The E-Sign Act (#39, 40, and 41)

Congress enacted the Electronic Signatures in Global and National Commerce Act, or E-Sign Act, in 2000.[1] The E-Sign Act provides national rules regarding, among other things, provision of electronic disclosures to consumers. In general, when a federal or state law requires a person to provide a notice or other information "in writing," the E-Sign Act permits the person to sign or send it electronically, subject to obtaining the consumer's consent and making several statements about the consumer's rights and the technology necessary to access the electronic notice.[2] The E-Sign Act applies to many federal and state laws, and numerous federal and state agencies have authority to interpret the Act as it applies to laws over which they have jurisdiction.[3] The Bureau is among these agencies, and it inherited the Board's rules interpreting the E-Sign Act as it applies to Regulation B (Equal Credit Opportunity Act), Regulation E (Electronic Fund Transfer Act), Regulation M (Consumer Leasing Act), Regulation Z (Truth in Lending Act), and Regulation DD (Truth in Savings Act).

As chapter 9 discusses in more detail, Congress enacted the E-Sign Act to promote innovation and electronic commerce, but some of its requirements now appear outdated and can impede timely provision of financial services. For example, the Act requires that, prior to obtaining consent, a person must provide a consumer with "a statement of the hardware and software requirements for access to and retention of the electronic record," and, if the hardware or software requirements subsequently change, the person may have to re-obtain the consumer's consent and provide a new statement of the hardware and software requirement. In addition, the Act requires that a consumer's consent be "affirmative" and given or confirmed "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."[4]

The Bureau estimates that the required disclosures may be more than 1,000 words long,[5] which could take an average person 2 to 8 minutes to read. Or, more likely, they simply add to the barrage of disclosures that consumers scroll past without reading as they attempt to complete a transaction.[6] Requiring that the consumer consent "in a manner that reasonably demonstrates that the consumer can access information in the electronic form" imposes an additional procedural step and can create compliance questions about whether a consumer has made such a demonstration.[7] The substance of the reasonable-demonstration requirement also may be

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[1] 15 U.S.C. §§ 7001 *et seq.*

[2] E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

[3] E-Sign Act section 104 (15 U.S.C. § 7004).

[4] E-Sign Act section 101(c)(1) (15 U.S.C. § 7001(c)(1)).

[5] Bureau of Consumer Fin. Protect., *Debt Collection Practices (Regulation F)*, 84 FR 23274, 23361 (May 21, 2019).

[6] [cite to chapter 7 (Information)].

[7] Compliance questions could include, for example, whether a "reasonabl[e] demonstrate[ion]" includes consumers' affirmations that they can access a particular type software or obtaining a consumer's consent on an HTML web page even though the disclosure will be in PDF. *See, e.g.*, Thomas P. Quinn, Jr., *Time to Rethink ESIGN "Consent Handshake" Standards?* (May 2014), [HYPERLINK "https://www.counselorlibrary.com/insights/article.cfm?articleID=810"].

antiquated, better suited to a time when software programs had very different capabilities and there was a genuine question whether a given consumer could open a particular type of electronic file. Today, formats such as PDF are widely available, free to download, and compatible with most operating systems, reducing concerns that consumers will consent to receiving notices that they cannot open.

For these reasons, the Taskforce recommends that Congress replace or revise substantially the E-Sign Act. At a minimum, Congress should eliminate the E-Sign Act's antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer's consent be in a manner that reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, including the requirement that a consumer's consent be affirmative.

The Taskforce notes that the E-Sign Act contains an unusual "reverse preemption" provision.[8] This provision allows the general preemption of section 101 of the E-Sign Act if a state enacts the Uniform Electronic Transactions Act (UETA) drafted and recommended by the National Conference of Commissioners on State Laws in 1999.[9] UETA, which has been adopted by all but two states, avoids many of the cumbersome procedures of E-Sign and provides a time-tested model for E-Sign modernization.[10] For example, UETA allows a consumer's consent to conduct a transaction electronically either by a simple consent ("I agree") or inferred from the circumstances.[11]

Pending Congressional action, the Taskforce recommends that the Bureau clarify or streamline certain of the E-Sign Act's requirements, recognizing that the Bureau's rulewriting authority is limited in some respects, particularly as to creating exemptions. Clarifying what constitutes a reasonable demonstration could alleviate unnecessary burden and potentially speed the consent process. In addition, the Bureau should streamline or create an exemption from the E-Sign Act's requirements for TILA/Regulation Z disclosures and ECOA/Regulation B adverse action notices. When consumer consent to an electronic transaction, the creditor should be able to provide required disclosures electronically and in a form the consumer can keep, without the need to read the extensive E-Sign consent disclosures and demonstration requirements. For instance, some laws, like the Fair Credit Reporting Act, have been amended to expressly allow electronic disclosures of adverse action, but the companion provisions in the Equal Credit Opportunity Act's Regulation B have not. This could easily be remedied by the Bureau, and the Taskforce believes that doing so would reduce the costs of offering credit with no reduction in consumer protections.

[redacted]

Recommendations:

39. ***Congress should eliminate the E-Sign Act's antiquated requirements, including the required disclosures regarding necessary hardware and software and the requirement a consumer's consent be in a manner that***

[8] E-Sign Act section 102(a) (15 U.S.C. § 7002).

[9] *Id.*

10 Only New York and Illinois have not adopted E-Sign, but they have laws that accomplish much of the same policies. *See* https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034.

[11] Comment 1 to UETA section 2, *available at*: [HYPERLINK "https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=2c38eebd-69af-aafc-ddc3-b3d292bf805a&forceDialog=0"], at 6-7.

reasonably demonstrates that the consumer can access information in the electronic records. More generally, Congress should consider revising the consent process, allowing consent by either a simple statement of agreement or consent to conduct the transaction electronically or an inferrence from the circumstances of the transaction.~~including the requirement that a consumer's consent be affirmative~~.

40. ***Pending Congressional action, the Bureau should provide guidance as to what constitutes a "reasonabl[e] demonstrate[ion]" that a consumer can access information in the electronic records.***

41. ***Pending Congressional action, the Bureau should streamline or create an exemption from the E-Sign Act's requirements for TILA/Regulation Z disclosures and ECOA/Regulation B adverse action notices, including providing guidance regarding a "reasonabl[e] demonstrate[ion]" consistent with the above recommendation.***

[redacted]

TF Member acknowledgement	Todd:	Jean:	Howard:	Bill:	Tom:
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	Oct. ___, 2020