use of an electronic record will satisfy the writing requirement *provided that* the consumer

> "consents electronically, or confirms his or her consent electronically, in a matter that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."

The workshop was part of the effort of the FTC and the Department of Commerce to discharge their responsibility under E-SIGN to study and report to Congress on the benefits and burdens of this consent provision by June 30, 2001.

The workshop was attended by representatives of consumer groups, academics, industry representatives, and officials from the FTC and the Department of

Commerce National Telecommunications and Information Administration. Commentators and officials agreed that, given the short time that E-SIGN has been in effect, it will be difficult to provide a complete evaluation of the consent provision. The FTC and the Department of Commerce are still soliciting comments but will not ask Congress for an extension of time.

How to "Reasonably Demonstrate" Receipt of E-Disclosures. Although there was broad consensus among workshop participants concerning the benefits of E-SIGN, panelists held different views about the impact of the "reasonably demonstrates" requirement. Participants suggested several ways that one could obtain consumer consent that would reasonably demonstrate a consumer's ability to receive an electronic disclosure.

The most popular solution discussed was the use of a "self-validating" format. For example, providing click-through consent or consent that otherwise requires consumers to access a website arguably reasonably demonstrates an ability to access information via the internet in an HTML format. Several participants expressed concern that the ease of using such an HTML format could lead to an industry-wide standard, and stressed that the FTC and Department of Commerce should encourage technology developers to build responsible standards into their products.

A second widely-proposed method to reasonably demonstrate consumers' ability to access information was a "test format," under which a consumer consents to receipt of information in a particular format (*e.g.*, PDF) only after receiving and accessing a test document that is delivered in that format.

The final (and potentially most burdensome) method discussed entailed consumer affirmation of the ability to access information in a particular format. Consumers would be asked whether or not they have the ability to receive information in a particular format (*e.g.*, PDF), and the consumer would respond affirmatively via e-mail or some other electronic means.

Several workshop participants questioned the utility of the "reasonably demonstrates" requirement, particularly for regulated industries like banking, insurance, and securities. For example, before E-SIGN a securities firm — relying on existing SEC interpretive guidance — could immediately begin sending electronic disclosures to consumers that had visited the firm's office and signed a paper form requesting electronic communications. After E-SIGN, such firms may not use electronic disclosures until their customers go home and request them over the firm's website (so as to prove the consumer's capability to access such disclosures). Some participants suggested that this additional step has led to a steep decline in the number of consumers asking for electronic disclosures.

Best Practices. Although there was no universal agreement, workshop participants suggested the following tips for E-SIGN compliance:

- Consent should be considered inadequate if it is provided via a computer located on the premises of the business seeking such consent, particularly if the consumer has no established email address. The majority of Americans do not have Internet access from home.
- A consent notice should be provided separately from other notice documents (*e.g.*, the privacy notices required of financial institutions by the Gramm-Leach-Bliley Act of 1999).
- Businesses should draft redundant consent provisions into contracts (*i.e.*, clauses that reiterate a consumer's consent).
- Businesses should expect that many consumers will be dissatisfied with electronic records and will want to return to paper.
- To maintain consumer goodwill, businesses should be prepared to provide paper copies of electronic records without charging a punitive fee (*i.e.*, a fee designed to deter requests for paper) during the period in which consumers are becoming comfortable with electronic delivery.

Regulatory Guidance. The workshop participants expressed varying opinions as to how much regulatory interpretation is necessary or desirable. Some panelists stated that regulatory silence will provide businesses with the greatest freedom to experiment with different approaches to satisfying the existing requirements. Other panelists welcomed further clarification and interpretation, regardless of the source or form, because the lack of regulation may produce uncertainty and invite litigation.

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