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## Electronic Delivery of Consumer Disclosures—New Rules Go Back to the Future

### What happened?

On April 20, 2007, the Federal Reserve Board (the “FRB”) issued a proposal to withdraw portions of five interim final rules that address the electronic delivery of required consumer disclosures. The regulations are: **B** (implementing the Equal Credit Opportunity Act), **E** (implementing the Electronic Funds Transfer Act), **M** (implementing the Consumer Leasing Act), **Z** (implementing the Truth in Lending Act) and **DD** (implementing the Truth in Savings Act).

The withdrawal means that those who have attempted to comply with the interim rules, and those who ignored them, can and should now focus their attention on the requirements of the federal Electronic Signatures in Global and National Commerce Act (“E-Sign”). This creates both benefits and new ambiguities for financial institutions.

### What’s the background?

In 2001, the FRB published for comment interim final rules establishing standards for the electronic delivery of disclosures required under the above regulations. Those rules became effective as of March 30, 2001, but were not to become mandatory until October 1, 2001. Before that date arrived, the FRB “lifted” the mandatory compliance deadline so that it could consider comments received on the “interim final” regulations.<sup>1</sup> Nothing has happened since then until now. With the issuance of the proposed rules, the FRB is essentially going back to basics by withdrawing the “electronic communications” provisions of the interim final regulations and substituting E-Sign in their stead. E-Sign does not impose many of the requirements the FRB had sought to impose under the interim final regulations. E-Sign also does not contain some of the FRB clarifications.

### What changed?

The interim rule required financial institutions to send electronic disclosures to an e-mail address designated by the consumer, or to make the disclosures available at another location, such as an Internet web site. If the disclosures were not sent by e-mail, financial institutions had to provide a notice to consumers alerting them to the availability of the disclosures. Disclosures posted on a web site had to be available for at least 90 days to allow consumers adequate time to access and retain the information. The FRB is now abandoning those requirements. Financial institutions were also required to make a good faith attempt to redeliver electronic disclosures returned as undelivered, using the address information available in their files. That requirement is also abandoned. In short, the entire section detailing “requirements for electronic communications” is being withdrawn, although some text is also added. In Regulation E, for example, 12 C.F.R. § 205.17, the heart of the FRB rules regarding electronic delivery of disclosures, is withdrawn as is the related FRB Staff Commentary for § 205.17. Similarly, in Regulation B, the heart of the electronic delivery rule is withdrawn (§ 202.16), but language is also added mandating delivery of certain

disclosures electronically if the applicant accesses the credit application electronically. In other words, the regulations do not *completely* cede electronic rules to E-Sign.

It is noteworthy that E-Sign did nothing to change the timing, format, content, and recordkeeping requirements of the underlying substantive rule (e.g., Regulation Z and Regulation B). If, for example, Regulation Z requires that a disclosure be delivered at the time of application, that requirement remains unchanged by E-Sign.

### What does it all mean?

In general, the FRB is replacing its own rules with E-Sign. There is logic in this because E-Sign restricts how far agencies may go in altering E-Sign, and the FRB rules made some arguable alterations. For example, the FRB interim rules limited electronic disclosures to “visual” disclosures, whereas E-Sign is not so limited. The FRB explained this as implementing its “clear and readily understandable” standard for disclosures<sup>2</sup> and not as an “interpretation,”<sup>3</sup> but a contrary argument could have been made that the “visual” restriction was actually a violation of the E-Sign rule prohibiting regulators from interpreting their rules inconsistently with § 7001 of E-Sign,<sup>4</sup> a section that does not limit “electronics” to visual formats.

### What E-Sign rules are at issue?

Using the proposed change to Regulation E as an example, the proposal substitutes this new rule for e-disclosures:

The disclosures required by this subpart may be provided to the consumer in electronic form, subject to compliance with the *consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act)*(15 U.S.C. § 7001 et seq.).<sup>5</sup>

Substantially similar language is found in the other proposed regulations.

The “consumer consent” provision of E-Sign is 15 U.S.C. § 7001 (c), but the “other applicable provisions” of E-Sign are spread throughout the act. While it is beyond the scope of this Client Alert to

detail the consumer consent provisions, we will attempt to provide a brief overview of them.

Under E-Sign, a financial institution may deliver to consumers electronic versions of disclosures that are required to be in writing, but only if the consumer affirmatively consents to using electronic records and has not withdrawn the consent.

However, before a financial institution receives the consumer’s consent to using electronic records, the financial institution must clearly and conspicuously inform the consumer of:

- Any right or option the consumer has to have the record provided or made available in paper form;
- The right of the consumer to withdraw consent and any conditions or consequences (including termination of the parties’ relationship) of the consumer’s withdrawal of consent;
- Whether the consent applies only to a single transaction or the entire relationship between the parties (e.g., whether it applies only to one disclosure or all disclosures in a transaction, whether it applies to only a particular loan or all loans, etc.);
- The procedures for withdrawing consent or updating contact information;
- How the consumer can obtain a paper copy of the electronic record and whether any fee will be charged for a paper copy; and
- The hardware and software requirements for access to, and retention of, the electronic records.

After receiving this disclosure, the consumer must consent in a manner that “reasonably demonstrates” that the consumer can access information in the electronic form that will be used to provide the disclosure. This could be accomplished, for example, by requiring the consumer to acknowledge that the consumer:

- Has access to a computer with appropriate hardware and software requirements to access and retain electronic documents associated with the disclosure process;
- Has access to a printer or the ability to download information for the consumer’s records; and

- Agrees to receive the required disclosures electronically.

For a detailed explanation of E-Sign, as well as the consumer consent rules, you may want to consult a book co-authored by one of the co-authors of this Client Alert.<sup>6</sup>

As many of you are aware, the federal E-Sign is not the only law addressing “e” delivery of disclosures and “e” signing of documents. A vast majority of the states have enacted a version of the Uniform Electronic Transactions Act (“UETA”). However, UETA is not relevant to the federal regulations addressed in the proposed regulations. While a state may avoid E-Sign’s federal preemption of state laws by enacting the uniform version of UETA, that ability to avoid the federal preemption does not apply to federal regulations.

### What might you start thinking about?

Any company that must comply with any of the impacted regulations may wish to consider at least the following:

#### Learn E-Sign Directly

Assuming the proposed regulations are issued in final form, the FRB’s gloss on E-Sign will be gone. That means institutions should take a fresh look at E-Sign not only to ensure compliance, but also to discover what might have changed. For example, the E-Sign consumer consent rule in § 7001(c) only applies to consumers, defined to include only individuals obtaining products and services which are used primarily for personal, family, or household purposes. Contrast that to Regulation B where the soon-to-be withdrawn “electronic communications” rule (§ 202.16) applies to “applicants,”<sup>7</sup> a concept that covers applicants applying for commercial or business credit as well as applicants applying for consumer credit. Although the Regulation B “e” rules for business credit were not the same as for consumer credit, even that version should not apply to business credit if E-Sign is substituted. E-Sign consumer consent rules are just that: consumer, not business rules. This is just one illustration of the impact of sole reliance on E-Sign. Changes proposed for each of the regulations should be consulted because the proposals are not uniform.

### Don’t assume that the old rules will still be viable, voluntary guidelines

The FRB is not simply withdrawing its e-communications rules because it has determined them to be unnecessary given E-Sign. The introduction to the withdrawal proposal explains that the FRB has determined that some parts of the interim rules are inappropriate or burdensome. For example, the interim regulations tell institutions to provide email notice when a disclosure is posted on the Internet for the customer’s review. Because many consumers do not want to receive email notice, and in light of the realities of “phishing,” identity theft, security and the like, the FRB has reconsidered that requirement and now characterizes it as neither necessary nor appropriate. Accordingly, if the proposed regulations are adopted, financial institutions should not assume that they should continue on as before. In this case, change may be both good and advisable. Having said that, we also note that the Staff’s prefatory comments to the proposed regulations encourage voluntary alignment with some concepts in the interim regulations that are being withdrawn, so financial institutions may also want to take that into consideration when formulating new approaches.

#### Consider commenting

E-Sign is more enabling of e-commerce than UETA, but still there are gaps or ambiguities in E-Sign that could use regulatory clarification. Submitting comments on the proposed withdrawal may provide an avenue for obtaining some clarification. Also, the FRB has invited comments on various aspects of the regulatory burden regarding collection of information. The deadline for comments is June 29, 2007.

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If you have any questions about the proposed changes, the consumer disclosure provisions of E-Sign, or other electronic commerce or consumer protection issues, please contact Holly K. Towle (+1.206.623.7580) or Jonathan Jaffe (+1.415.249.1023) / [holly.towle@klgates.com](mailto:holly.towle@klgates.com) or [jonathan.jaffe@klgates.com](mailto:jonathan.jaffe@klgates.com) of the K&L Gates E-Merging Commerce group.

## Endnotes

- <sup>1</sup> 66 F.R. 41439, 41440 (8/8/01).
- <sup>2</sup> See 12 C.F.R. Staff Commentary to § 205.17.
- <sup>3</sup> See, e.g., proposal for Regulation E where the FRB states that “Each of the interim final rules incorporated, but did not interpret, the requirements of the E-Sign Act.”
- <sup>4</sup> See 15 U.S.C. § 7004(b).
- <sup>5</sup> Proposed change to 12 C.F.R. § 205.4.
- <sup>6</sup> See Holly K. Towle and Raymond T. Nimmer, *The Law of Electronic Commercial Transactions* (<http://www.sheshunoff.com/store/F53.html>) at Chapter 4.08 (E-Sign) and Chapter 11.09 (E-Sign Consumer Consent Rules).
- <sup>7</sup> See 12 C.F.R. § 202.16(b).

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