The Electronic Signatures in Global and National Commerce Act (E-Sign Act)

Introduction

The Electronic Signatures in Global and National Commerce Act (E-Sign Act),[1] signed into law on June 30, 2000, provides a general rule of validity for electronic records and signatures for transactions in or affecting interstate or foreign commerce. The E-Sign Act allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing, if the consumer has affirmatively consented to such use and has not withdrawn such consent.

Subject to certain exceptions, the substantive provisions of the law were effective on October 1, 2000. Record retention requirements became effective on March 1, 2001. The E-Sign Act grandfathers existing agreements between a consumer and an institution to deliver information electronically. However, agreements made on or after October 1, 2000, are subject to the requirements of the E-Sign Act.

Summary of Major Provisions

Consumer Disclosures

Prior Consent, Notice of Availability of Paper Records

Prior to obtaining their consent, financial institutions must provide the consumer, 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 a non electronic form, and the right to withdraw consent, including any conditions, consequences, and fees in the event of such withdrawal;
- whether the consent applies only to the particular transaction that triggered the disclosure or to identified categories of records that may be provided during the course of the parties' relationship;
- describing the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically; and
- informing the consumer how the consumer may nonetheless request a paper copy of a record and whether any fee will be charged for that copy.

See Section 101(c)(1)(B).

Hardware and Software Requirements; Notice of Changes

Prior to consenting to the use of an electronic record, a consumer must be provided with a statement of the hardware and software requirements for access to and retention of electronic records. *See* Section 101(c)(1)(i).

If the consumer consents electronically, or confirms his or her consent electronically, it must be 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. *See* Section 101(c)(1)(C)(ii).

If a change in the hardware or software requirements need 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, a financial institution must:

- provide the consumer with a statement of (a) the revised hardware and software requirements for access to and retention of electronic records, and (b) the right to withdraw consent without the imposition of any condition, consequence, or fee for such withdrawal; and
- again comply with the requirements of subparagraph (c) of this section.

See Section 101(c)(1)(D).

Oral communications or a recording of an oral communication shall not qualify as an electronic record. *See* Section 101(c)(6).

Record Retention

The E-Sign Act requires a financial institution to maintain 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. *See* Section 101(d).

Agreements reached with consumers prior to October 1, 2000, to deliver information electronically are exempt from the requirements of Section 101(d). However, for any agreements made with new or existing customers on or after October 1, 2000, the requirements of Section 101(c)(1) will supersede all other consumer consent procedures relating to the use of electronic disclosures set forth in other regulations.

Regulatory and Other Actions

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Nonetheless, on March 30, 2001, the Federal Reserve Board (FRB) adopted interim final rules (Interim Final Rules) and on November 9, 2007, the FRB adopted final rules (Final Rules) establishing uniform standards for the

1 Public Law 106-229, June 30, 2000.

electronic delivery of federally mandated disclosures for five consumer protection regulations: Regulation B, Equal Credit Opportunity; Regulation E, Electronic Fund Transfers; Regulation M, Consumer Leasing; Regulation Z, Truth in Lending, and Regulation DD, Truth in Savings.

The Final Rules provided guidance on the timing and delivery of electronic disclosures. Pursuant to the Final Rules, electronic disclosures should be made using a method best suited to the particular type of disclosure. If the consumer uses electronic means to open an account or request a service, the disclosures must be provided before the account is opened or the service is requested. In response to a consumer request, disclosures should be made available in a reasonable amount of time and may be electronic if the consumer agrees. There are exceptions to the consumer consent requirement for electronically providing certain types of disclosures when the consumer is using electronic means such as a home computer. Disclosures should be maintained on the website for a reasonable amount of time for consumers to access, view, and retain the disclosures. The mandatory compliance date was October 1, 2008.

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 non-electronic 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 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 Guidance Attachment

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

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

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