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A Case Study of the Challenge of Designing Effective Electronic Consumer Credit Disclosures: The Interim Rule for the Truth in Lending Act

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A CASE STUDY OF THE CHALLENGE OF DESIGNING EFFECTIVE ELECTRONIC CONSUMER CREDIT DISCLOSURES: THE INTERIM RULE FOR THE TRUTH IN LENDING ACT

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I. INTRODUCTION

The national mandate to give legal effect to electronic records and signatures[2] poses puzzling challenges to the maintenance of traditional levels of protection of written documents in the electronic age. The structure and content of consumer protection statutes clearly contemplate paper writings. The disclosure regulations that implemented those statutes often amplified that focus with rules relating to timing, format, language and delivery that had their roots in a paper world. The regulatory

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1. Managing Attorney of the National Consumer Law Center's Washington office. The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of predatory practices against low-income people in almost every state in the union. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. We have led the effort to ensure that electronic transactions subject to both federal and state laws provide an appropriate level of consumer protections. We publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions.

This article was written by the National Consumer Law Center as Comments to the Federal Reserve Board, on behalf of its low-income clients, as well as Consumers Union, Consumer Federation of America, Consumer Law Center of the South, National Consumers League, National Association of Consumer Advocates, U.S. Public Interest Research Group, and Community Legal Services on Interim Rule Allowing Electronic Disclosures, Truth in Lending - Regulation Z, Docket No. R 1043.

2. Electronic Signatures in Global and National Commerce Act ("E-Sign"), 15 U.S.C. § 7001 (2000).

agencies must now remake the old rules for application in the new world.

More than a simple translation from writing to electronic record is necessary. The context of the old world transaction must be considered. In the face-to-face setting in the writing world, consumer credit disclosures not only provided essential information, but they also contributed to the likelihood of actual consumer consent to the important disclosed terms. [3] A new world transaction, in contrast, might be a monitor-to-monitor transaction or perhaps, confusingly, a mix of face-to-face and face-to-monitor. The likelihood of actual consent must be examined in this new context.

The Electronic Signatures in Global and National Commerce Act ("E-Sign") correctly assumes that everyone does not have effective electronic access and therefore establishes baseline requirements to help ensure that the disclosures are in fact communicated and to prevent outright circumvention of the disclosure requirements. Clearly, these requirements are procedurally important in trying to realize effective disclosure. But, can they contribute to the likelihood of actual consent to the disclosed terms in the same way as may occur in a face-to-face transaction?

The signing of a written document has long been considered, legally and culturally, a matter of gravity. The formality impresses on the consumer that this is a real and important transaction. Moreover, the written document can be kept by the consumer and consulted during the entire life of the transaction. Does the computer click and the availability of an electronic "record" carry the same gravitas and utility?

Regulatory agencies have begun to address at least some of these issues. The Federal Reserve Board's ("the Board") actions pertaining to electronic disclosures for truth in lending illustrate some of the difficulties. Even before the effective date of E-Sign,

3. Of course, any individual consumer may not in fact be focusing on the credit disclosures at all. Her focus may well be on other product attributes of the transaction. *See, e.g.,* Russell Korobkin, *Bounded Rationality and Unconscionability: A Behavioral Theory of Policing Form Contracts*, (Nov. 2002), *available at* http://lawweb.usc.edu/cleo/leo_papers/fall02/korobkin.pdf (last visited Feb. 15. 2003).

the Board was considering a rule that would have allowed electronic disclosures in other than home-secured transactions.[4] In 2001, the Board issued an interim rule that was immediately effective and was to become mandatory on October 1, 2001.[5] However, after the comment period had expired, the Board extended the mandatory date to consider "adjustments to the rules to provide additional flexibility."[6] It is not clear when the Board will take further action. In the meantime, the Interim Rule may serve as a case study to consider the issues involved. It has a number of deficiencies that would cause significant problems for consumers. These must be addressed in fashioning a final rule.

The Board states that the issuance of this Interim Rule is pursuant to section 105(a) of the Truth in Lending Act ("TILA"). That section requires that the Board issue regulations to "carry out the purposes" of TILA, "to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[7] The purpose of the TILA is articulated in section 102(a):

> It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[8]

The primary purpose of TILA is to *protect consumers, not to make compliance easier* for creditors. Although consumers may well benefit from electronic disclosures, under this Interim Rule, many consumers, especially those whose credit was originally

4. Supplemental Information, 64 Fed. Reg. 49,722, 49,727 (Sept. 14, 1999).

5. Truth in Lending Interim Rule on Regulation Z, 66 Fed. Reg. 17,329 (March 30, 2001).

6. Equal Credit Opportunity, Electronic Fund Transfers, Consumer Leasing, Truth in Lending, Truth in Savings, 66 Fed. Reg. 41,439, 41,440 (Aug. 8, 2001).

7. Truth in Lending Act, 15 U.S.C. § 1504 (2000).

8. *Id.* § 1601.

provided in face-to-face situations, will effectively lose the protections provided by TILA.

Until recently, paper writings have been exclusively used to make the TILA disclosures. With the advent of electronic commerce, considerable pressure has mounted to permit electronic contracting and electronic disclosure. One result was the adoption of E-Sign[9], which facilitates the authorization of electronic records. The adoption of E-Sign cannot be used as the rationalization for this abandonment of consumer protections, as that Act actually contains more protections for consumers than this Interim Rule. For example, E-Sign's consent provisions clearly require certain assurances of actual access to electronic communications, and can require that paper copies be provided.[10] The Board should not violate the limitations on rulemaking authority under E-Sign,[11] but it should implement the consumer protection provisions that are contained in E-Sign, pursuant to the purpose of TILA.

Some of the concerns expressed in 1996 regarding the first proposal for electronic delivery of TILA disclosures were addressed in the 1999 proposed rule. However, the Interim Rule not only ignores the consistently expressed concerns of representatives of consumers, *it represents a significant regression* from some better provisions included in the 1999 proposal. For example, the 1999 proposal had required that consumers be provided paper copies of electronic disclosures upon request in certain situations.

The Interim Rule will make electronic disclosures a burdensome and risky process for consumers. Rather than providing an even playing field for electronic disclosures, this Rule will make accessing and retaining electronic disclosures much more difficult, and considerably more risky than the use of paper disclosures. The Interim Rule allows the use of electronic

9. E-Sign, Pub. L. 106-229, 114 Stat. 464 (codified as amended in scattered sections of issue).

10. *15* U.S.C. § 7001(c)(1)(B)(iv) (2000).

11. *Id.* at § 7004(b)(2)(B) (prohibiting a federal agency from adopting a regulation which adds to the requirements of § 7001).

disclosures in situations which will facilitate, if not encourage, fraud.

Our suggestions for improvements to the proposed regulations should not be construed to indicate that we are opposed in any way to facilitating electronic commerce as we are not. Indeed, we believe that once access to the Internet is more widely available to all Americans, especially the nation's poor and elderly, there may be many new and beneficial opportunities made available. However, for electronic commerce to benefit consumers, the differences between a tangible piece of paper and an electronic record must be addressed. The Interim Rule has failed to address every major concern expressed regarding the need to protect consumers engaged in electronic financial transactions.

The Board knows that predatory lending is a serious problem in this nation and is attempting to address this problem with the proposed Home Ownership and Equity Protection Act ("HOEPA") regulations.[12] However, if the Board continues the consent, retention and delivery of documents rules which are included in this Interim Rule, predatory lenders will have a field day with electronic records. Electronic commerce will facilitate the abuses they currently engage in because consumers will not even have copies of the TILA disclosures describing the predatory credit. Under this Interim Rule, creditors will be permitted to use electronic records as a method of avoiding providing basic TILA information to consumers who lack access to the Internet. This may be a serious problem since a majority of individuals in this nation still do not have Internet access in their homes.

Imagine an elderly woman is visited at home by a home improvement salesman who talks her into taking out a home equity loan to pay for an overpriced home improvement. The salesman uses his laptop computer and the woman's telephone line to connect to the salesman's website and then puts the laptop in front of her. He guides her through the process of electronically consenting to receive all notices and disclosures electronically on

12. Truth in Lending Final Rule on Regulation Z, 66 Fed. Reg. 65,604, 65,617 (Dec. 20, 2001) (addressing changes in HOEPA).

the salesman's website. She also signs an acknowledgment that various disclosures required by state and federal law have been provided to her electronically, and indeed the salesman has posted these documents on his website. However, the woman has no home computer and no knowledge of how or where she can access a computer. She might even be home bound or disabled.

When the salesman leaves the elderly woman's house she has signed a high cost mortgage on her house, but she has no paper documents to explain the details of the transaction. All of her disclosures, including the notice of her right to rescind, have been visually displayed to her on the salesman's laptop. Under the Interim Rule they are considered delivered to her so long as they are left on the website for ninety days. Even if she were able to make her way to a public access computer to access the Internet, she would have no way of finding the particular website address at which her disclosures were posted, because the creditor is not required to leave her with a piece of paper with the website address. Even if the creditor did so, it is not certain that would be sufficient to address all the problems.

The balance of this article is organized into three sections. Section II addresses considerations regarding individuals' access to the Internet, the differences between tangible paper and electronic records, as well as the distinctions between delivery of paper documents and electronic documents. Section III deals with the legal requirements established in E-Sign and the deficiencies of the Interim Rule in connection with those requirements. The Conclusion in Section IV offers specific suggestions on how the Interim Rule should be rewritten.

II. CONSUMERS' COMMENTS ON THE INTERIM RULE

A. Lack of access to the internet MUST be considered

Electronic disclosures must not undermine consumers' ability to receive or retain their TILA notices and disclosures. Some financial institutions will undoubtedly take advantage of the loopholes created by allowing electronic disclosures to effectively avoid providing consumers with the required information under

TILA. We caution against blind assumptions that the two forms of communications are equivalent. Despite the benefits of electronic delivery over physical world delivery, there are incontrovertible differences between the two that dictate that the law not treat them in identical fashions.

The rules developed by the Board for electronic disclosures are not limited to purely electronic communications. This Interim Rule will also apply to situations in which the parties are facing one another. If this were not the case, the concerns would be considerably different. This means that consumers who are standing in a place of business may be asked to agree to receive important documents electronically. They may be asked to agree to receive electronic records immediately relating to the transaction taking place in the store, or they may be asked to receive electronic records in the future relating to an ongoing relationship between themselves and the business.

It does not take money to receive mail sent in the physical world. As the Department of Commerce's excellent report on the Digital Divide indicates, half of all households are still not connected electronically in the home.[13] While we want to encourage and facilitate electronic commerce, we must remember that a majority of Americans are still not connected to the Internet at home, at work, or in a public place. Only access at home can be considered a reliable method of receiving personal information. Use of a computer at work for personal purposes is frowned upon or considered grounds for disciplinary action by many employers. Public access computers have extensive waiting times and limitations on use.

Moreover, even as Internet access continues to expand, people continue dropping their Internet service as well. The

13. NAT'L TELECOMM. & INFO. ADMIN., A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 39, Figure 4-4 (Feb. 2002), http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf (last visited Feb. 21, 2003) [hereinafter NATION ONLINE]. The majority of all Americans (56%) have no access to the Internet in their homes. *Id.* Only 43.6% of all households can access the Internet from their home. *Id.* Over 10.3% of internet-using Americans rely on public access, their employer's computer, or another person's computer for internet access. *Id.*. The percentages of elderly and the poor who do not have access to computers are much higher. *Id.* at 47, Figure 5-6.

yearly reports on the Digital Divide indicate that each year between 3 and 4 million households drop their electronic access.[14] This is a significant figure, especially when considering the total number of households that are on-line is 53.9 million,[15] and only a portion of these use the Internet from their homes. This is an annual drop-off rate of as much as ten percent a year.[16] The message here, unfortunately, is that even as more households rush to obtain Internet access, a significant number are terminating that access.

B. The Interim Rule ignores the real differences between tangible paper and electronic records

TILA's underlying requirement that a disclosure be provided in writing is based on the belief that the consumer needs to receive the disclosure in a form the consumer can both access and keep. No one can dispute that the disclosures required under TILA are critically important to consumers both to apprise them of the terms and obligations of their transactions and to provide proof of those terms to enforce rights in court.

The differences between the physical world and the electronic world must be recognized and appropriately addressed. For example, when TILA requires a document to be in writing, there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to an electronic record. First, a piece of paper handed to or mailed to a person can be read without any special equipment. This is in contrast to the need for a computer in order to access or read an electronic record. Yet the Interim Rule allows some disclosures to be provided electronically without a consumer's electronic

14. *See id.* at Figure 39, 4-4; NAT'L TELECOMM. & INFO. ADMIN., FALLING THROUGH THE NET: TOWARDS DIGITAL INCLUSION 1-32 (Oct. 2000), http://search.ntia.doc.gov/pdf/fttn00.pdf (last visited Feb. 21, 2003).

15. *See* NATION ONLINE, *supra* note 12, at 3-9.

16. *See supra* note 13. Actually, if one compares the drop-off rate in the year 2001 to the number of households which were on-line during the previous year, which may be the better comparison, this ratio will be higher. However, we do not have the number of households which had Internet access the previous year, only the percentage.

consent, thereby permitting TILA disclosures otherwise required to be in writing to be provided to consumers without any assurances that the consumer has a computer.

Second, a paper writing does not require special equipment to hold on to or to retain. A consumer need only put it in the drawer, or in a file, where it will remain until the consumer removes it. An electronic record can only be retained electronically. The consumer must have access to a computer with a hard disk to retain the record,[17] or access to a computer with a printer to retain a printed copy of the electronic record (although the printed copy may not be useful to prove the terms of the electronic record in court unless the paper representation of the electronic record includes some means of verifying that it is a true reflection of the actual electronic record received by the consumer). Yet the Interim Rule allows important TILA disclosures to be provided to consumers in an electronic record without any assurance they will have the capacity to electronically retain them in a form they can later use.

Third, a paper writing is by its nature solid and definite. Once delivered to a person the paper will stay on the table or in the drawer, wherever the consumer put it, until it is thrown out by the consumer. The consumer could easily keep the writing in a drawer until it is needed. An electronic record can be provided in a form which will disappear after a period of time determined by the provider of the record. Yet, the Interim Rule specifically permits important TILA disclosures to be posted on a website for the limited period of ninety days. Many consumers will fail to access and download these disclosures within this period, only seeking them when a dispute arises. If this is after the ninety days, as is likely, the consumer simply will not have access to these disclosures.

Finally, the printed matter on the paper writing will not change every time someone looks at it, and the paper writing can

17. It is conceivable that the consumer without regular access to a computer with a hard disk could use a floppy disk or a CD to retain important electronic records. But this requires access to a computer on which to download the records onto the floppy when they are received, and access to a computer with similar capabilities to access the electronic records at a later time when they are needed.

be used at a later date to prove its contents in a court. The electronic record could be provided in a format which is not retainable by the consumer. And, even if the consumer is able to access and retain the electronic record, the record may not be printable in the same format in which it was viewed. To provide the same level of integrity to an electronic record that exists naturally with a paper writing, a special effort must be made: the electronic record must be deliberately preserved in a particular locked format (PDF, XML, etc.) to prevent alterations by mistake or on purpose every time the document is read. The Interim Rule does not require electronic records to have a level of integrity similar to paper writings.

C. *The Interim Rule does not address the distinctions between delivery of paper documents in the physical world and electronic delivery of electronic records*

There is no question that electronic communication provides wonderful opportunities, but it cannot be assumed to be as reliable a method to receive essential information as postal delivery for the general public. The Interim Rule completely ignores the very real dangers of relying on constant access to the Internet. A ten-percent annual drop-off rate from Internet access indicates that in any one year, one out ten households which had Internet access the previous year will no longer be able to receive electronic communications.[18] The Interim Rule also ignores E-Sign's specific provisions allowing consumers to withdraw consent to receiving electronic delivery. The Board's position on access to the Internet will leave many American consumers in the situation where they will not receive important, required TILA notices.

As the Department of Commerce noted, the drop off rate was higher among households at lower incomes. This should come as no surprise. Also, we can assume that households at lower incomes will continue to have less stable access to electronic commerce in the future. It is very important that the U.S.

18. NATION ONLINE, *supra* note 12. Compare the number of households connected in the previous years to the number of households dropping access in the current year.

Government continue to require that access to essential information not be determined by one's wealth. Receipt of mail through the U.S. Postal Service has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service, the law should treat electronic delivery and physical world delivery of records differently.

The differences between the ease and the lack of expense to receive paper records in the physical world and electronic records via the Internet are substantial. The Interim Rule fails to recognize the distinctions and appropriately protect consumers in light of these differences.

A written record can be received by the consumer at no cost to the consumer. The consumer pays nothing to maintain and open the mailbox to which the U.S. Post Office delivers the mail daily. A record delivered electronically can only be accessed through a computer connected to a third party (Internet Service Provider or ISP) to whom payment is generally required on an ongoing basis. Yet the Interim Rule allows important "pre-transaction" notices to be considered provided to a consumer, even when the consumer is in a face-to-face transaction, simply by showing the consumer a computer screen containing these notices.[19] These disclosures need only be posted to a website and downloadable within ninety days by the consumers.

For the disclosures for which consent is required, those consumers who are in the fifty-seven percent of the population who lack Internet access at home would also effectively be denied copies of even these notices. These consumers would have consented electronically using the creditor's equipment on the creditor's premises. They would not have an email address to which the disclosures would be posted. Instead, these consumers would have to remember or figure out the web site address, which might involve dozens of separate characters, find a public access computer with a printer, find the specific sub-link on which the disclosure applicable to their credit product was provided, and

19. Truth in Lending Interim Rule on Regulation Z, 66 Fed. Reg. 17,329, 17,335 (March 30, 2001) (referring to § 226.36(c)).

download it, within ninety days from the date it was first displayed.[20]

If the consumer moves, U.S. Postal mail can be easily forwarded, at no cost to the consumer and with minimal difficulty – one notice to the Post Office suffices to forward all incoming mail for a year. ISPs generally do not forward electronic mail. Occasionally electronic mail will bounce back as undeliverable to the sender, but this is neither automatic nor universal. The Interim Rule has failed to acknowledge the very real differences between electronic and physical world delivery, and essentially requires only that delivery be attempted electronically. There is no requirement that once an electronic delivery has failed, the creditor must use the physical world address.[21] There is no requirement that even if all signs are that the consumer has not received an electronic notice, the creditor must revert to physical world delivery. There is no requirement that the creditor acknowledge a consumer's withdrawal of consent to receive electronic communications as required by E-Sign.[22] Despite the availability of numerous computer programs which ascertain that an email has been opened, and the fact that this electronic check actually ensures consumer protection, the Interim Rule goes out of its way to emphasize that the creditor has no obligation to ensure that the consumer has received and opened the disclosure.[23]

A paper writing mailed to a person will generally stay in the mailbox or the post office until it is picked up by the recipient (or a designated agent), often for years. An electronic record emailed to a person may disappear from the ISP or the server at any time before actually being opened and read by the recipient. An electronic message posted to a website may disappear within days after it is posted, and ISPs unexpectedly go out of business. Yet the Interim Rule only requires covered disclosures to be posted on a website for ninety days. This ignores the fact that

20. *Id.* at 17,334 (Official Staff Commentary to § 226.36(b)(6)).

21. *Id.* at 17,336 (referring to § 226.36(e)).

22. 15 U.S.C. § 7001(c)(1)(B)(iii) (2000).

23. *See* discussion of extensive software technologies available which provide automatic acknowledgment that the recipient of an email has opened it, *supra* Section III (regarding Interim Rule § 226.36(e)).

most consumers will not refer to a particular disclosure until a problem arises, and most problems are likely to occur after the ninety-day period. Even worse, the Interim Rule does not require pre-transaction disclosures to be posted for even ninety days. [24]

A paper writing mailed to a person can be held for receipt by an agent of the person for an indefinite amount of time without the person losing their privacy to that agent. To ask another person to access and retain electronic mail necessitates asking that person to open the electronic mail. It becomes impossible for electronic mail to be "held" by another, without a complete loss of privacy regarding the sender and the content of the message. Unfortunately, the Interim Rule allows essential TILA notices to be posted on a website and the consumer notified about that posting by physical mail.[25] Then the consumer has to find a computer with Internet access and a working printer and plug in the correct address for the web page containing the information regarding the consumer's particular transaction, which is likely to involve fifty to one hundred separate characters which must be placed in perfect order, to access a TILA disclosure that is currently just mailed to the consumer. Further, this disclosure need only stay on the website for ninety days. So if the consumer is not able to jump through these hoops in time, the consumer will never have a copy of crucial information that affects important rights.

Junk mail received through the post office is readily identified and easily discarded such that it does not affect the delivery of important notices and documents. Electronic junk mail filtering programs incorrectly filter out real messages needed to be received by the recipient. Delivery of all post-transaction TILA notices and disclosures otherwise required to be in writing and provided to the consumer in a form the consumer can keep should be considered to be delivered electronically only when there has been either an electronic acknowledgment or a manual acknowledgment that the consumer has opened the email. This

24. Truth in Lending Interim Rule on Regulation Z, 66 Fed. Reg. 17,329, 17,336 (March 30, 2001) (referring to § 226.36(d)(3)).

25. *Id.* at 17,335 (referring to § 226.36(d)(2)(i)).

can be done cheaply and can thus provide assurance that electronic disclosures are not being used as a way of avoiding actual delivery of important disclosures to consumers.

III. THE DEFICIENCIES OF THE INTERIM RULE IN CONNECTION WITH E-SIGN

A. The Interim Rule fails to apply E-Sign's consumer consent provisions to implement the consumer protection purposes of TILA

1. Electronic consent must be required in a manner that ensures consumers will be able to access and keep disclosures otherwise required to be in writing

The electronic consent requirement was included in the E-Sign legislation to protect consumers in a number of ways. Clearly, one reason was to protect consumers from the use of electronic commerce to facilitate fraud on consumers. However, it is clear from the Congressional Record that the electronic consent is also intended to create a type of electronic handshake between the parties – a means to ensure that the electronic communication will in fact be successful. It is also apparent that the electronic consent is meant to emphasize to the parties the significance of the agreement to receive records electronically and to ensure that there is actually a meeting of the minds.[26]

The electronic consent protects consumers in the off-line world as well as the on-line world. The provisions protect consumers from mistakenly agreeing to receive electronic records by signing a form contract with this agreement in small print. They protect consumers from mistakenly agreeing to receive electronic records in a form that they are not able to access and retain. And these provisions protect consumers from fraudulent practices which might otherwise be facilitated by the laws like E-Sign, which

26. In reference to § 226.31 of the Interim Rule, it is necessary for the Board to clarify that if a HOEPA loan is conducted electronically, that all co-owners must agree to receive electronic disclosures, and the HOEPA notice provided three days prior to closing must be separately provided to each co-owner. Regulation Z already requires a separate notice to each co-owner in § 226.31(e).

are designed only to expedite the transition to an electronic marketplace.

The three distinct but related protections afforded by the requirement for a consumer to electronically consent are:

- To ensure that the consumer has reasonable access to a computer and the Internet to be able to access information provided electronically.
- To ensure that the consumer's means of access to electronically provided information includes the software to read the electronic records provided.
- To underscore to the consumer the fact that by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.

Senator Leahy emphasized these differences when he spoke on the floor of the Senate, regarding the passage of E-Sign:

> [This bill] avoids facilitating predatory or unlawful practices. . . . [It] will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher. I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information. [27]

27. 146 CONG. REC. S5219, 5222 (daily ed. June 15, 2000) (statement of Sen.

The Board must keep in mind the important reason for the specific language on electronic consent and ensure that its rules promote the essential consumer protections intended with this statutory requirement. Each of the specific words included in the requirement of E-Sign § 7001(c)(1)(C)(ii) must be given meaning. A number of specific requirements in the Interim Rule, as well as several casual comments in the accompanying commentary, indicate that the Board has misinterpreted much of the rationale behind this requirement.

The Board's justification for not requiring consumer consent for pre-transaction disclosures appears to be based on the assumption that the shopping for credit will be over the Internet.[28] This entire rationale for the application of the consumer consent requirements to TILA disclosures fails to recognize the very real possibility that in a face-to-face transaction the consumer may be asked to look at a computer screen provided by the creditor. It might therefore be entirely legal for a creditor in a face-to-face transaction – for both open-ended unsecured credit[29] as well as home-secured credit[30] – to provide these disclosures by showing consumers a computer screen on which the disclosures were displayed.

In this situation, there is no reasonable way for the consumer to effectively retain these disclosures. This visual display certainly should not qualify as providing disclosures otherwise required to be in writing to a consumer. After the transaction is consummated, this consumer must go to a computer and attempt to find the specific disclosures provided for his credit. It would be very difficult, to say the least, for the consumer to be assured that the disclosures accessed *after consummation* were the

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Leahy).

28. For example, the commentary consistently makes reference to "on-line credit shopping."

29. All open-end disclosures that required pre-application are allowed to be provided without electronic consumer consent. Truth in Lending Interim Rule on Regulation Z, 66 Fed. Reg. 17,329, 17,338 (Mar. 30, 2001) (referring to § 226.5a).

30. Pre-application disclosures provided under home equity credit plans are also exempted. *Id.* (referring to § 226.5b(d), (e)). Also exempted is information provided for closed-end home secured credit. *Id.* at 17,333 (referring to §§ 226.17(g), 226.19(b)

same as those seen on the computer screen before consummation.[31]

2. The Interim Rule does not implement the requirement for a consumer to "reasonably demonstrate" the ability to access and read electronic disclosures

The Board asks for assistance on whether interpretive guidance is necessary on the meaning of the requirement in E-Sign that a consumer electronically consent in a manner which "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."[32] On behalf of our clients, we urge the Board to provide guidance on this and related questions.

The issue is whether the consent process itself must electronically indicate that the consumer can access the electronic records provided, or whether this requirement is satisfied by *allowing* the consumer the opportunity to test his capacity to access the electronic records. The question is whether the requirement for an electronic consent is accomplished when an email, which includes an attachment in PDF format, simply requires the consumer to respond by email and *affirm* that the consumer could access the PDF attachment. The answer is unequivocal: unless the consumer's email response contains some information that necessitated the consumer's actual opening of the PDF attachment, this electronic consent would not satisfy the statutory requirement.

The statutory language itself is clear: "in a manner which demonstrates that the consumer can access" does not permit the

31. Retention of the information provided *pre-application* in this situation is very important. For example, one very large home improvement chain typically provides on-the-spot credit to customers based on the promise that no interest and no payments will be required for six months. Yet, customers have found that interest is actually assessed after four months. Only when the customers call and *point to the promises made in the disclosures received pre-application* are the interest charges removed from the account. In this scenario, even very careful consumers would be unable to provide that necessary proof of the terms of the original agreement, because they would have no electronic or paper record of the disclosures.

32. E-Sign, 15 U.S.C. § 7001(c)(1)(C)(ii) (2000).

consumer to simply affirm that access. The operation of consenting itself must provide the demonstration. This was a matter of considerable debate during the passage of E-Sign. Several Senators insisted that the electronic consent process test the consumer's computer's capacity to access the electronically provided information. They did not want to leave it to the consumer's subjective understanding of his or her computer's capacity. Every person who has ever received e-mail with attachments has found themselves unable to open some of those attachments. The electronic consent requirement mandates an electronic handshake – whereby the two computers communicating are assured that they can each open and read the electronic information to be shared between them.

This issue itself was the matter of extensive comment by Members of Congress involved in the passage of E-Sign. Consider the following excerpts from the Congressional Record regarding the language in 15 U.S.C. § 7001(c)(1)(C)(ii). By Senator Leahy:

> Section 101(c) of the conference report requires the use of a technological check, while leaving companies with ample flexibility to develop their own procedures. The critical language, which Senator Wyden and I developed and proposed, provides that a consumer's consent to the provision of information in electronic form *must involve a demonstration that the consumer can actually receive and read the information.* Section 101(c) also provides that if there is a material change in the hardware or software requirements needed to access or retain the information, *the company must again verify that the consumer can receive and read the information,* or allow the consumer to withdraw his or her consent without the imposition of any conditions, consequences or fees. (emphasis added).[33]

33. 146 CONG. REC. S5215, S5220 (daily ed. June 15, 2000) (statement of Sen. Leahy).

A joint statement by Senators Hollings, Wyden and Sarbanes, confirms this:

> Today, many different technologies can be used to deliver information – each with its own hardware and software requirements. An individual may not know whether the hardware and software on his or her computer will allow a particular technology to operate. (All of us have had the experience of being unable to open an e-mail attachment.) Most individuals lack the technological sophistication to know the exact technical specifications of their computer equipment and software. *It is appropriate to require companies to establish an "electronic connection" with their customers in order to provide assurance that the consumer will be able to access the information in the electronic form in which it will be sent.* This one-time "electronic check" can be as simple as an e-mail to the customer asking the customer to confirm that the or she was able to open the attachment (if the company plans to send notices to the customer via e-mail attachments) and a reply from the customer *confirming* that he or she was *able to open the attachment.* (emphasis added).[34]

By Mr. Tauzin:

> S. 761, I must also mention, provides for extensive consumer protection. Not only are existing state and federal consumer protection laws unaffected, but the provisions regarding consent afford consumers with the greatest possible safeguards against fraud imaginable. Consumers must opt-in to electronic transactions, receive full disclosure of terms and conditions, and *ultimately prove that they*

34. 146 CONG. REC. S5229-30 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden & Sarbanes).

> *can electronically access and retain the information that is the subject of the consent.* I submit that in all my time in Congress, I have never seen a more involved statutory framework for purposes of manifesting consent. (emphasis added).[35]

The Board should state that electronic consumer consent has been effectively accomplished *only* when the consumer has *electronically* confirmed that he or she is able to open and read the TILA disclosure that has been provided electronically.

3. The Interim Rule must only permit consent in face-to-face transactions when the consumer supplies the computer equipment used to electronically consent.

In the 1999 proposed regulations on electronic disclosures[36] the Board recognized the inherent risks to consumers who are asked to agree to receive electronic disclosures in face-to-face transactions. Is the Board no longer concerned about these risks?[37] Not only were these risks apparent to Congress when it passed E-Sign, but the language of the electronic consent requirement is included as a mechanism of addressing these risks.

The statutory requirement that the consumer test his capacity to access the information is deliberately *not* testing the consumer's personal knowledge base; does the consumer *know* how to access a record electronically? The requirement tests the *capacity* of the consumer; does the consumer have access to the

35. 146 CONG. REC. H4360 (daily ed. June 14, 2000) (statement of Mr. Tauzin).

36. *See* Equal Credit Opportunity, Electronic Fund Transfers, Consumer Leasing, Truth in Lending, Truth in Savings, 66 Fed. Reg. 41,439, 41,440 (Aug. 8, 2001).

37. In the 1998 Proposed Regulations, the Board recognized at that time, the inherent dangers to consumers in face-to-face transactions when their house secured the credit, and required paper copies of the electronically delivered disclosures and the notice of rescission. Have these dangers somehow disappeared? Is there no longer the same threat of coercive activity in face-to-face transactions that the Board recognized in 1998? The Board's recent investigation of ways to address predatory mortgage practice underscores the importance of ensuring that consumers are not further victimized by unscrupulous lenders through electronic delivery. *See* Truth in Lending Final Rule on Regulation Z, 66 Fed. Reg. 65,604, 65,617 (Dec. 20, 2001) (addressing changes in HOEPA).

necessary hardware and software to receive the electronic disclosures?

Under E-Sign, in face-to-face transactions, this means that if the consumer uses the computer equipment provided by the business seeking consent, the consumer has *not* satisfied the requirement to demonstrate the ability to access electronic disclosures. Yet, in the Official Staff Commentary accompanying Interim Rule § 226.36(b)(6) the Board seems to assume that the consumer will have no trouble retaining disclosures accessed through equipment provided by the creditor so long as the "disclosures are sent to the consumer's e-mail address or . . . made available at another location such as the creditor's Internet web site . . . ." This completely ignores the very real possibility that some creditors will require that the consumer consent as a condition of the transaction (as is far too true with credit insurance, despite the separate disclosure box that the consumer must sign stating otherwise).[38]

The Board appears to contemplate that it would be legal for important TILA disclosures to be delivered to consumers standing in the creditor's place of business by posting them to a website which the consumer could access at a later time, so long as the consumer electronically consents to using the creditor's equipment. This is a complete misinterpretation of the electronic consent requirements of E-Sign. It simply establishes a new way to play "hide the ball" with essential consumer disclosures. It ignores the uselessness of making information available at the creditor's website if the consumer has no Internet access.[39]

Instead, the Interim Rule should only permit electronic consent to be effectively accomplished in face-to-face transactions

38. *Equity Predators: Stripping, Flipping and Packing Their Way to Profits: Hearing before the Special Committee on Aging United States Senate*, 105th Cong. 33-34, (Mar. 16, 1998) (statement of Jim Dough, former employee of predatory lender). Allegations of coercion in the sale of what is supposed to be a "voluntary" product have been the subject of federal enforcement cases and private litigation. *In re* USLIFE Credit Corp. & USLIFE Corp., 91 F.T.C. 984 (1978), *modified on other grounds*, 92 F.T.C. 353 (1978), *rev'd*, 599 F.2d 1387 (5th Cir. 1979); Lemelledo v. Beneficial Management, 674 A.2d 582 (N.J. Super. Ct. App. Div. 1996), *aff'd on other grounds*, 696 A.2d 546 (N.J. 1997).

39. Currently, over 56% of the households in the U.S. do not have access in their home. Supplemental Information, 64 Fed. Reg. 49,722, 49,727 (Sept. 14, 1999).

when the consumer uses equipment supplied by the consumer. This is the only way the Board can be assured that consumers:

1) are not being coerced into accepting electronic disclosures,[40]
2) have actually consented "in a manner which reasonably demonstrates that the consumer can access information,"[41] and
3) have the ability to retain the electronic disclosures provided them. Since TILA requires disclosures to be *provided* to consumers – not just *shown* to consumers – the electronic provision of these disclosures must include some reasonable way for consumers to retain them. While E-Sign technically only requires a testing of the consumer's capacity to retain the electronic records when the consumer is asked to consent the second time after the provider has changed software,[42] it certainly makes no sense to interpret E-Sign's requirement for consumer consent to test the consumer's capacity to retain documents only in the event of a second consent, but not in the first consent. Clearly, the first consent process must ensure that the consumer has the capacity to retain the electronic records as well.

In face-to-face transactions, E-Sign's consent requirement can be met only when the consumer uses equipment under the consumer's own control (such as a laptop or other portable

40. In the 1999 proposed regulations on electronic disclosures the Board recognized the potential coercive opportunities for creditors to insist that consumers accept electronic disclosures.

41. E-Sign, 15 U.S.C. § 7001(c)(1)(C)(ii) (2000).

42. This is required for any electronic disclosure provided to consumers to replace writings. TILA requires disclosures to be provided to consumers in a form consumers can keep, and E-Sign requires that consumers must be able to retain electronic records replacing written records provided to them. *See* 15 U.S.C. § 7001(c)(1)(C)(i), (D) (requiring a new electronic consumer consent if a change in the hardware or software requirements needed to access or *retain* electronic records creates a material risk that the consumer will not be able to access or *retain* a subsequent electronic record that the was the subject of the consent).

device). This is the only way that the consumer's actual capacity to access *and retain* the electronic record can be assured.

4. The Interim Rule should articulate the consequences of a failure of consumer consent

The Interim Rule should clearly state the consequences if the creditor has failed to satisfy the requirements for E-Sign's consumer consent. Some people have publicly characterized E-Sign's electronic consent provision as simply a safe harbor. They have argued that a failure to comply fully with the consent provision did not, *by itself,* mean that the electronic delivery of records otherwise required to be in writing was not accomplished.

Allowing the consumer consent provision to be only a safe harbor is clearly wrong and in derogation of the stated language in E-Sign as well as congressional intent. The consumer consent provision in E-Sign establishes an "opt-in" regime. No records required to be in writing can be considered to be provided to a consumer if they were provided electronically, *unless* the consumer consented properly according to the requirements of 15 U.S.C. § 7001(c). The consequences of that lack of consent are whatever consequences there are in the underlying law for the failure to deliver documents required to be in writing to the consumer. For example, when TILA requires that a certain disclosure be provided to a consumer, then the electronic delivery of that disclosure is invalid if the consumer's consent did not comply with all of the requirements of 15 U.S.C. § 7001(c).

E-Sign specifically distinguishes between its treatment of contracts and its treatment of other records required to be in writing. There is a very limited, but clear, protection just for electronic contracts (which is not extended to other records provided electronically to consumers) in section 15 U.S.C. § 7001(c)(3), which says:

> The legal effectiveness, validity, or enforceability of *any contract* executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by

> that consumer in accordance with paragraph (1)(C)(ii) (emphasis added).[43]

This section indicates that the contract itself shall not be considered invalid just because the consumer did not electronically consent in conformance with the statutory requirement. For example, a contract that was delivered electronically despite the fact that the consumer did not electronically consent may still be fully enforceable. The effect of the failure to electronically consent has the same effect as failing to provide a copy of the contract to the consumer. In some cases, there may be no consequences from this. A contract enforced under the Statute of Frauds, for example, must be in writing and signed by the person against whom enforcement is sought. But this contract does not need to have been *provided* to the person against whom it is being enforced.[44] If a contract governed only by the Statute of Frauds were entered into electronically by a consumer and a business, and the consumer had *not* electronically consented, then the contract would not be deemed *un*enforceable just because of the failure to obtain the consumer's consent.[45] However, if the underlying law requires the contract to be *delivered* to the consumer to be valid, then the fact that the consumer had not electronically consented would mean that the contract would not be valid. But the

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43. *Id.* § 7001(c)(3).

44. *See, e.g.*, U.C.C. § 2-201 (Formal Requirements; Statute of Frauds)

> (1) . . . A contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement has been sought . . . .

Id.

45. However, the fact that the consumer had not electronically consented could be raised to show that there had not been a meeting of the minds, or that the electronic signature did not actually belong to the consumer. There would be no bar against the consumer making some other argument to show that the contract could not be enforced against him. However, in many states, the failure to provide a copy of a small loan contract to a consumer carries the statutory consequence that the contract may be unenforceable against the consumer. *See, e.g.*, N.C. GEN. STAT. § 53-181 (2001). The law in North Carolina governing small consumer loans states "(a) At the time a loan is made, the licensee shall deliver to the borrower . . . a copy of the loan contract. . . ." *Id.*

invalidity would flow from the fact that the contract had not been delivered to the consumer, not from the consent failure by itself.

There need not be such complex analysis applied to the situation where a consumer has failed to electronically consent to receive records, which are not contracts. The legal requirement in E-Sign for a consumer's consent is only triggered by the requirement of another law for a document to be in writing. Therefore, if the consumer has not properly consented to the receipt of that writing electronically – by electronically consenting pursuant to 15 U.S.C. § 7001(c)(1)(C)(ii) – the document cannot be considered to have been provided to the consumer. The consequences of not providing the document to the consumer are those that are specified in the underlying law. In TILA, this means that the consumer was *not* provided with the required TILA disclosure, triggering TILA damages and rescission, if applicable.

5. The Interim Rule wrongly allows some disclosures to be provided without prior consumer consent.

In a serious deviation from the requirements of the E-Sign law, the Interim Rule fails to require consumer consent to pre-application notices. There is no authority for this deviation from the law. In § 226.36(c), the Interim Rule allows a number of important, pre-transaction disclosures to be provided to consumers without E-Sign consent, and without requiring those disclosures to remain accessible to consumers for a period of time. These include disclosures in connection with applications for open and closed end credit, both unsecured and secured. There seems to be an implicit assumption that the consumer will obtain the information provided in the pre-application disclosures *after* the transaction is consummated. But if that were so, why would these disclosures currently be required to be in writing and provided to the consumer in a form the consumer can keep?

In fact, the disclosures provided pre-application are very important, and often provide essential information about the terms of the transaction. These disclosures were the basis upon which the consumer applied for the credit, and so must be available to the

consumer so that once the credit is supplied, the terms can actually be checked against those disclosed prior to the application.

Clearly the pre-application disclosures "relate to a transaction" as are required for E-Sign's consumer consent to apply. All consumer notices and disclosures required to be in writing are covered by the consumer consent requirement. As the three leading Democratic Senators working on E-Sign specifically said about this provision:

> The House bill included an amendment that required that consumers affirmatively consent before they can receive records (included required notices and disclosures and statements) electronically that are legally required to be provided or made available in writing. Special rules apply to electronic transactions entered into by consumers. *It is the Congress' intent that the broadest possible interpretation should be applied to the concept of "consumer." The definition in Section 106(1) is intended to include persons obtaining credit and insurance,* even salaries and pensions—because all of these are "products or services which are used primarily for personal, family or household purposes" as the word is defined in the Act (emphasis added).[46]

We are most concerned about the exclusion in the context of face-to-face transactions. If the exclusion for pre-application disclosures were limited to the situation where consumers were actually shopping on-line, it might make some sense. However, by allowing pre-application disclosures to be visually displayed on a computer screen to a consumer standing in a store applying for credit, we are inviting problems. That consumer might apply electronically, using the store's computer equipment, and consent electronically, also using the store's computer equipment to go to

46. 146 CONG. REC. S5229-30 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden & Sarbanes).

the store's website and click at the appropriate places. The consumer then leaves the store with no paper documents indicating the terms of the credit just entered into, and *no information* about the website, or how to access and download the disclosures. Even if the consumer wants to retain the pre-application disclosures, how would this be accomplished? The Interim Rule does not require any method of retention for these disclosures.[47]

While we do not object to the exclusion of advertisements from the requirement of consumer consent, we believe that the exclusion of pre-application disclosures is an illegal interpretation of E-Sign's consent provisions, particularly when applied to face-to-face transactions.

B. The Interim Rule completely ignores E-Sign's record retention and integrity requirements.

1. The electronic disclosure must be provided in a manner that the consumer can retain *at the time the disclosure is provided.*

When disclosures are provided electronically, consumers must be assured that they will have a way of keeping those disclosures for use at another time. Also, the disclosures must be provided in a manner, which would allow consumers to use the electronic record containing them to prove the terms of the disclosures in court, if necessary. As E-Sign wound its way through Congress there were several significant changes to it relating to document retention and integrity. These changes are reflected in § 7001(d) and (e), the provisions which are not limited to consumer transactions. The Interim Rule has failed to require compliance with these sections. Consider subsection (e):

> (e) ACCURACY AND ABILITY TO RETAIN CONTRACTS AND OTHER RECORDS- Notwithstanding subsection (a), if a statute,

47. Truth in Lending Interim Rule on Regulation Z, 66 Fed. Reg. 17,329, 17,336 (Mar. 30, 2001) (regarding § 226.36(d)(3)).

> regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.[48]

This means, among other things, that any disclosure required under TILA to be in writing must be provided to the consumer in a form which the consumer can retain. Providing a disclosure to a consumer in a face-to-face transaction, after the consumer consents using the creditor's equipment, by posting it on a website, and requiring the consumer to then go to another Internet access computer to find the appropriate link in the right website and download the disclosures does not meet these requirements. The visual display of TILA disclosures without a viable method *at that moment* for the consumer to download or print the disclosures is not providing the consumer an electronic record that is "capable of being retained."

The Board indicates in the Official Staff Commentary (§ 226.36(6)) in relation to this situation that the disclosures should be either a) sent to the consumer's email address, b) made available at another location, such as the creditor's website, or c) printable on a printer supplied. We believe that this requirement of E-Sign would be met if the disclosures are a) sent to the consumer's email address, or b) immediately printed. However, it must be clear that the consumer must have already established that email address. The Rule should plainly state that neither the creditor – nor his agent – can establish an email address for the consumer.

We commend the Board for its definition of email address, which excludes addresses only capable of receiving

48. 15 U.S.C. § 7001(e).

communications transmitted by the creditor.[49] However, when the agreement to receive electronic transactions is obtained in a face-to-face transaction there needs to be further protection. As those situations are so fraught with the potential for abuse of the consumer, special protections are required and should be applied.

E-Sign's consumer consent requirement invalidates a consent obtained in a face-to-face transaction using the creditor's computer equipment in which the creditor establishes the email address for the consumer. Unless the consumer has previously established an email address which the consumer can access through the consumer's own computer or a public access computer which the consumer regularly uses (which is established by the fact that the consumer has already established an email address), the consumer's consent does not meet E-Sign's requirements. A consumer using a creditor's hardware and an email address established by a creditor in a face-to-face transaction cannot electronically consent "in a manner that reasonably demonstrates that the consumer can access information in the electronic form."

2. The electronic disclosure must be provided in a form that the consumer can use to accurately reproduce the disclosure to prove the terms at a later time.

E-Sign's language regarding record integrity is very different from the original language in E-Sign, and it is different from the requirements for writings in the Uniform Electronic Transactions Act (UETA).[50] The differences made in the federal statute were deliberately inserted to ensure that the recipients of electronic records were provided records they could actually retain and use at a later time. The E-Sign language goes beyond UETA's provision by putting the onus on the provider of the electronic record to prove its validity.

E-Sign's requirement for document integrity specifically requires that *the electronic record be capable of being accurately*

49. Official Staff Commentary § 226.36(d)(1)

50. 15 U.S.C. § 7002(a).

reproduced for later reference by all parties.[51] This should mean that the electronic record provided to the consumer should have the same legal viability as the electronic record retained by the creditor. Consumers must be provided a viable opportunity to keep the record, and the electronic record itself must be useful to the consumer. Senator Leahy specifically addressed this issue in the Conference Report on E-Sign:

> [T]he conference report will ensure that electronic contracts and other electronic records are accurate and that relevant persons can retain and access them. Consumers must be able to retain electronic records and must have some assurance that they provide reasonable guarantees of the accuracy and integrity of the information that they contain.
>
> Under section 101(e) of the conference report, the legal effect of an electronic contract or record may be denied if it is not in a form that can be retained and accurately reproduced for later reference and settlement of disputes. *This means that the parties to a contract may not satisfy a statute of frauds requirement that the contract be in writing simply by flashing an electronic version of the contract on a computer screen.* Similarly, product warranties must be provided to purchasers in a form that they can retain and use to enforce their rights in the event that the product fails. (Emphasis added).[52]

The Interim Rule should require that when written disclosures are provided electronically, they must be in a form that the consumer can retain at the same time the disclosure is provided. This means that if the consumer is in a face-to-face transaction, the disclosure must be either: 1) downloaded to a device operated by the consumer, 2) printed immediately by the

51. *Id.*
52. 146 CONG. REC. S5219-22 (daily ed. June 15, 2000) (statement of Sen. Leahy).

creditor and the paper copy handed to the consumer, or 3) e-mailed to the consumer at a pre-existing email address, which the consumer can access prior to proceeding with the transaction. Simply allowing the disclosure to be posted to a website for future downloading – if ever – by the consumer, does not provide the consumer with a viable opportunity to retain the disclosure in a form which the consumer could later use to resolve a dispute.

We must also consider the form of the electronic record that is provided. When a paper disclosure is provided, the consumer will have no trouble using that paper to prove the terms of the disclosure at a later time. The creditor, however, could provide an electronic record of a disclosure that is so easy to alter that the downloaded version of the disclosure would be useless to the consumer in court. E-Sign § 7001(e) forces the creditor to make a choice to either: 1) provide the electronic record in a version which the consumer cannot inadvertently alter, or 2) retain and later use the same less secure version of the electronic record in court. *The crucial point here is that the provider of the electronic record must provide to the recipient the same type of record, which the provider will use to prove the terms of that record if a dispute arises later.*[53] The Board should specifically address this issue and mandate that the creditors follow the requirements for document integrity in E-Sign § 7001(e).

IV. CONCLUSION AND RECOMMENDATIONS

We are disappointed with the Board's Interim Rule on electronic disclosures. The Board appears to have substantially ignored the consumer protection purposes of E-Sign, stepped back from several important protections articulated in previous proposals, and disregarded congressional intent to protect consumers evidenced in E-Sign.

We request the Board immediately withdraw this Interim Rule and rewrite it with the following changes. First, in face-to-face transactions, consumers cannot "reasonably demonstrate" their ability to access information in the electronic form unless

53. This requirement should be articulated in 12 C.F.R. § 226.36(b)(5).

they are using hardware under their own control. This requirement simply implements the protections in E-Sign's requirement for consumer electronic consent.

Second, all disclosures required to be provided to consumers in writing under TILA, including all pre-application disclosures, can only be considered provided electronically if the consumer has consented electronically to receiving them. This simply implements the requirements of E-Sign's consumer consent provisions § 7001(c)(1). Also, a consumer consent is only valid when it is accompanied by a disclosure of all the terms required by E-Sign § 7001(c)(1), including the consumer's right to request a paper copy. This is E-Sign's requirement, which should be reiterated in the Interim Rule.

Next, all disclosures required to be provided to consumers must be emailed to the consumer or posted on a website, after the consumer has received an email which includes a web link to the disclosure. As delivery requirements were not addressed by E-Sign, it simply implements in a reasonable way the consumer protections purposes of TILA that consumers actually receive and are able to retain the required TILA disclosures provided to them. Disclosures which are provided on a website, rather than emailed to the consumer, must either be left on the website, or otherwise made available to the consumer, for the duration of the transaction between the parties. This provision implements E-Sign's requirements on document retention in § 7001(d).

In addition, disclosures electronically delivered to a consumer should only be considered delivered when: a) the creditor can determine that the consumer has accessed the web link containing the disclosure, b) the consumer acknowledges receipt of an email, or c) an automatic acknowledgment notifies the creditor that the consumer has opened the email. As delivery criteria were entirely omitted from E-Sign, this requirement simply implements TILA's consumer protection purposes of ensuring the required disclosures actually be provided to consumers. It recognizes that ongoing access to electronic communications remains considerably less definite for many households in this nation.

Disclosures electronically delivered to a consumer must be provided in an electronic format, which the consumer can retain, and can accurately reproduce at a later time. This means that if the creditor provides disclosures to a consumer in an electronic format, which can be altered, the creditor cannot later complain in a court proceeding that that electronic format does not meet evidentiary requirements to prove the terms of the record. This simply implements the requirements of E-Sign § 7001(e) on document integrity.

When HOEPA notices are delivered electronically, each co-owner must consent to receive the disclosure electronically, and each co-owner must receive a notice. This simply implements the current requirements of 12 C.F.R. § 226.31(e).

Creditors should be required to produce paper copies of electronically delivered disclosures at any time during the term of the credit agreement between the parties; a reasonable charge may be assessed for these paper copies. This specifically implements the requirements of E-Sign's consent provision mandating that paper copies be allowed, in § 7001(c)(1)(B)(iv).

Finally, consumers should be clearly permitted to electronically respond to notices electronically provided to consumers. This seems a matter of basic equity – to make electronic disclosures equally useful to consumers and creditors – which was mandated in the Board's previous iterations of rules on electronic disclosures but for some reason was not included in the Interim Rule.