

## ***Bytes are Beautiful: The Federal Reserve Board's New Rules for Electronic Delivery of Disclosures***

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The Electronic Signatures in Global and National Commerce Act (“ESIGN”), which was enacted on June 30, 2000, paved the way for the use of electronic records and signatures as legally valid and enforceable substitutes for paper documents and ink signatures. In response to ESIGN, the Federal Reserve Board (“FRB”) attempted in 2001 to draft rules setting uniform standards for the electronic delivery of required consumer disclosures. The 2001 rules were designated as “interim final rules,” but were never made mandatory due to lender concerns regarding operational changes and information security. As a result, lenders have implemented a variety of ways to deliver electronic disclosures with varying success.

On November 9, 2007, the FRB issued amendments to five consumer protection regulations to finally simplify and standardize the electronic delivery of required consumer disclosures. The regulations affected are:

- 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 amendments are effective as of December 10, 2007, with a mandatory compliance date of **October 1, 2008**. This article will focus on the changes to Regulations B and Z.

### **I. Background**

#### **A. *ESIGN Consent Requirements***

In order to preserve the underlying consumer protection laws governing consumers' rights to receive certain information “in writing” (e.g., Truth in Lending disclosures), ESIGN imposes special requirements on parties who want to deliver this information electronically. Before a party can electronically deliver such information, ESIGN requires the party to (1) provide specific ESIGN disclosures to the consumer; and (2) require the consumer to affirmatively consent to receive the information electronically in a manner that reasonably demonstrates the consumer's ability to access the required disclosures. If there are any changes to hardware and software requirements that may materially affect a consumer's ability to access and retain the required information, a consumer must be notified of the changes and be given the opportunity to consent again.

ESIGN does not affect any laws regulating timing, content, format and acknowledgments of any required consumer notices and disclosures. Lenders are still required to comply with the underlying laws with respect to electronic delivery of disclosures. For example, if a law requires that a specific disclosure appear immediately above a consumer's signature line, then such

disclosure must continue to appear in the same position within the electronic form of the disclosure.

### ***B. FRB's First Attempt to Issue Electronic Delivery Rules – 2001 Interim Final Rules***

The 2001 interim final rules incorporated the requirements of ESIGN, including requiring creditors to obtain consumers' affirmative consent to provide disclosures electronically. In addition, the interim final rules set forth additional electronic communication requirements, such as requiring that disclosures be delivered to the consumer via email or if the disclosure is posted at another location (e.g., the creditor's website), the consumer must be notified by email of the disclosure's availability. If a disclosure is posted on a website, the interim final rules required the disclosure to be made available on the website for at least 90 days. The interim rules also required, in the event of failed email delivery, a creditor to attempt redelivery to another email address or postal address on file for the consumer. Commenters to the 2001 interim final rules expressed their concerns that consumers may not have email addresses or may not want personal information sent via email. Additionally, there were also concerns expressed about email not being a secure medium for transmission of confidential information. Commenters were also concerned that the 90-day rule would increase costs and was not necessary for consumer protection. Based on these comments, the FRB lifted the previously established October 1, 2001 mandatory compliance date, thus making compliance voluntary.

## **II. New Electronic Disclosure Delivery Rules**

The FRB's amendments to Regulations B and Z (1) withdraw portions of the 2001 interim final rules on electronic disclosures that are deemed unnecessary; (2) withdraw other portions of the interim final rules the FRB believes pose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection; (3) retain provisions providing regulatory relief or guidance regarding electronic disclosures; and (4) mandate compliance with these amendments by October 1, 2008.

### ***A. General Disclosure Requirements***

With respect to Regulations B and Z, the rules clarify that financial institutions may provide required disclosures in electronic form, as long as the financial institution complies with the consumer consent and other applicable provisions of ESIGN.

In both Regulations B and Z, the FRB makes a distinction on the format of disclosures that are required to be provided on or with a loan application depending on the location where the consumer accesses the loan application electronically. For example, if the consumer accesses the application electronically in a location other than in the creditor's office (e.g., a home computer), any applicable disclosure must be provided in electronic form in order to meet the requirement that it be provided on or with the application. However, if a consumer is (1) physically present in the office of a creditor, a creditor's affiliate, or a third party that has arranged with creditor to provide applications to consumer and (2) submits an electronic

application (e.g., via a terminal or kiosk), the applicable disclosures can be provided to the consumer either in electronic or paper format.

Additionally, the FRB recognizes that some creditors may want to provide disclosures in both paper and electronic form, but rely on the paper form to satisfy their compliance obligations. For those creditors, the FRB states that a duplicate electronic form of the applicable disclosures may be provided without regard to ESIGN requirements since the electronic duplicates are not being used to satisfy any compliance requirements.

### ***B. Withdrawal of the 2001 Interim Final Rules On Timing and Delivery of Electronic Disclosures***

The 2007 final rules delete the provisions in the 2001 interim final rules governing electronic communications. As long as a creditor complies with ESIGN in providing electronic disclosures and the existing timing, content, format, acknowledgment and record retention requirements of the affected regulations, creditors will no longer need to:

- Send an email to the consumer's email address with the disclosure or a notice of the disclosure's availability on a specific website;
- Attempt redelivery of an email that has been return undelivered to another email address or other address that creditor has on file for the consumer; and
- Make disclosures posted on a website available for at least 90 days.

### ***C. Specific Regulation Z Amendments***

#### **1. No ESIGN Consent Required for Shopping Disclosures**

If a consumer accesses a loan application or advertisement electronically, Regulation Z clarifies that certain "shopping disclosures," such as disclosures required to be provided on or with applications and solicitations and advertising disclosures, may be delivered electronically without a creditor needing to comply with the consumer's consent.

#### **2. Guidance on Application Disclosures**

The final rule expands the guidance originally provided dealing with electronic disclosures provided on or with electronic applications. A creditor has flexibility in determining the method of presenting such disclosures on or with the application. The commentary includes examples of methods that can be used. These include, but are not limited to:

- a. Presenting disclosures automatically on the screen when the application appears;
- b. Locating disclosures on the same web page as the application, if the application contains a clear and conspicuous reference to the location of the

disclosures and indicates that the disclosures contain rate, fee, and other cost information, if applicable;

- c. Providing a link to the electronic disclosures on or with the application as long as the disclosures cannot be bypassed by the consumer before submitting the application. The link would take the consumer to the disclosures, but the consumer would not be required to scroll completely through the disclosures; or
- d. Locating disclosures on the same web page as the application without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application.

Regardless of the method used, the creditor is not required to confirm that the consumer has read the disclosures.

### 3. Notice of Right to Rescind

The final rule continues to allow a creditor to provide one electronic copy of the notice of right to rescind (versus two copies for paper notices) to each consumer as long as the creditor complies with the consumer consent and other applicable provisions of ESIGN.

### 4. Electronic Advertising Disclosure Guidance

The final rule retains the 2001 interim rule requirement that, in an electronic catalog or multiple-page advertisement (such as those appearing on an Internet website), the required disclosures need not be shown on each web page where a “trigger term” appears, as long as each page includes a cross-reference to the web page where the required disclosures appear.

### 5. Other Issues Raised by Commenters

The Supplementary Information to the Regulation Z final rule includes a discussion on several issues brought up by commenters during the comment period prior to the final rules being issued. Although not official rulemaking, this discussion provides insight on the FRB’s current thoughts with regard to new and emerging ways to deliver electronic disclosures. The topics covered are as follows:

- a. *Clear and Conspicuous Disclosures:* A commenter requested clarification on whether creditors would be deemed to comply with font or “clear and conspicuous” disclosure requirements, even when a consumer views such disclosure on a small hand-held electronic device, such as a cell phone or PDA. The FRB believes compliance can be met as long as the disclosures are provided in a manner such that that would be clear and conspicuous and presented in the required font when viewed on a typical home personal computer monitor.

- b. *Retainable Form:* Several commenters requested guidance on how creditors can ensure that they meet the requirement to provide disclosures in a form that the consumer can keep. The FRB believes that creditors satisfy the requirement of providing electronic disclosures in a form the consumer can retain if they are provided in a standard electronic format that can be downloaded and saved or printed on a typical home personal computer. The FRB will continue to monitor creditor's practices to evaluate whether additional guidance is needed.
- c. *Delayed Disclosures:* Several commenters suggested that, in the case of transactions involving small hand-held electronic devices, creditors should be permitted to treat transactions as though they were conducted by telephone and, as a result, delay delivery of applicable disclosures. For example, for disclosures that are required to be provided on or with a HELOC or ARM application, Regulation Z provides that if such applications are received by telephone, a creditor may provide such disclosures within three business days after the creditor receives the application. The FRB does not think that the use of hand-held devices for financial transactions has advanced enough to warrant delayed disclosures for electronic transactions.
- d. *Expansion of Exception from ESIGN Notice and Consent Requirements:* One commenter suggested that the FRB exempt additional disclosures, such as account opening or loan closing disclosures, from compliance with the ESIGN notice and consent requirements for consumers who choose to conduct financial transactions online. The FRB declined to accept this suggestion because of insufficient evidence that the consent requirement is burdensome and because the FRB believes that consumers should have a choice whether they want such disclosures delivered electronically.

**D. Regulation B Amendments – No ESIGN Consent for Application-Related Disclosures**

If a consumer accesses a loan application electronically, any Regulation B disclosures that are included within the application can be provided electronically without obtaining the consumer's ESIGN consent. Specifically, this applies to the following Regulation B disclosures:

- Optional self-test information about race, color, religion, national origin, or sex;
- Optional title information;
- Explanation of marital status inquiry;
- Alimony, child support and separate maintenance inquiry;
- Ethnicity, race, sex, marital status and age inquiries; and
- Right to copy of appraisal.