

X. Other – E-Sign Act

The Interim Final Rules provided guidance on the timing and delivery of electronic disclosures. Pursuant to the Interim Final Rules, disclosures can be provided by e-mail or can be made available at another location such as the institution's web site. If a disclosure, such as an account statement or a notice of change of terms, is provided at a web site, an institution must notify the consumer of the disclosure's availability by e-mail. In addition, the disclosures must remain available on the web site for 90 days.

On August 3, 2001, the FRB lifted the mandatory compliance date of October 1, 2001, and directed institutions to follow their existing procedures² or, alternatively, to comply with the Interim Final Rules until permanent rules are issued. Once permanent final rules are issued, the Board expects to afford institutions a reasonable period of time to comply with those rules.

Definitions

“Consumer” – The term “consumer” means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

“Electronic” – The term “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

“Electronic Agent” – The term “electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action to respond to electronic records or performances in whole or in part without review or action by an individual at the time or the action or response.

“Electronic Record” – The term “electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

“Electronic Signature” – The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

“Federal Regulatory Agency” – The term “Federal regulatory agency” means an agency as that term is defined in section 552(f) of Title 5, United States code.

“Information” – The term “information” means data, text, images, sounds, codes, computer programs, software, databases, or the like.

“Person” – The term “person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.

“Record” – The term “record” means information, that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

“Requirement” – The term “requirement” includes a prohibition.

“Self-Regulatory Organization” – The term “self-regulatory organization” means an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such organization or entity, by a Federal regulatory agency, or by another self-regulatory organization.

“State” – The term “State” includes the District of Columbia and the territories and possessions of the United States.

“Transaction” – the term “transaction” means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct:

1. the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and
2. the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

Examination Procedures

1. Determine if and to what extent the financial institution electronically delivers compliance-related notices or disclosures subject to the consumer consent provisions of the Act.
2. Determine if the financial institution has established procedures to ensure compliance with the provisions of this Act.
3. Determine that the consumer, prior to consenting, is provided with a clear and conspicuous statement informing the consumer of any right or option to have the record provided or made available on paper or in nonelectronic form, and the right to withdraw the consent, including any conditions, consequences, or fees in the event of such withdrawal. Verify that the statement contains the following:
 - a. informs the consumer whether the consent applies only to the particular transaction that triggered the disclosure

² Existing procedures of the institutions are expected to be compliant with Federal Reserve Regulations E and DD.

or to identified categories of records that may be provided during the course of the parties' relationship;

- b. describes the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically; and
 - c. informs the consumer how the consumer may nonetheless request a paper copy of a record and whether any fee will be charged for that copy.
4. Determine that the consumer, prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of electronic records.
 5. Determine that the consumer provides affirmative consent electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.
- NOTE: Oral communications shall not qualify as an electronic record.*
6. 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 subsequent electronic records subject to the consent, verify that the financial institution provides the consumer with the following:
 - a. statement of the revised hardware and software requirements for access to and retention of electronic records;
 - b. the right to withdraw consent without the imposition of any condition, consequence, or fee for such withdrawal; and
 - c. the consumer provides a new affirmative consent as previously outlined.
 7. Determine that the financial institution maintains a single "authoritative" copy of any transferable record relating to a loan secured by real property. Such record must be "unique", "identifiable", and "unalterable".
 8. Determine that the financial institution maintains electronic records accurately reflecting the information contained in

applicable contracts, notices, or disclosures and that they remain accessible to all persons who are legally entitled to access for the period required by law in a form that is capable of being accurately reproduced for later reference.

References

FIL 79-98: Interagency Guidance on Electronic Financial Services and Consumer Compliance

<http://www.fdic.gov/news/news/financial/1998/fil9879.html>

Guidance Attachment

<http://www.fdic.gov/news/news/financial/1998/fil9879a.pdf>

FIL 66-2001: Lifting of Mandatory Compliance Date for Interim Rules Amending Regulations B, E, M, Z, and DD

<http://www.fdic.gov/news/news/financial/2001/fil0166.html>

FIL 40-2001: Interim Final Rules Amending Regulations B, E, M, Z, and DD Regarding Electronic Delivery of Required Disclosures

<http://www.fdic.gov/news/news/financial/2001/fil0140.html>

FIL 72-2000: Notice of Consumer Consent Requirements Applicable to the Electronic Delivery of Consumer Disclosures

<http://www.fdic.gov/news/news/financial/2000/fil0072.html>

DCA RD Memo 96-044: Electronic Banking Activities

<http://fdic01/division/dsc/memos/memos/direct/6480-1.pdf>

FIL 14-97: Examination Guidance on the Safety and Soundness Aspects of Electronic Banking Activities,

<http://www.fdic.gov/news/news/financial/1997/fil9714.html>

FIL 70-2001: FDIC Seeks Comment on Study of Banking Regulations Regarding the Online Delivery of Banking Services

<http://www.fdic.gov/news/news/financial/2001/fil0170.html>

FIL 30-2003: Federal Bank and Credit Union Regulatory Agencies Jointly Issue Guidance on the Risk Associated with Weblinking

<http://www.fdic.gov/news/news/financial/2003/fil0330.html>

Attachment

<http://www.fdic.gov/news/news/financial/2003/fil0330a.html>