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ESIGN: ENCOURAGING THE USE OF ELECTRONIC SIGNATURES IN THE FINANCIAL SERVICES INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON
DOMESTIC MONETARY POLICY, TECHNOLOGY,
AND ECONOMIC GROWTH

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

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ESIGN: ENCOURAGING THE USE OF ELECTRONIC SIGNATURES IN THE FINANCIAL SERVICES INDUSTRY

THURSDAY, JUNE 28, 2001

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DOMESTIC MONETARY POLICY,
TECHNOLOGY, AND ECONOMIC GROWTH,
COMMITTEE ON FINANCIAL SERVICES,
Washington, DC.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 2128, Rayburn House Office Building, Hon. Peter T. King, [chairman of the subcommittee], presiding.

Present: Chairman King; Representatives Oxley, Grucci, Hart, Capito, C. Maloney of New York, J. Maloney of Connecticut, Hooley, Hinojosa, and Inslee.

Chairman KING. The hearing will come to order. Today, the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth begins its first hearing on the use and application of technology in financial services. Innovations in the electronic world clearly have had a profound impact on the way consumers interact with financial professionals. I suspect that technology will continue to drive our marketplace in ways that we have never imagined.

The subcommittee is committed to facilitating such growth and efficiency on behalf of financial consumers and the institutions that serve them. For the purpose of today's hearing, the subcommittee will examine the Electronic Signatures in Global and National Commerce Act, or more commonly, ESIGN. This legislation gave legal recognition and effect to electronic signatures, contracts and records.

We are revisiting the legislation in an effort to determine if its real-world implementation is providing the legal certainty and protection envisioned by Congress. Specifically, Section 105[b] of the legislation directs the Department of Commerce and the FTC to submit a report to Congress evaluating the benefits and burdens of a particular consumer consent provision contained in the Act. This consent provision speaks to the understanding a consumer demonstrates within the context of a business-to-consumer transaction. This subcommittee looks forward to the findings and opinions of the panelists concerning this study.

At this time I would like to commend the FTC and the Department of Commerce for their combined efforts to complete the mandated study before its June 30th statutory deadline. This sub-

committee appreciates your expediting the process to allow for this hearing and we look forward to your testimony.

In closing, let me just say that our examination of this legislation is not a referendum on consumer protections and financial services, electronic or otherwise. Congress carefully crafted this legislation last year with the intent of providing certainty, uniformity and efficiency for transactions conducted electronically.

We have yet to see a wholesale embracing of ESIGN and the benefits it affords. This raises the question whether the legislation is overly restrictive to the point that consumers and businesses do not recognize the benefit. Perhaps it's too early to tell. Regardless, this is a dialogue that will begin now.

I thank the witnesses for taking the time out of their busy schedules today to share their expertise on the subject and I know that ESIGN is of particular interest to our Chairman, Mr. Oxley, who is also joining with us here this morning. And with that, I now recognize the Ranking Member of the subcommittee, the gentlelady from my State of New York, Mrs. Maloney.

[The prepared statement of Hon. Peter T. King can be found on page 34 in the appendix.]

Mrs. MALONEY. I thank the Chairman.

A year ago this Saturday, June 30th, 2000, President Clinton signed the historic ESIGN legislation granting electronic records and signatures legal enforceability on a par with written documents. Enactment of ESIGN was driven by the explosion in online commerce and the bipartisan desire of Congress and the Clinton Administration to facilitate its continued expansion.

While ESIGN modernizes our legal framework to reflect the new economy, Congress made clear that individuals deserve the same level of consumer protection in the online world as when they engage in paper-based transactions. One of the most important efforts to transfer these protections online is the consumer consent section in ESIGN.

Today, the subcommittee meets to review the report of the Federal Trade Commission and Department of Commerce on the benefits and burdens of the consumer consent provisions. In preparing its report, the Commission and Department of Commerce reviewed extensive public comments from industry and consumer groups and conducted a public workshop. While today we are only 1 year removed from an enactment, I am pleased that the FTC and Commerce have concluded that thus far the ESIGN consent provisions are proving effective.

The consumer consent provision in ESIGN required that information that businesses are currently required to provide to consumers in writing may only be provided in electronic form if the consumer affirmatively consents to electronic delivery in a manner that reasonably demonstrates the consumer's ability to access the electronic record.

Information that businesses are currently required to make in writing include contract terms and the gamut of consumer protection disclosures which are intended to protect consumers from fraud and to hold parties to the terms of agreements. The ESIGN consumer protection provisions recognize that there is a wide range in the level of public computer proficiency and access to the inter-

net. While customers of online banks or brokerages are already accustomed to conducting complicated transactions over the internet, ESIGN is intended to prevent consumers who are less accustomed to the online world from unwittingly consenting to receive information in a form that they cannot access.

While I agree with FTC/Commerce Report's conclusion that the benefits of the consent provisions outweigh their burden, I am interested to hear the perspective of industry witnesses today and their perspective on complying with the provisions. I also look forward to the discussion of the interaction of ESIGN and the electronic signature legislation being promoted at the State level, the Uniform Electronic Transaction Act. Enactment and enforcement of strong consumer protections are the best tools Congress has to increase public confidence in the internet and to contribute to the continued growth of e-commerce. The ESIGN Act's consumer consent provisions are an important part of this effort.

Thank you very much. I look forward to all the testimony.

[The prepared statement of Hon. Carolyn B. Maloney can be found on page 38 in the appendix.]

Chairman KING. I thank the Ranking Member. And now for an opening statement, the Chairman of the full committee who has a long and abiding interest in this legislation, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman, and thanks for holding this hearing on ESIGN and encouraging the use of electronic signatures in the financial services industry. This is the first technology-related hearing for the subcommittee, and I look forward to continuing our review of tech issues as they affect financial services.

The Electronic Signatures in Global and National Commerce Act enabled electronic signatures to satisfy the legal requirements for paper signatures. I worked closely with Chairman Bliley last session on the passage of ESIGN, and I was a Member of the Conference Committee that wrote the current law.

The goal of ESIGN was to simplify electronic business transactions, enabling consumers to sign a mortgage, take out a student loan, or open an IRA account from their own computer. Exchanging records and agreements electronically instead of on paper is good for the environment, less burdensome for consumers, and more cost effective for businesses. Members of the Conference Committee envisioned that ESIGN would open up the floodgates to many new transactions that individuals and businesses would be able to do online while at the same time giving people greater confidence and convenience when shopping online.

Unfortunately, electronic transactions have not increased significantly over the past year. Even in the financial services industry, which should benefit from most from ESIGN, people and businesses have been very slow to take advantage of the new opportunities. When the Conference Committee was debating ESIGN we struggled to create the right balance in the consumer protection provisions.

It is always hard to look into the future and determine what consent provisions will be necessary to protect consumers from abuse that will not unduly burden the implementation of the law. And while I believe our efforts were successful overall, we need to go back and review the balance to see if we tipped too far in one direc-

tion or another. In particular, we need to consider the proper level of protection necessary in the financial services industry where we have a separate layer of oversight and regulatory supervision already.

We also need to ensure a sufficient level of uniformity in the adoption and interpretation of ESIGN by the States and Federal regulators. States can now choose to adopt either ESIGN or a version of the Uniform Electronic Transactions Act, also known as UETA, as long as it's not inconsistent with ESIGN. Unfortunately, many States are adopting UETA, but with different portions of the ESIGN consent provisions thrown into the mixture. This patchwork of laws governing electronic transactions is resulting in higher costs and more confusion. If we don't end up with a minimum level of certainty and consistency, businesses and consumers will not have the confidence to make ESIGN a reality.

Service providers and consumers must be comfortable interacting with each other online. If the procedures surrounding a transaction are unduly burdensome for either party, the deal will not get done. We must work to ensure that our laws are evenly balanced to bring the greatest benefit to all the participants in the marketplace. Recognizing that ESIGN has been in effect for less than 8 months, I look forward to the initial report by the Federal Trade Commission and the Secretary of Commerce on the benefits and the burdens of ESIGN's consumer consent provisions and to the testimony of our other industry and consumer witnesses. And I yield back the balance of my time.

[The prepared statement of Hon. Michael G. Oxley can be found on page 36 in the appendix.]

Chairman KING. Thank you, Mr. Chairman.

Mr. Maloney.

Mr. MALONEY. Mr. Chairman, in the interest of time, I'd just ask unanimous consent for Members who have opening statements to be able to submit them for the record.

Chairman KING. Without objection, so ordered.

Mrs. Capito.

[No response.]

Chairman KING. Before we begin the testimony, certain Members of the full committee not assigned to the subcommittee are going to be allowed to participate and ask questions of the witnesses during this hearing, and if there's no objection, that will be so ordered.

We have a distinguished panel of witnesses this morning. Again, I want to thank them for taking the time from their schedules to be here. We look forward to their testimony. We certainly appreciate the time and effort they put into their preparation. I will introduce them individually and then ask them to make their statements.

The first witness will be Ms. Eileen Harrington, the Associate Director for Marketing Practices for the Federal Trade Commission. Our next witness will be Mr. Christopher Roe, the Vice President of Fireman's Fund Insurance Companies, testifying on behalf of the American Insurance Association. Mr. Thomas Crocker, Partner in Alston & Bird. Mr. Jeremiah Buckley, General Counsel for the ELectronic Financial Services Council. Also Mr. Louis Rosenthal, Executive Vice President of ABN AMRO Information Technology

Services Company on behalf of the Financial Services Roundtable. And Ms. Margot Saunders, Managing Attorney for the National Consumer Law Center.

And we would ask you to keep your testimony to 5 minutes. If it goes a minute or two behind, we're not going to pull the trap door.

Ms. Harrington.

STATEMENT OF EILEEN HARRINGTON, ASSOCIATE DIRECTOR FOR MARKETING PRACTICES, FEDERAL TRADE COMMISSION BUREAU OF CONSUMER PROTECTION

Ms. HARRINGTON. Thank you, Mr. Chairman and distinguished Members, Chairman Oxley. I am Eileen Harrington from the Federal Trade Commission, and I am pleased to be here this morning to present the Commission's testimony.

As you may know, the FTC is the Government's principal consumer protection law enforcement agency. Its mission is to promote the efficient functioning of the marketplace by taking action against unfair or deceptive acts or practices and to increase consumer choice by promoting competition. The Commission has vigorously promoted e-commerce in a variety of ways, in part by bringing enforcement actions to stop deceptive and fraudulent practices on the internet. And this experience particularly provided useful grounding for us as we examined implementation of the reasonable demonstration requirement in the consumer consent provision.

In Section 105(b) of ESIGN, the Congress directed the FTC and the Department of Commerce to issue a report on the impact on electronic commerce and consumers of the reasonable demonstration requirement of the consumer consent provisions of the Act. Specifically, the Congress asked us to report on the benefits of that provision to consumers, the burdens that the provision imposes on e-commerce, whether the benefits outweigh the burdens, the effect of the provision in preventing fraud, and whether any statutory changes would be appropriate.

Our testimony today will be limited to a discussion of these issues which were the focus of our review and the report from Commerce and the FTC. To fulfill our mandate, we conducted outreach efforts, which included issuance of a notice in the Federal Register inviting comment, a public workshop, and extensive outreach to consumer, industry, and other Government organizations.

Our outreach was extensive in an attempt to evaluate the technology available to reasonably demonstrate compliance with the consumer consent provisions and to learn how companies are implementing the reasonable demonstration requirement. We met with online businesses community members, technology developers, consumer groups, law enforcement officials, and academics.

Our industry contacts included high tech companies involved infrastructure development for electronic contracting and electronic payment systems as well as businesses entities that use or plan to use electronic records in consumer transactions.

We also did our own research to identify the types of businesses that are using the consumer consent provision of ESIGN. And specifically, we just went on the internet and looked and looked and looked for businesses that are now doing that.

To comply with the mandate to solicit comment from the general public and consumer representatives in e-commerce businesses, as I mentioned we published a Federal Register notice inviting comment. We sent that notice and the press releases by both agencies to literally hundreds of businesses and organizations that we know have an interest in the development of electronic commerce. And in response to our outreach efforts, we received 32 comments from consumer organizations, software and computer companies, banks, members of the financial services industry, and academics.

And in April, we hosted a public workshop to explore the issues raised in the comments and in our outreach efforts and to discuss new issues and develop a basis for analysis and conclusion as requested by the Congress.

Although a number of e-commerce businesses, principally in the financial services industry, have implemented the procedures requiring reasonable demonstration of consumer consent, there was consensus among the participants and commentors that insufficient time has passed since the law took effect to allow consumers or businesses to experience the full effect of the provision, to develop sufficient empirical data to evaluate quantitatively whether the benefits outweigh the burdens, or to determine whether the absence of the procedures that are required by the consumer consent provision would lead to an increase in deception and fraud against consumers.

In general, consumer advocates and State law enforcement agencies expressed strong support for the reasonable demonstration requirement of the consumer consent provision as an effective tool to promote e-commerce by increasing consumer confidence in the electronic marketplace. They said that the benefits of this requirement to consumers and e-commerce businesses outweigh the burdens associated with adapting business systems to comply with the provision.

Consumer advocates also suggested that the reasonable demonstration requirement may prevent deception and fraud from occurring by giving consumers more information about the legitimacy of the business they are dealing with and alerting them to the importance of receiving electronic documents.

Businesses that have implemented the consumer consent procedures also report benefits, including increased protection from liability, increased consumer confidence, and the opportunity to engage in additional dialogue with consumers about transactions. Some industry commentors indicated that the reasonable demonstration requirement may be burdensome, because it adds an extra step that could delay the consummation of the transaction and may cause confusion that could lead consumers to forego the use of electronic records.

Although some commentors identified burdens, there is insufficient data to assess the likelihood or severity of these burdens quantitatively or their impact on consumers and e-commerce businesses. In addition, the record suggests that some burdens such as the additional step entailed to satisfy the reasonable demonstration requirement may be resolved or minimized over time as businesses and consumers adjust to the consent procedure and gain experience sending and receiving documents in an electronic form. Similarly,

instances of consumer frustration or confusion and the potential for loss of business may be reduced or eliminated by the refining of consent procedures in the marketplace.

Although measuring the consequences of omitting the consumer consent provisions or the reasonable demonstration requirement therein is difficult, we believe that the inclusion of this provision helps prevent deception and fraud. The provision ensures that consumers who chose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions. This provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent State and Federal laws that contain a writing requirement.

As enacted, ESIGN gives appropriate consideration to the threat that fraud and deception on the internet pose to the growth and public acceptance of electronic commerce. Most laws protecting consumers against fraud and deception come into play after fraud has been committed and documented. ESIGN attempts to discourage fraud before it takes hold. It incorporates basic consumer protection principles that will help maintain the integrity and credibility of the electronic marketplace, bolster confidence among consumers that electronic records and signatures are safe and secure, and ensure that consumers continue to receive comprehensible written disclosures.

Our report concludes that although the participants in our study expressed a range of views, it is reasonable to conclude that thus far, the benefits of the reasonable demonstration requirement outweigh the burdens of its implementation on electronic commerce, although we can't make that assessment in any quantitative form. The provision facilitates e-commerce and the use of electronic records and signatures while enhancing consumer confidence. It preserves the right of consumers to receive written information required by State and Federal law, and discourages deception and fraud by those who might fail to provide consumers with information that the law requires that they receive.

The requirement appears to be working satisfactorily at this stage. Almost all participants recommended that for the time being, implementation issues should be worked out in the marketplace and through State and Federal regulations, and that it is simply too soon to consider making changes to the statutory scheme.

The Commission greatly appreciates the opportunity to describe its efforts, and we would be happy to answer any questions that you may have. Thank you.

[The prepared statement of Eileen Harrington can be found on page 41 in the appendix.]

Chairman KING. Thank you, Ms. Harrington.

Mr. Roe.

STATEMENT OF CHRISTOPHER ROE, VICE PRESIDENT, FIREMAN'S FUND INSURANCE COMPANIES, ON BEHALF OF THE AMERICAN INSURANCE ASSOCIATION

Mr. ROE. Thank you, Mr. Chairman and Members of the Domestic Monetary Policy, Technology, and Economic Growth Subcommittee, for providing me with an opportunity to testify before you today regarding the Electronic Signatures in Global and National Commerce Act, ESIGN.

My name is Christopher Roe. I am Vice President and Legal Counsel for Firemen's Fund Insurance Company. Fireman's Fund, established in 1863 in San Francisco, California, is among the Nation's top writers of property casualty insurance, writing over four billion in gross premiums and employing over 8,000 people.

Chairman KING. Excuse me, Mr. Roe. Could you move the microphone a little closer, please?

Mr. ROE. Certainly. Thank you.

Chairman KING. Thank you.

Mr. ROE. I am pleased to appear before you today on behalf of the American Insurance Association to discuss ESIGN. The AIA is the principal trade association for property and casualty insurance companies. The passage of ESIGN is an important ingredient to the evolution of e-commerce within the insurance industry. We believe that ESIGN, coupled with the State passage of the Uniform Electronic Transaction Act, UETA, will ultimately allow insurers to better deliver speed, efficiency, and cost savings in future online insurance transactions.

In particular, some of the advantages of ESIGN are already evident. ESIGN sets a higher degree of legal uniformity among the States than currently existed, which is more conducive to an online marketing strategy in the 50 States. ESIGN establishes a higher degree of predictability and stability in the States, which allows insurers to more confidently provide their customers with the online services they are increasingly seeking. And ESIGN now allows customers to execute an online insurance transaction completely online.

Without ESIGN and UETA, customers and their insurers could not close an insurance transaction online. Many customers naturally became discouraged after completing information for an insurance quote and then not being able to finalize the transaction. Often the customer would receive an e-mail that an agent would contact them in a few days or that they would have to wait to receive a package in the mail to complete the process. ESIGN will help smooth this transition and allow us to meet customer expectations, including 24-hours-a-day service, greater efficiency, convenience, and cost savings.

My company, Fireman's Fund, believes annual savings of millions of dollars can be achieved if consumers signed policy applications and receive coverage notices and renewals online. Mailing expenditures alone cost Fireman's Fund $8 million annually. By the end of the year, we expect to begin to use electronic signatures and records in some of our commercial divisions.

Because of its recent passage and more recent implementation, the insurance industry has had limited practical experience with ESIGN. As a result, we believe more time is needed to test the

workability of the ESIGN provisions before advocating specific changes to the Act.

Even with the constraints of ESIGN, State laws still deviate from Federal law. About 20 States have adopted an exact version of UETA as recommended by the National Conference of Commissioners on Uniform State Laws, and another 15 have adopted a UETA-styled version, but with modifications. Some non-uniform provisions were adopted before ESIGN. For example, in California, homeowners and automobile insurance consumers were required to complete their transactions offline. Few insurers want to be the legal test case for Federal preemption for these particular laws.

Recently, nine States have locked the ESIGN consent provisions into their State UETAs. The scenario is ripe for creating an unlevel playing field between the financial sectors. Because these provisions are still untested, Federal regulatory agencies were given the power to waive consumer consent provisions for a category or type of record. However, a similar regulatory waiver provision does not exist in these nine States except for Texas. Regulatory parity among the financial sectors may be further exacerbated if State regulators do not have the same regulatory flexibility.

AIA and Fireman's Fund support a process whereby the parties consent to an electronic transaction. Similarly, in those States that adopt UETA, businesses and consumers must agree to use electronic signatures. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

In conclusion, even though questions remain on such issues as consumer consent, the legal environment has vastly improved. We continue to support UETA in the States in order to maintain uniformity and believe that UETA provides a simpler approach with regard to consent. In the meantime, non-uniformity, particularly for the business of insurance, still remains a nagging and unfortunate reality.

As this subcommittee and all of Congress mulls over the implementation of ESIGN provisions and other e-commerce issues, we urge you to take the following action:

First, contact the National Association of Insurance Commissioners and State insurance regulators to encourage the States to strive for the highest level of uniformity possible in implementing ESIGN or UETA so that the insurance companies can have the highest level of confidence in delivering services to its customers online in a way that utilizes the best technology available.

And second, recognize that in many policy and regulatory areas, but particularly in e-commerce, a strong Federal preemption is vital in giving businesses greater certainty and confidence in using technology and the internet to serve their customers.

In the next year, we will learn valuable insights on whether the ESIGN consent provisions are successful and whether UETA provides an equally effective and simpler approach to consent.

Again, I appreciate having the opportunity to testify before you today and would be happy to answer any questions you may have.

[The prepared statement of Christopher Roe can be found on page 105 in the appendix.]

Chairman KING. Thank you, Mr. Roe.

Mr. Crocker.

STATEMENT OF THOMAS E. CROCKER, PARTNER, ALSTON & BIRD, LLP

Mr. CROCKER. Mr. Chairman, Chairman Oxley, and Members of the subcommittee, my name is Thomas Crocker. I am partner in the Washington office of the law firm of Alston & Bird.

My involvement with the ESIGN Act goes back to 1997. When representing the then-CitiCorp, I helped draft a predecessor version of the ESIGN Act in the 105th Congress. More recently, we represented Charles Schwab & Company and the Securities Industry Association in all phases of the development, consideration, and eventual enactment of the ESIGN Act in the 106th Congress.

Today, however, I am testified solely on my own behalf as an attorney in private practice who has assisted a number of clients in implementing the ESIGN Act and who has had some practical experience with the types of real-world concerns that businesses have had in complying with the Act.

As has been noted, almost exactly 1 year ago, on June 30th, 2000, the President signed the ESIGN Act into law. At that time it was hailed as the, quote, "single most important piece of e-commerce legislation enacted in the 106th Congress." Now, 1 year later, it is appropriate to ask whether the ESIGN Act has lived up to its promise, and if not, why not?

The significance and the promise of ESIGN Act lay in its central attribute of being a technology-neutral, uniform Federal law designed to encourage the use of electronic records and signatures. The uniformity and consistency were and remain the most important ingredients to providing industry with the legal certainty that it needs to conduct e-business on a national and global scale. These touchstones—uniformity, consistency, and legal certainty—are important measures by which the success or failure of the ESIGN Act will appropriately be judged.

As part of our representation of clients seeking to implement the ESIGN Act, we recently conducted an informal website survey to try to determine how widespread reliance in the ESIGN Act has actually become. This survey was aimed primarily at the financial services industry—banks, broker-dealers, insurance companies—but it also touched on other business sectors such as health care, technology, and online sales.

Our findings confirmed what we had long suspected to be the case—that use of the ESIGN Act has been slow to take off and that compliance with it is limited at best. Its embraced by U.S. industry at large has been spotty. Why is this so? Based on our work with various clients seeking to understand and implement the ESIGN Act, we believe that although well-intended, the ESIGN Act in its present form fails to deliver on the promises of uniformity, consistency, and legal certainty.

This failure is compounded by the unusual absence of a statement of managers as part of the legislative history of the Act, which would help in its interpretation, as well as by the fact that the Act is studded with well over two dozen vague terms in its critical provisions, which inject uncertainty into its meaning. Against this background our clients' practical concerns focus on three spe-

cific areas in the Act: Consumer consents, preemption, and agency rulemaking.

Throughout the Congressional debate on the ESIGN Act, there was wide support by industry for reasonable consumer protection provisions. However, as is well known, the Act as signed into law contains consumer consent provisions that go beyond those that exist in the paper world.

Two elements of the consumer consent requirements continue to cause concerns which contribute to reluctance to use the Act. First, the "reasonably demonstrates" requirement at Section 101(c)(1) is vague. It has, however, proven workable, provided it is interpreted to allow firms flexibility in meeting its requirements and it is used in its simplest form—one company, one consumer, one electronic system. However, the concern is that the "reasonably demonstrates" requirement is in a sense a straitjacket, because it requires a company to communicate with its customer only through the identified single system that the customer has originally chosen to access the information in electronic form. This rigid, narrow procedure does not take account of the reality that consumers might own multiple computers or of the increased market presence of hand-held terminals. It creates issues when a customer deals with a firm through a variety of access channels.

The second major concern with the consumer consent provisions is the requirement governing what happens if the hardware or software requirements change after the consumer has given affirmative consent. If that change, quote, "creates a material risk that the consumer will not be able to access or retain a subsequent electronic record", then the party providing the electronic record must go through the entire consumer notice, consent, and reasonable demonstration process all over again. The very vagueness of the term "material risk" creates uncertainty as to when it must be invoked. For example, does a simple system upgrade require a company to go through the costly process of notifying all of its customers and obtaining consents de novo?

Another reason that businesses have shied away from using the ESIGN Act is the mind-numbing complexity of its preemption provisions and the uncertainty that they raise in connection with the Act's interface with the Uniform Electronic Transactions Act. Put yourself in the shoes of a company that wants to rely on the ESIGN Act, trying to minimize risk. You must first ask yourself whether the State whose law you want to govern has enacted a clean version of UETA, as reported by the NCCUSL.

If it has, then that State's enactment of UETA should govern, at least in theory. But many States have not done that. You must therefore ask whether the changes by the State to UETA are pursuant to Section 3(b)(4) of UETA. If they are, well, then, the ESIGN Act preempts that State's UETA only to the extent those changes are inconsistent with Titles I or II of the ESIGN Act. However, if the changes by the State are not pursuant to Section 3(b)(4), and many are not, then you have to go to the second prong of the two-pronged preemption test under Section 102 of the ESIGN Act, which seemingly would preempt the State's version of UETA unless further tests are satisfied.

Ultimately, in any given case, whether the ESIGN Act preempts State law may have to be determined through litigation. As one in-house counsel to a large insurance company recently told me, "I was very excited about the ESIGN Act when it passed. But once I worked through what was in it, well, just forget it."

The third major concern is the agency rulemaking. This section is designed to govern the interface of the Act with Federal and State agency rulemaking at Section 104. However, it is also confusingly and complexly drafted so that the goals of uniformity, consistency, and legal certainty come up short.

I see that I am running out of time, so I will truncate this and just cut to my conclusion, which is that there are those who say that it is premature to consider amending the ESIGN Act and that the best approach is to wait and see. That is one view. However, based on my experience, the complexities and ambiguities of the statute have already resulted in a tangible level of discomfort in industry that procedures, once adopted, might be held inadequate or out of compliance when the law is eventually interpreted by courts or Federal or State agencies.

It therefore is not clear what further wait-and-see will achieve. If the Congress wishes to adjust the ESIGN Act to accord it more closely with the three original goals of uniformity, consistency, and legal certainty, the time to commence that process may well be now.

Thank you.

[The prepared statement of Thomas E. Crocker can be found on page 113 in the appendix.]

Chairman KING. Thank you, Mr. Crocker. I appreciate your facilitating your statement. And just so you know that all of these statements will be considered as part of the record in full.

Mr. Buckley.

STATEMENT OF JEREMIAH S. BUCKLEY, PARTNER, GOODWIN PROCTOR; GENERAL COUNSEL, THE ELECTRONIC FINANCIAL SERVICES COUNCIL

Mr. BUCKLEY. Thank you, Mr. Chairman. Good morning, Mr. Chairman, and Members of the subcommittee. I am Jerry Buckley.

Chairman KING. Mr. Buckley, if you could move the microphone a little closer, please.

Mr. BUCKLEY. I am partner in the law firm of Goodwin Procter and act as General Counsel for the Electronic Financial Services Council. Thank you for the opportunity to appear today.

Members of the Electronic Financial Services Council believe that the rules regarding electronic signatures and records set for the ESIGN Act have tremendous potential to promote the growth of electronic commerce, particularly in the financial services sector.

Under the ESIGN Act, consumers may access products 24 hours a day, 7 days a week. Consumers who are in currently underserved areas will now have the opportunity, whether they be urban areas or rural areas, to access a competitive menu of services from a variety of financial services providers.

These online consumers will receive real-time disclosures as opposed to packets of paper they receive several days after they've made their decision on a financial product, and businesses will be

able to literally eliminate billions of dollars of records management costs, savings which we believe will ultimately be competed through to consumers.

Some have observed today that the financial services industry has been slower than was expected in adopting the use of electronic medium that ESIGN empowers. We believe that several factors are responsible for this phenomenon.

First the Act is self-effectuating. That is, it does not require a Federal agency to spell out rules of the road and standard mandated forms as is often the case with Federal legislation, rather leaving these decisions to private parties. This flexibility, which will be very important in the long run in facilitating market innovation, has the short-run disadvantage of not providing specific governmental guidance regarding appropriate electronic business procedures. We think the tradeoff is worthwhile, though.

Private parties are now required to devise their own standards and specifications for conducting business electronically, and particularly in the financial services business where financial instruments must often be capable of being traded or pledged, it is not sufficient for the financial instrument to be enforceable between the parties originating the transaction.

These instruments must be originated to the satisfaction of the secondary market purchasers of mortgages and chattel paper and others who trade in or finance these instruments. In order that this happen, each financial services industry will have to develop a series of conventions or guidelines regarding what electronic practices and procedures will be acceptable to companies doing business in that particular industry.

We at the Electronic Financial Services Council are participating in promoting the development of these guidelines or conventions. Over the last 7 months, Freddie Mac, one of our members, has developed specifications for the purchase of electronically originated loans in the secondary market. Freddie Mac and Fannie Mae are currently negotiating with lenders to arrange forward commitments for the purchase of electronically originated mortgages. And as a result, we expect a gradual, but steady, growth in the paperless mortgage transactions.

Similarly, drawing on the seminal thinking of Freddie Mac in this area, the Department of Education has promulgated guidelines for the electronic origination of student loans. These loans will be available online next month for students seeking financing for the upcoming academic year.

One of my colleagues here, Pete Simons, is going to going to be attending UVA law school and intends to apply next month electronically for his student loan.

As an attorney advising on the implementation of ESIGN, I deal with clients who are wrestling with choices of vendors, decisions regarding authentication, evidence of intent, authority to sign. Again, ESIGN having become law, these companies are now coming to grips with the legal decisions involved in setting up an online contracting process.

In the absence of court decisions affirming the evidentiary validity of electronic records, those seeking to do business electronically are understandably proceeding with caution.

Now you have asked whether the consumer consent provisions of ESIGN are hampering the speedy adoption of electronic records. While we believe that some aspects of the consumer consent provisions do place an unnecessary burden on the use of electronic signatures and records, we are firmly committed to the proposition that consumers are entitled to timely and meaningful information. Electronic commerce cannot reach its full potential without consumers' complete comfort with and confidence in both the process and the medium. Effective delivery of the ESIGN consent disclosures will materially contribute to that comfort and confidence.

The Council strongly supported the original package of consumer protection provisions to the ESIGN Act which were offered in the House of Representatives, the so-called Inslee-Roukema Amendments. Certain elements of ESIGN's rules concerning effective consumer consent were not part of the Inslee-Roukema Amendments. Instead, they were added at the very end of the legislative process and were perhaps unavoidably subject to less rigorous analysis than the rest of the statute. In particular, I refer to the requirement that consent be in electronic form and that there be a reasonable demonstration of the consumer's ability to access information. These have proven to be hurdles, although I would say we have concluded not yet barriers to the use of ESIGN powers.

Others have covered the problems with these, and I won't try to go through them in detail here. But suffice it to say that these put the consumer through a test that is we believe unnecessary and impair the ability to take what might be a face-to-face transaction by sending the consumer back through a series of tests to make sure they can contract electronically in a way that is inconsistent with the way we otherwise do business.

The second major concern we have is regarding the implementation of regulatory requirements under Section 104 of ESIGN. We believe that Federal and State agencies should adhere to the standards set out in the ESIGN Act when interpreting it, and we have noticed a tendency to stray from that which concerns us greatly. We have addressed this in more detail in a submission which is an attachment, a letter to the Federal Reserve regarding the Federal Reserve's new interim final rule on electronic communications.

To sum up, the fact that large-scale implementation of ESIGN has not occurred should not be read as either a lack of enthusiasm for the statute or a waning of industry interest in e-commerce. Rather, the deliberate pace reflects the determination by many responsible members of the financial services industry to act thoughtfully and to roll out e-commerce applications that are well designed and will be well implemented.

While some may urge Congress to amend or revisit the ESIGN Act, we believe the best course at this point is to allow financial services industries and other firms time to acclimate themselves to this new environment and to implement powers already conferred by the ESIGN Act.

In our written submission, which is an attachment, we submitted our comments to the FTC. And on page 8, we detail the amendments which we believe would be desirable for the ESIGN Act. But we don't think now is the time to do it. We think that we should rely on this settled law now, see what happens over the next 6

months to a year, let these processes of setting up guidelines and conventions take place, and then make a decision whether these consumer consent requirements, particularly the reasonable demonstration test and the electronic confirmation requirement, are really barriers as opposed to just hurdles. And we'll have more experience to make that judgment over time.

Thank you, Mr. Chairman.

[The prepared statement of Jeremiah S. Buckley can be found on page 174 in the appendix.]

Chairman KING. Thank you, Mr. Buckley.

Mr. Rosenthal.

STATEMENT OF LOUIS F. ROSENTHAL, EXECUTIVE VICE PRESIDENT, ABN AMRO NORTH AMERICA, INC., ON BEHALF OF THE FINANCIAL SERVICES ROUNDTABLE AND BITS

Mr. ROSENTHAL. Good morning, Mr. Chairman, and Members of the subcommittee. I am Louis Rosenthal, Executive Vice President at ABN AMRO North America. I am pleased to appear before you today on behalf of the Financial Services Roundtable and BITS. The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. BITS was established in 1996 as a not-for-profit industry consortium and a sister organization to The Roundtable. We share many of the same members.

I want to begin by commending the Members of this subcommittee and indeed all Members of the 106th Congress for passing the ESIGN Act. ESIGN represents the kind of supportive yet minimalist legislation that is needed to encourage and facilitate the continued growth of electronic commerce in the United States. It levels the playing field between electronic and paper-based methods of doing business by granting legal recognition to electronic signatures, contracts and records, and creates a consistent and uniform legal environment for electronic commerce by preempting State laws.

Perhaps the most important principles embodied in ESIGN are those of party autonomy, technology neutrality, and uniformity. For the most part, ESIGN allows the parties to electronic commercial transactions to decide for themselves how they wish to do business and to structure their business relationships in the manner most appropriate to their needs. By not prescribing standards or mandating the use of any particular technology, ESIGN permits parties to select from a broad array of electronic methods for doing business, thus helping to ensure that technological innovation will continue to flourish.

Finally, by preempting inconsistent State laws, ESIGN enables businesses to offer electronic services and products to their customers on a nationwide basis without having to worry whether their contracts and relationships will in fact be legally recognized and enforced.

Shortly after ESIGN was passed, BITS created an ESIGN working group to assist our members in addressing these issues on a cross-industry basis. I am especially pleased to be here as the chairman of that working group, which consists of approximately

50 member companies. The ESIGN working group has served as a valuable discussion forum and information clearinghouse regarding the approaches and steps being taken by the financial services companies, Government entities, and technology providers to implement ESIGN. Through these meetings we have identified a number of challenges to the successful implementation of ESIGN.

Our members do not necessarily see these challenges as roadblocks preventing them from going forward, but rather as hurdles to address so that they do not threaten their ability to provide the kind of streamlined and cost-effective services their customers want and expect. To a large degree, whether these hurdles prove to be major problems or simply minor irritants depends on how ESIGN is interpreted and applied.

If it is broadly interpreted with common sense and in line with its underlying purpose of facilitating electronic commerce, we believe these hurdles can be overcome without undue burden. If, however, it is interpreted narrowly and restrictively, they could well be major impediments.

As the subcommittee is no doubt aware, ESIGN contains fairly complex consumer consent requirements for the electronic delivery of required written disclosures. Consumers must be provided with a clear and conspicuous statement containing a number of mandatory disclosures, after which they must affirmatively consent to receiving information in electronic form. In addition, consumers must either consent or confirm their consent electronically in a manner that reasonably demonstrates that they can receive the information in the form in which it will be provided. For example, by e-mail on an HTML format on a website.

Our members fully support the concept of informed consumer consent to electronic delivery of information and all would build meaningful consent processes into their electronic offerings, regardless of whether it were required by ESIGN. Unfortunately, the ESIGN consent requirements go beyond ensuring that consumers are afforded the same level of protection in the electronic world as in the paper world, and instead impose requirements that have no equivalent in the paper world.

This is particularly true with respect to the reasonable demonstration requirement, which has emerged as posing the most significant practical challenge to fully implementing ESIGN. ESIGN does not define what is meant by a reasonable demonstration, and firms have been working diligently to come up with real-world solutions that meet both ESIGN's consumer protection goals and its underlying purpose of facilitating electronic commerce. In our view, if this requirement is interpreted broadly and with common sense to permit consumers to demonstrate their ability to receive electronic documents in a variety of ways, the burden it imposes will likely be manageable. If narrowly construed, the burden can well impede the use of electronic delivery in the future.

Even if construed broadly, however, the reasonable demonstration requirement poses particularly difficult challenges when firms interact with consumers both through electronic and non-electronic means, which most of our members do. For example, if a consumer wishes to open an account at a firm's office or by telephone and at the same time consents to receive subsequent disclosures through

electronic communications, both the consumer and the business must go through the added step of confirming electronically that the consumer can receive the disclosures. This is true even if the disclosures are to be made through e-mail and the consumer gives the business an e-mail address as part of the paper-based consent process.

It is also true even if the disclosures are to be made in HTML format on a firm's website and the consumer assures the firm that she or he has internet access, has previously visited the firm's website, and is fully capable of viewing HTML documents.

ESIGN creates a uniform national framework for the use of electronic signatures, contracts and other records. ESIGN does, however, authorize States to legislate in this area if they meet certain requirements in Section 102(a). As a result, over 20 States have enacted uniform versions of UETA that are consistent with ESIGN. For example, Illinois is amending its electronic commerce law with language taken verbatim from ESIGN, and Michigan has used virtually identical language in adoption of UETA.

Other States, however, have adopted non-conforming versions of UETA. At this point, these issues are somewhat theoretical, and they may well end up being resolved in the courts. Nevertheless, we urge Congress to pay close attention to how States are reacting to ESIGN and to take appropriate action if States pass laws that threaten to undermine it.

Our members are also greatly concerned by the need for uniformity in the international marketplace. We have spent some time reviewing the laws of our trading partners, and there are inconsistencies in the laws of sovereign countries that could impede implementation globally. However, as is the case in areas mentioned previously, it is too early to tell what if any disruption these inconsistencies may cause and what, if any, recommendations we would have for lawmakers. In the interim, we urge Congress to ensure that the Government takes all necessary steps to implement the provisions of Title III of ESIGN, which outlines the principles to guide the use of electronic signatures in international commerce.

Finally, our members are concerned that some Federal regulatory agencies are interpreting ESIGN in an overly restrictive manner. We urge Congress to continue to review agency interpretations, along with the OMB Guidance on which many of them are based, to ensure regulations implementing ESIGN are consistent with the goals of the Act.

Once again, Mr. Chairman, The Roundtable and BITS congratulate Congress on passing ESIGN. While the Act has some provisions that make its implementation cumbersome, we are not proposing that Congress reopen ESIGN. Once our members and our customers have a chance to operate under the Act for a while, The Roundtable may have proposals to bring back to the subcommittee. At the present time, however, The Roundtable believes the marketplace should be allowed to come up with practical methods for implementing the Act.

We would also urge Congress to remain watchful that its provisions are not being restrictively interpreted and applied so as to frustrate its underlying purpose of removing barriers to electronic commerce.

On behalf of both BITS and The Roundtable, Mr. Chairman, thank you for the opportunity to testify today, and I would be happy to answer any questions later.

[The prepared statement of Louis F. Rosenthal can be found on page 199 in the appendix.]

Chairman KING. Thank you, Mr. Rosenthal.

Ms. Saunders.

STATEMENT OF MARGOT SAUNDERS, MANAGING ATTORNEY, NATIONAL CONSUMER LAW CENTER; ON BEHALF OF THE CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, AND THE U.S. PUBLIC INTEREST RESEARCH GROUP

Ms. SAUNDERS. Mr. Chairman, Mrs. Maloney, Members of the subcommittee. I testify today on behalf of the low-income clients of the National Consumer Law Center and also on behalf of Consumers Union, Consumer Federation of America, and U.S. PIRG.

Contrary to popular belief, we are not troglodytes. We agree with all here that facilitating e-commerce will be good for consumers, and we do not want to stand in the way of that facilitation. But we believe that the electronic consent requirement in ESIGN or some similar provision is necessary to ensure that consumers are protected in this brand new world.

As Mr. Oxley in his opening statement specifically said, ESIGN was designed to facilitate the communication between a consumer operating from his home computer to a business also operating from its computer. If this Act only applied between parties operating computer-to-computer, we would not need the same protections. Our concern, however is that it also applies to the physical world. We need to keep in mind that the majority of the Nation is different from most of the people in this room. I am virtually certain that everyone in this room has at least access to one computer, if not two.

The vast majority of Americans do not have computers or internet access in their home. According to the Department of Commerce's Digital Divide report, 59 percent of the households do not have internet access in their home. The numbers of people in rural areas who do not have internet access, and the numbers of low-income and elderly households who do not have internet access are much higher.

Given those dynamics, until those numbers change significantly, we have to make sure that consumers transacting business in the real world are not tricked into receiving electronic disclosures that they have no reasonable ability to access or retain. Those are the realities that drove the electronic requirement in the consumer consent provision in ESIGN.

In our view, and backed by the Congressional Record statements of the Congressmen involved in the passage of this bill, there are three distinct related protections afforded by the electronic consent requirement:

One, it ensures that the consumer has reasonable access to a computer and the internet to be able to access the information provided electronically.

Two, it ensures that the consumer's means of access to electronic information includes software necessary to read and retain the electronic information.

And three, it is meant to underscore to the consumer the fact that by electronically consenting, the consumer is agreeing to receive information in the future electronically as well.

Delivery of electronic records is significantly different than delivery of physical world mail. It takes money to access your electronic records. It takes money to maintain a computer. It takes money to maintain access to an internet service provider. It does not take money to receive physical world mail. According to the Digital Divide report, even as more and more households in America obtain internet access, there's a 10 percent or greater drop-off rate every year.

So we have to keep in mind that, even if a consumer on day one agrees to receive electronic transactions, that consumer may be the 1 in 10 consumers the following year who no longer has access to electronic information. The electronic consent provision in ESIGN does provide some protection against this.

We agree with everyone on this panel that there are significant problems with the lack of uniformity and the application of the consumer consent provisions to State law. Our reading of the law is that every State that passed UETA prior to ESIGN automatically has the consumer consent provisions applicable in that State. This is because the State is required to take a deliberate action before it can be seen to have displaced ESIGN. Not everyone agrees with us.

If that reading is correct, then at least half the States will have a consumer consent provision applicable and another half may or may not, depending on what happens in the future in those States. There are significant questions. We would argue that the simplest way to resolve this is simply to make the consumer consent provisions applicable nationally. Obviously, not everyone would agree to that.

We have spelled out a number of examples of what could happen without the electronic consent provision in our testimony. Given the time restraints, I won't go into them now. But I would request that you look at them and consider them strongly before you consider changing the law.

We also have several suggestions that if you do decide to change the law, we see other ways that it can be improved.

Thank you.

[The prepared statement of Margot Saunders can be found on page 206 in the appendix.]

Chairman KING. Thank you, Ms. Saunders. We have been joined by Mr. Inslee. Do you have an opening statement?

Mr. INSLEE. Mr. Chairman, I just want to thank you for the opportunity to be involved in this review, and I really appreciate you conducting this. And I need to leave. I just wanted to tell you, I really appreciated all of the testimony. The one thing I would ask perhaps all of you is I have a particular interest in this "reasonable demonstration" issue of the ability to obtain access to the information.

I would be interested if all the panelists if they can give us any thoughts on how we could at some point—this may not be the moment—help folks obtain a little more certainty of what that may be. I think that is one area that listening to all of you, that we might be able to help at some point. So Ms. Saunders and others, if any of you could favor me with your thoughts over time and I will share with other members of the panel when we receive them, that would be helpful.

Rulemaking, orders, further colloquies, anything that you think might be of assistance, I would be happy to try to facilitate that.

Thank you very much. And I am sorry, but I must leave at this moment, and will look forward to further discussion.

Chairman KING. Thank you, Mr. Inslee.

Mrs. MALONEY. If I could, Mr. Chairman, I would just like to publicly thank Mr. Inslee, who is a Member of the full Financial Services Committee. He fought incredibly hard last year for these consumer provisions, and I wanted to acknowledge his hard work and welcome him to the subcommittee.

Chairman KING. Thank you, Mrs. Maloney.

I had just a few questions. One, I don't want to start a debate among the panel. But Ms. Harrington, in your statement, you say that the FTC report concludes that the benefits outweigh the burdens when it comes to the reasonable demonstration requirement.

Mr. Rosenthal seems to be saying that the reasonable demonstration requirement is probably the most significant practical challenge to the full implementation of ESIGN. Is there any way you can reconcile that difference? Or do we just have a difference of opinion here?

Ms. HARRINGTON. I don't think we do have a difference of opinion. I think that we have been very careful to say that there is very little information available right now that is based on the implementation of the reasonable demonstration requirement because, as you have heard from all of the panelists, there aren't many businesses that are doing business with consumers who have a lot of experience to date with ESIGN generally and implementation of this provision specifically.

The participants in our study identified both burdens and benefits. And looking at what was identified, without there being enough data to do any kind of quantitative analysis of benefits and burdens, Mr. Chairman, we see that there is agreement on what the benefits are across the board. That is, both business commentors and consumer advocates and State authorities agree about what the benefits are from that specific provision. And also some of the business commentors identify challenges.

What we learned and heard is very similar to what you've heard this morning. That is, that the reasonable demonstration requirement in the minds of some businesses may be a hurdle, but in terms of providing evidence of burden, the record there is very thin. There is a concern, but not a body of information that we can look at that lets us say aha, here's how we measure that burden. It's very early.

Chairman KING. Any of you wish to comment on that?

Mr. Rosenthal.

Mr. ROSENTHAL. Yes, Mr. Chairman. I would just say that I would agree with Ms. Harrington. The jury is still out. It's still early. There aren't lots of examples of application of ESIGN within the industry. We have spent the better part of the past year trying to work together in The Roundtable identifying what some of these issues are. Our concern is that in fact this becomes interpreted in such a way that it does become a burden.

We would not be viable businesses if we created mechanisms that alienated customers and if they weren't able to conduct their transactions the way they wish, I would tell you that we've spent the past year implementing the privacy provisions of Gramm-Leach-Bliley, so we're now focusing our efforts on what some of the ESIGN provisions are.

Chairman KING. Anybody else wish to comment?

Mr. ROE. I would like to add that that issue of burden and interpretations and questions around consent feeds into State regulation and how this will play out in the States. And you've got questions here, you'll end up having different interpretations, different conclusions in the 50 States. And the more differences that exists in the States, the more you break down the efficiencies of having the internet in a 50-State marketing strategy.

Mr. BUCKLEY. I would just, Mr. Chairman, like to add that the "reasonably demonstrates" requirement in my experience is not a deal breaker. It has not caused people not to use the ESIGN Act. What is of more concern in the consumer consent provisions is the material risk that you have to go through the whole procedure again at some unspecified point, and there is a vagueness and lack of specificity as to when that point might be.

And as to the need for the standard, I think it's important to keep in mind that in financial transactions, there is going to be an ongoing need for both parties to communicate. There is something of an assumption that we have to put everybody through this process, which is not absolutely clear. If it were clear it would be fine, but it's not absolutely clear what they have to go through. I don't know that it would be fine if it were clear either, but the idea that businesses would want to, having spent the time and money to attract a customer, do business with a customer who wasn't able to communicate with them electronically and set up an electronic procedure is contrary to the way businesses operate. Businesses are going to be just as interested in making sure that their notices get to consumers, because there's an ongoing transaction here.

So I think both parties have an interest in making sure that this is going to work, and imposing this legislative requirement, which is vague and uncertain just standards in the way of letting the market forces move forward.

I understand Ms. Saunders' concerns about well there might be people out there who would dupe people into agreeing to receive things electronically, that this is happening already in the paper world, and we don't want to see it happen in the electronic world. But I don't think that these provisions are going to stand in the way of people who want to commit fraud, any more than current law does. So why put people through this test? Why put people through these hurdles?

We don't say to someone before they get a mortgage, now we're going to test you to see whether you understand what an amortization table is. We let them make their own decisions. And we shouldn't in the electronic medium say, well, we aren't going to trust you to operate in this medium. We're going to put you through a test to make sure you can do it, and you'd better go back and confirm electronically that you can do business with us electronically. It reflects a lack of faith in this medium which we think is not justified.

Chairman KING. Ms. Saunders, you seem very anxious to reply.

Ms. SAUNDERS. I think the first question that perhaps should be resolved is what does that reasonable demonstration test mean? Many here seem to think that it means a test of the consumer's mental ability to access documents. In my opinion, it doesn't mean that at all. It means the consumer's accessibility to electronic documents via software and hardware. So it's not testing the consumer's acumen. It's testing the consumer's—what do they have? Do they have a computer or do they have regular access to a computer?

My other point that I want to make is I think that the substantial risk, the material risk issue I agree is an issue, but I think it is probably a temporary issue. Eventually all the electronic records should be readable or accessible by all types of computers and software. So if technology continues to move forward as it has been in the past, access to different software techniques will not be an issue. Eventually, the seamless movement from one electronic record to another won't create any material risk so that you won't need to go through the consumer consent.

But there is very much a risk today. I would bet that everybody in this room has received an e-mail which had an attachment that they couldn't open. And given that reality, until all technology has reached the point that everyone can access everything sent to them, we have to recognize that consumers need to be sure to be able to read what is sent to them. Thank you.

Chairman KING. We've been joined by Mr. Grucci from New York. Felix, do you have any opening statement you would like to make?

Mr. GRUCCI. No, Mr. Chairman. I'm just learning a lot, though, by listening to this panel and the discussions today. I have no opening statements, thank you.

Chairman KING. OK. We have also been joined by Mr. Hinojosa. Rubén, do you have any statement?

Mr. HINOJOSA. Thank you, Mr. Chairman. I would like to ask Margot Saunders what—let me restate my question. Are the consumer protection provisions in ESIGN superior to those in the Uniform Electronic Transfer Act which many States have adopted?

Ms. SAUNDERS. Undoubtedly. Yes they are. The ESIGN includes the consumer consent provisions. UETA has no similar provision. UETA allows a consumer's agreement to receive records electronically to be determined from the circumstances so that a consumer could be deemed to have agreed to receive electronic records by signing a piece of paper which includes that agreement in fine print on the back. And that is a serious problem to us for the reasons that I have already articulated.

Also, ESIGN includes superior record retention and integrity requirements in Section 101(d) and 101(e) over UETA. And ESIGN specifically has exemptions from electronic records in Section 103(b) for certain essential records such as utility disconnect and eviction notices and foreclosure notices that is not in the Uniform version of UETA, although UETA leaves room for those to be added.

Mr. HINOJOSA. Well, tell me as a consumer, what are the benefits of receiving the electronic versions of information previously required by law to be provided in written form?

Ms. SAUNDERS. Well, for a consumer who is transacting business electronically who wants to receive electronic notices rather than mail notices, there is substantial benefits. Many of us are beginning to organize all of our affairs on our hard drives and rather than in file drawers, and those consumers want to receive their notices and records electronically and be allowed to store them electronically. And we don't want to hamper that in any way.

Our concern is that the consumer actually be able to read it and retain it if they want to.

Mr. HINOJOSA. Would the accounting trail information be readily available to a consumer to maybe in a dispute to be able to show what happened?

Ms. SAUNDERS. I'm not sure I understand the question.

Mr. HINOJOSA. Well, the way we do it today, there is a lot of written material, checks and statements and correspondence, and if there is a dispute, you can always go to the files, pull up that what we call the accounting trail, and be able to say that someone in their organization made the mistake or the bank made the mistake. Somebody made a mistake and I have proof of what I'm talking about.

Ms. SAUNDERS. I see. That issue goes to record retention ability, which is a very important issue to us. Let me walk you through a transaction, for example. If you go to a local large hardware store and apply for an open-end account to buy some carpet, for example, you will given, if you're operating this is in the physical world, a piece of paper describing the terms of your open-end credit agreement. Then you'll sign another piece of paper, and then you will go home with copies of both of those pieces of paper. And if 3 months down the line, there is a dispute between you and the creditor regarding what the amount that you owe or the interest rate that's being applied, you will always have those pieces of paper to refer to, as you have already noted.

Our concern is that if you are, again, in the exact same transaction, but if that transaction becomes electronic rather than paper, you might not have that. For example, if you are allowed to consent to receiving all of those disclosures electronically when you're standing in the store by signing a piece of paper and then the store posts the disclosures to a website, which you then have to go home or to a library to download and retain, you may not, a, be able to do that because you don't have a computer; or b, your computer may not have the capability to access that particular website; or c, you may not know to do it because many of us actually don't look at our disclosures until the dispute has arisen. So

one important question would be how long those disclosures have to stay up on the website for you to be able to look at.

So there are substantial differences in the electronic and paper world in that situation. And we would hope that while the electronic transaction should be facilitated, the consumer should always be able to access that electronic record electronically and download it, even at some point long in the future so that they would be able to resolve the dispute with access to the information in the same way that we know the creditor will have access to that information.

Mr. HINOJOSA. Well, that last statement you made——

Chairman KING. Excuse me, Rubén.

Mr. HINOJOSA. I'll end it right quick, Mr. Chairman.

That last statement you made, "the consumer should be able to access," is the key, and I just hope that as we move along that our subcommittee will ensure that that will occur for the protection of the consumer.

Thank you, Mr. Chairman.

Chairman KING. The time of the gentleman has expired.

Mrs. Maloney.

Mrs. MALONEY. I would like to thank all of the panelists for their very informative testimony. And many of you raised the challenge of a Federal standard and a State standard and some of the complications that it is causing. And Ms. Saunders raised the idea of a national consent provision, and I wonder how the other panelists feel about that.

And I would like to go back to a theme that Christopher Roe raised and Louis Rosenthal likewise raised, and the confusion sometimes between a State and a Federal standard. And I would like to know whether you think we should have a Federal standard in all respects. And I would like to open that up. If we are having different standards in the States—Mr. Roe raised the insurance industry. If you are a national insurance company, that is going to cause more headaches than benefits.

So I would like comments on Ms. Saunders' idea of a national consent provision and really the theme raised by Mr. Rosenthal and Mr. Roe about conflicting standards from the State and the Federal. Would we be better off with a Federal standard? What are your feelings on this? Anyone?

Mr. ROSENTHAL. OK. The way we see the confusion or the conflicting issues between State application of the law and the Federal preemption is that e-commerce bridges borders, it bridges the boundaries. And, in fact, that is what is very interesting to businesses, to be able to do business across all borders.

The burdens that we would have to bear to maintain electronic compliance if you will with individual State laws is enormously burdensome and in fact confusing. For fear of making an error, we would wind up not offering the kind of access we think we can offer to consumers just for fear of making a mistake. So uniformity I think would be beneficial, provided that uniformity is not overly burdensome or in fact confusing to the consumer.

Mrs. MALONEY. And about the consent provision. A uniform consent provision on privacy?

Mr. ROSENTHAL. Related to E-Sign, I think it's early right now. We think that anything that is a standard would be beneficial for both the consumer as well as our industry.

Mrs. MALONEY. And, Mr. Roe.

Mr. ROE. Yes. I'd like to add that a universal standard would be greatly appreciated as long as it's a standard that doesn't overregulate the internet, that's not set too high or doesn't have unintended consequences. For example, in the Federal consent provision, it allows for the consumer to withdraw consent at any time.

When you couple that with insurance laws, which put very severe restrictions on insurance companies on terminating coverage or canceling a risk or non-renewing, what you may be doing unintentionally is interfering with a virtual insurer business model where that specific insurance company would only handle online transactions.

Or let's say you wanted to encourage traffic to your website and provide a discount or a price break for your insurance product. That individual, once they withdraw consent, would automatically jump back into the paper world and you may end up having to carry forward that price break.

So there are some consequences that the ESIGN consent provision puts forward that we may not fully comprehend yet.

Mrs. MALONEY. I agree. I think there are a lot of challenges, particularly in insurance. Because, as you say, the product changes. There are all types of agreements. Some are different from State to State. I think there are a lot of challenges there.

A national consent provision for privacy, would you support that?

Mr. ROE. A national consent provision for privacy or for electronic signatures?

Mrs. MALONEY. For electronic signatures. Would you support that?

Mr. ROE. We would support it as long as the consent provision really preempted State law, was a universal consent provision, and it was something that was not set too high that would overregulate the internet.

Mrs. MALONEY. Mr. Crocker, would you support it? Or not?

Mr. CROCKER. I think that the interplay between the Federal law and the State law is one of the most problematic aspects of this legislation. There are a lot of complicated reasons why we had that. It was part of the political price of getting the Federal legislation.

If you go back to the original goal of uniformity, legal certainty and consistency, that a Federal standard, not just in the consumer consent area, but in other areas covered by the ESIGN Act would be beneficial.

Mrs. MALONEY. OK. Great.

And what do you think, Mr. Buckley?

Mr. BUCKLEY. I would agree. But I'd like to point out that most financial services firms are going to have to comply with the ESIGN requirements and obtain the consumer consents in order to deliver the federally mandated disclosures that have to be in writing.

States enacting UETA are fine, but that does not authorize the delivery of Federal disclosures electronically. So for all practical purposes with respect to a mortgage where you have to give truth

in lending and RESPA disclosures, with respect to other transactions that are going to be conducted by banks and mortgage companies and others, as a practical matter, you're going to have to go through the Federal consent process right now for most financial services that this subcommittee has jurisdiction over. That's just a reality. So it's not hard for me to say it's not a bad idea to have a national standard and not worry about variations at the State level.

Mr. CROCKER. If I could just respond to that, I would agree with what Jerry just said, but I would also like to stress that this is a different issue in case there's any question about it from privacy. And we're talking about electronic signatures, and it should not——

Mr. BUCKLEY. I hope I didn't imply that.

Mr. CROCKER. No, you did not.

Mrs. MALONEY. OK. Now Mr. Rosenthal, you raised really the challenge—and this is a particularly important one I think for financial services—the uniformity in the international marketplace. I could see, you know, just internationally ESIGN taking off probably faster than domestically, because of the need to communicate. How would we go about setting a uniformity in the international marketplace? What are your ideas? I think that you're right. We need uniformity or you're going to have more problems than answers.

Mr. ROSENTHAL. Yes. It's true that ESIGN covers some of the international issues. We've obviously been focused since last year on the domestic issues. But the Basel Committee on Banking Supervision published guidelines for e-commerce and it addresses some of the issues there. And I would suggest that to echo the theme of standards uniformly applied that a closer look by this subcommittee at some of the provisions in the Basel guidelines might be beneficial. We would certainly like to be on an equal playing field with our counterparts overseas.

Mrs. MALONEY. OK. Anybody else want to comment on the international challenge? Anybody?

Mr. CROCKER. If I could just briefly say a word on that. I think there are very significant differences between the approach in the United States and the approach in the EU. If you look at the EU Digital Signature Directive, it basically boils down to being not technology neutral. It probably endorses PKI, Public Key Infrastructure. And in order for U.S. electronic signatures to be recognized in the EU, they have to be approved by a regulatory body there.

And the whole question of interface between what is being developed in the United States and elsewhere is a vast and complicated and vexing subject that needs attention.

Mrs. MALONEY. OK. Great. Thank you. You raised in your testimony, Mr. Crocker, you know, what does "reasonably demonstrate" mean? And the difficulties of not having it more spelled out and as being just too vague. But you say it's workable. Would you like to comment further? Do you think we need to change that language? "Reasonably demonstrates." I mean, what does it mean?

Mr. CROCKER. I think the key is that industry has to have some flexibility to devise solutions that meet that term. It is a vague

term. But I think concomitant with that is the idea of some flexibility. And I think industry has been groping to do that, and in most cases they've come up with solutions that seemed to pass a reasonableness test of reasonably demonstrating, through a pingback or an e-mail response.

And again, I think it's important that the regulatory agencies and the Congress just keep a view to keeping some flexibility and reasonableness in allowing how people meet that test.

Mrs. MALONEY. I think that in our Federal system one of the strengths is that we provide for flexibility and innovation. We look to see what States are doing. We allow them to experiment and come forward with their own formulas. But in something as important as e-commerce and communication, you need to have standards. Otherwise, it's going to really cause a lot more problems.

I'd like to ask Mrs. Saunders, could you provide examples of specific consumer protection provisions in existing law that ESIGN transfers to the online and how effective is that doing that, if at all?

Ms. SAUNDERS. What ESIGN's consumer consent provision does is ensure that a consumer actually gets electronically what they would have received by paper in the real world. At least that's the intent of the provision.

So let me detail just a few types of papers that a consumer would receive in real-world transactions. As Mr. Buckley described, when you are signing a mortgage on your house, there's a number of important documents that you receive that are required by Federal law that you want to be able to hold onto. If you are refinancing the mortgage you will get an early disclosure required under truth in lending describing your rates and points and fees. You will get a good faith estimate required under the Real Estate Settlement Procedures Act which describes your closing cost.

When you close the loan, assuming you do that electronically as well, you get the contract itself, which in all States is required to be in writing, and you get truth in lending disclosures that describes when your payments are due and what your interest rate is, and you get a very important document, again required under RESPA called the HUD One, which describes the exchange of monies at the table. And you also get a notice of your right to cancel the transaction, which you may want to do if you find that the transaction is not as you thought it was, and that's why you've got 3 days to cancel.

All of those papers, which we all currently get and stick in a drawer and then look at if and when we have questions, you would get electronically by virtue of ESIGN.

Mrs. MALONEY. Thank you. And my time has expired.

Chairman KING. Thank you, Mrs. Maloney.

We have been joined by Ms. Hart of Pennsylvania who is going back and forth between committees and subcommittees and she has asked to make a statement. Ms. Hart.

Ms. HART. Thank you very much for your indulgence, Mr. Chairman. I also very much appreciate you having this hearing. I apologize to the presenters. I'm going to bring all the testimony with me and make sure I get a chance to really review it over our break.

I simply wanted to make a statement up front, and I may have questions that I'll address later to the witnesses. But I'm a freshman here and was the sponsor of our ESIGN legislation in Pennsylvania. We passed it in December of 1999. We basically followed the Uniform Electronic Transactions Act. However, we were very careful to try to make ours more technology neutral than the Uniform Act was.

I think it's important that we do all we can to make sure that this is a user-friendly law and that it is something that both businesses and individuals alike will look at as something that they will use and that is practical. I think the input of the witnesses today is going to help us I think move in that direction.

The advantage I think to this is far beyond our borders in the United States. And in fact, as we dealt with the issue in Pennsylvania, the input I got was mostly from multinational corporations or fledgling internet corporations that were basically starting their work by trying to use ESIGN and using ESIGN without the benefit of our law to begin with, which I didn't think was very smart, but they wanted to try to do.

Because I'm a lawyer, I thought that was ill-advised. Obviously, we're all concerned about the enforceability of the contracts made over the internet. But I do know that now we've gotten up to 34 States I think that have adopted their own versions of either the Uniform Electronic Transactions Act or ESIGN to govern their electronic transactions, and I think 13 additional States obviously have bills pending.

I think it's important for us on the Federal level to try to make them as uniform as possible. As I said, it's really not going to be that effective if we have 50 different laws that don't obviously comport with each other. But we're still—if we try to make sure that somehow we can control what goes on throughout the world, because we're not going to be able to do that. I think our goal here is to have an acceptable standard, an acceptable, especially from the things that I've gotten through in some of the testimony, a standard dealing with consent.

I believe that it should be less regulated rather than more regulated. That is, I think whatever is agreed to between the parties should be effective. Now when it comes from a large corporation to a bunch of customers, I think that's where we start to get into a sticky situation, and obviously customer error or misunderstandings and things like that have to be I think provided for by our law.

But I certainly don't want to take the responsibility of the consumer off the consumer. I think we have to make sure that our requirements for consent are clear, especially in those levels where we have a large company and consumer.

As I said, I will take the time to review the testimony. I just want to share that. I've talked with several groups who are struggling to fully implement their own e-commerce into their business practice, both small corporations and very large multinationals. Some of them have been successful with it. Their problems still do stem from I think the things that I'm hearing, at least that I've seen so far in the testimony regarding consent. So I'll be looking forward to what we do further.

I also obviously agree with the Chairman that we certainly don't want to jump into doing anything that might make it worse, since this is a very new law and we're still trying to shake out exactly what we need to do, if anything.

So again, I want to thank the Chairman for this hearing. I want to thank the witnesses for appearing today and for my colleagues who I know have also been in and out of the hearing. So thank you, Mr. Chairman, for your indulgence. I yield back.

Chairman KING. Thank you very much, Ms. Hart.

Mr. Hinojosa.

Mr. HINOJOSA. I just have one last question, Mr. Chairman, and I'll be brief.

Margot, in your presentation—am I pronouncing it correct? Margot?

Ms. SAUNDERS. Actually, it's Margot.

Mr. HINOJOSA. Margot.

Chairman KING. I would just say for the record, if anybody has a difficult name to pronounce, it's Mr. Hinojosa.

[Laughter.]

Mr. HINOJOSA. You're very kind, Mr. Chairman.

Ms. SAUNDERS. My mother decided to make life difficult for me.

Mr. HINOJOSA. In the testimony on page 7, I was reading with great interest the portion about the danger. And you give an example of a person going in to buy an automobile and the salesman saying that it would be cheaper and better if they could just do this electronically. The lady didn't have a computer, as 50 percent of Americans do not have computers. And you go on through this.

And the concern that really is like a red flag to me is that if in this example the lady were to sign the contract and they would say that they would send it electronically and let her go to a public library and get the documents, there would be opportunities to change the electronic record after the signature was affixed to the contract. And you say that there is nothing in ESIGN which requires that the process of electronically signing a record would prevent alteration of the record. How can we in this subcommittee help consumers so that that will not happen?

Ms. SAUNDERS. Well, I have a lot of ideas. We presented during the debate of ESIGN that language be added to the electronic signature statement very similar to what was in Mr. Bliley's original bill, which was that once an electronic signature was applied to a document it would prevent alterations to that document afterward. That was seen to be not technology neutral, I believe, because an electronic signature under ESIGN can be anything from a digital signature, which in fact does lock a document once it's supplied, to a click or just typing your name at the bottom. It's anything.

So there is language that we could certainly add to the definition of electronic signature that would say something like once an electronic signature is applied to an electronic record, it should be essentially locked or not alterable. That seems to me to be technology neutral, but obviously not everyone agreed.

But there are a number of State laws around the country that have similar standards. The status of those State laws given ESIGN I think is in some disarray. There is a question as to the

extent to which ESIGN preempts them if they are not considered technology neutral.

So there are things you can do. As to whether this Congress will do them, that's another question.

Mr. HINOJOSA. Well, that's our responsibility and we thank you, Ms. Saunders. Thank you. Thank you, Mr. Chairman.

Chairman KING. Thank you, Mr. Hinojosa.

Mr. Rosenthal, I just have one question. At the end of your testimony, and it sort of reaffirms what you said earlier, you talk about some of the provisions making implementation cumbersome. But you seem somewhat sanguine about it, suggesting that the marketplace can work out these difficulties. In the course of the marketplace resolving the difficulties, are you concerned about any potential litigation, massive litigation? And would any of your members be willing to be the one on the spot as far as that litigation?

Mr. ROSENTHAL. Well, first let me tell you that I'm not a lawyer so I am always concerned about litigation.

[Laughter.]

Mr. ROSENTHAL. This is an evolving field right now. And the fear that I have as I am charged with implementing these kinds of technologies is that we become overly prescriptive up front and it limits the ability of our organizations to do business with consumers. And I don't think that that was the intent of ESIGN. In fact, I'm not sure it's the intent of most of the legislation coming out of Congress to do that.

So I would tell you that I would guess there is most likely going to be litigation on certain issues, and the industry is going to have to work itself out or work through some of these issues. But to be prescriptive about the solution in fact may work against what I think ESIGN was intended to deliver to businesses and consumers.

Chairman KING. Anybody want to comment on that? Especially any of the lawyers?

Mr. CROCKER. Well, I think that the fear of litigation is certainly affecting people's use of ESIGN. I do know instances where financial institutions have decided to not rely on it because of that concern.

Chairman KING. We just had a bell here for a vote on the House floor. I have concluded my questions. Does anybody else have any comment they want to make on that question?

[No response.]

Chairman KING. If not, I want to thank the Ranking Member, Mrs. Maloney, for her assistance, cooperation today. I want to thank the staff. And most of all, I want to thank the witnesses for coming here, for your testimony. It was very enlightening. You were very patient. You endured a lot. You have given us certainly a considerable amount of information which we're going to have to digest and analyze, and this really is an evolving area. So you really have contributed immeasurably, and I thank you very much for your cooperation and your testimony.

The meeting stands adjourned. And without objection, the record of today's hearing will remain open for 30 days to receive additional material and supplementary written responses from the witnesses to any question posed by a Member of the panel. This hear-

ing of the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth is adjourned.

[Whereupon, at 11:51 a.m., the hearing was adjourned.]

A P P E N D I X

June 28, 2001

Opening Statement
Subcommittee Chairman Peter T. King
Committee on Financial Services
Subcommittee on Domestic Monetary Policy,
Technology and Economic Growth
June 28, 2001

The Committee will come to order.

Today the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth begins its first hearing on the use and application of technology in financial services. Innovations in the electronic world clearly have had a profound impact on the way consumers interact with financial professionals. I suspect that technology will continue to drive our marketplace in ways that we have never imagined. This subcommittee is committed to facilitating such growth and efficiencies on behalf of financial consumers and the institutions that serve them.

For the purpose of today's hearing, the subcommittee will examine the "Electronic Signatures in Global and National Commerce Act", or, more commonly, "ESIGN." This legislation gave legal recognition and effect to electronic signatures, contracts, and records. We are revisiting ESIGN in an effort to determine if its "real-world" implementation is providing the legal certainty and protection envisioned by Congress.

Specifically, Section 105(b) of the legislation directs the Department of Commerce and the Federal Trade Commission to submit a report to Congress evaluating the benefits and burdens of a particular consumer consent provision contained in the act. This consent provision speaks to the understanding a consumer demonstrates within the context of a business-to-consumer transaction. The committee looks forward to the findings and opinions of the panelists concerning this study.

At this time I would like to commend the FTC and the Department of Commerce for their combined efforts to complete the mandated study before its June 30th statutory deadline. This subcommittee appreciates your expediting the process to allow for this hearing. We look forward to your testimony.

In closing, let me just say that our examination of ESIGN today is not a referendum on consumer protections in financial services—electronic or otherwise. Congress carefully crafted this legislation last year with the intent of providing certainty, uniformity, and efficiency for transactions conducted electronically. We have yet to see a wholesale embracing of ESIGN and the benefits it affords. This raises the question whether the legislation is overly restrictive to the point that consumers and businesses do not recognize a benefit? Perhaps it is too early to tell. Regardless, this is a dialogue that will begin now.

I thank the witnesses for taking time out of their busy schedules today to share their expertise on this subject. I know that ESIGN is an issue of particular interest to our Chairman, Mr. Oxley.

With that, I yield back my time and recognize the ranking member of the subcommittee, the gentle-lady from the great state of New York, Ms. Maloney.

Opening Statement
Chairman Michael G. Oxley
Committee on Financial Services
Subcommittee on Domestic Monetary Policy,
Technology and Economic Growth
June 28, 2001

"ESIGN - Encouraging the Use of Electronic Signatures in the Financial Services Industry"

I want to thank Chairman King for holding this hearing on ESIGN and encouraging the use of electronic signatures in the financial services industry. This is the first technology related hearing for the Committee and I look forward to continuing our review of tech issues as they affect financial services.

The Electronic Signatures in Global and National Commerce Act enabled electronic signatures to satisfy the legal requirements for paper signatures. I worked closely with Chairman Bliley on the passage of ESIGN last year, and I was a member of the conference committee that wrote the current law.

The goal of ESIGN was to simplify electronic business transactions, enabling consumers to sign a mortgage, take out a student loan, or open an IRA account from their own computer. Exchanging records and agreements electronically instead of on paper is good for the environment, less burdensome for consumers, and more cost-effective for businesses.

Members of the conference committee envisioned that ESIGN would open-up the flood gates to many new transactions that individuals and businesses would be able to do on-line, while at the same time giving people greater confidence and convenience when shopping online.

Unfortunately, electronic transactions have not increased significantly over the past year. Even in the financial services industry, which should benefit most from ESIGN, people and businesses have been very slow to take advantage of the new opportunities.

When the Conference Committee was debating ESIGN, we struggled to create the right balance in the consumer protection provisions. It is always hard to look into the future and determine what consent provisions will be necessary to protect consumers from abuse that will not unduly burden the implementation of the law.

While I believe our efforts were successful overall, we need to go back and review the balance to see if we tipped too far in one direction or another. In particular, we need to consider the proper level of protection necessary in the financial services industry where we have a separate layer of oversight and regulatory supervision.

We also need to ensure a sufficient level of uniformity in the adoption and interpretation of ESIGN by the states and federal regulators. States can choose to adopt either ESIGN or a version of the Uniform Electronic Transactions Act, also know as UETA, as long as it is not inconsistent with ESIGN. Unfortunately, many states are adopting UETA but with different portions of the ESIGN consent provisions thrown into the mixture. This patchwork of laws governing electronic transactions is resulting in higher costs and more confusion. If we don't end up with a minimum level of certainty and consistency, businesses and consumers will not have the confidence to make ESIGN a reality.

Service providers and consumers must be comfortable interacting with each other on-line. If the procedures surrounding a transaction are unduly burdensome for either party, the deal will not get done. We must work to ensure that our laws are evenly balanced to bring the greatest benefit to all the participants in the marketplace.

Recognizing that ESIGN has been in effect for less than 8 months, I look forward to the initial report by the Federal Trade Commission and the Secretary of Commerce on the benefits and the burdens of ESIGN's consumer consent provisions, and to the testimony of our other industry and consumer witnesses.

14th District • New York

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FOR IMMEDIATE RELEASE
JUNE 28, 2001

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MALONEY STATEMENT ON ESIGN

WASHINGTON, D.C. – Today, the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth held a hearing: "ESIGN – Encouraging the Use of Electronic Signatures in the Financial Services Industry." Ranking Member Congresswoman Carolyn B. Maloney (D-NY) delivered the following statement at the hearing:

A year ago this Saturday, June 30, 2000, President Clinton signed the historic ESIGN legislation granting electronic records and signatures legal enforceability on par with written documents. Enactment of ESIGN was driven by the explosion in online commerce and the bipartisan desire of Congress and the Clinton Administration to facilitate its continued expansion.

While ESIGN modernizes our legal framework to reflect the new economy, Congress made clear that individuals deserve the same level of consumer protection in the online world as when they engage in paper-based transactions. One of the most important efforts to transfer these protections online is the consumer consent section in ESIGN. Today the Subcommittee meets to review the report of the Federal Trade Commission and Department of Commerce on the benefits and burdens of the consumer consent provisions.

In preparing its report the Commission and Department of Commerce reviewed extensive public comments from industry and consumer groups and conducted a public workshop. While today we are only one year removed from enactment, I am pleased that the FTC and Commerce have concluded that thus far the ESIGN consent provisions are proving effective.

The consumer consent provisions in ESIGN require that information that businesses are currently required to provide to consumers in writing may only be provided in electronic form if the consumer affirmatively consents to electronic delivery in a manner that reasonably demonstrates the consumer's ability to access the electronic record. Information that businesses are currently required to make in writing include contract terms and the gamut of consumer

protection disclosures which are intended to protect customers from fraud and to hold parties to the terms of agreements. At this time I want to welcome to the Subcommittee Rep. Jay Inslee (D-WA), a member of the full Financial Services Committee who will join us today and who fought for these consumer provisions last year.

The ESIGN consumer protection provisions recognize that there is a wide range in the level of public computer proficiency and access to the Internet. While customers of online banks or brokerages are already accustomed to conducting complicated transactions over the Internet, ESIGN is intended to prevent consumer who are less accustomed to the online world from unwittingly consenting to receive information in a form they cannot access.

While I agree with the FTC/Commerce report's conclusion that the benefits of the consent provisions outweigh their burden, I am interested to hear the perspective of industry witnesses today and their perspective on complying with the provisions. I also look forward to the discussion of the interaction of ESIGN and the electronic signature legislation being promoted at the state level, the Uniform Electronic Transaction Act (UETA).

Enactment and enforcement of strong consumer protections are the best tools Congress has to increase public confidence in the Internet and to contribute to the continued growth of e-commerce. The ESIGN Act's consumer consent provisions are an important step in this effort.

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STATEMENT OF HON. JOHN J. LaFALCE, RANKING MEMBER
COMMITTEE ON FINANCIAL SERVICES
Subcommittee on Domestic Monetary Policy, Technology and Economic Growth
June 28, 2001

I would like to thank the Chairman and Ranking Member for holding this hearing today on a matter of great importance - implementation of the Electronic Signatures in Global and National Commerce Act, or ESIGN. As we become accustomed to the digital era, and the electronic delivery of financial goods and services becomes ever more commonplace, the issue of whether we are adequately protecting consumers should be paramount. While there is no question that there are extensive benefits with electronic communication -- greater convenience, greater flexibility, and reduced costs -- I am committed to ensuring that electronic communication provides the same degree of consumer protections, including equal access to those protections, that are now readily available to consumers in the traditional financial services arena.

The Electronic Signature bill was groundbreaking legislation. However, Congress recognized that further study was necessary following the enactment of the ESIGN bill to determine, among other things, whether the benefits to consumers from the requirement for electronic consent in E-Sign outweigh the burden of its implementation on electronic commerce. I am pleased to know that thus far, the FTC and the U.S. Department of Commerce, the agencies responsible for monitoring this issue, have found that ESIGN is working and consumers and electronic commerce are both benefitting from the ESIGN law.

As the Congress continues to monitor electronic commerce, the significant differences between paper communications and electronic commerce must be carefully scrutinized. Differences in delivery mechanisms have important implications. For instance, while paper records can be safely filed away for future reference by a consumer, an electronic record may exist for only a limited time, and then it could very well disappear.

Perhaps my greatest concern is the digital divide between the haves and the have nots. It is my understanding that at present, a majority of Americans, some 55 percent, have no access whatsoever to the Internet. Access to essential information embodied in traditional consumer protections must not be determined by one's wealth. And no unfair advantages should be given to those who are willing to have services delivered electronically. Our consumer witness, Margot Saunders with the National Consumer Law Center, will provide us with greater insight into the current and potential impact of the ESIGN Act on consumers. I look forward to hearing her testimony and urge my colleagues to heed her concerns.

As American consumers become more comfortable with electronic commerce, it is my goal to ensure their traditional consumer protections will remain tangible and real. However, if this bill is implemented by maximizing corporate protection from liability with a minimum of concern for preserving consumer protections, I stand ready to act in whatever means necessary to shore up consumer protections.

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION ON

THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

Before the

COMMITTEE ON FINANCIAL SERVICES

UNITED STATES HOUSE OF REPRESENTATIVES

Washington, D.C.

June 28, 2001

Mr. Chairman, I am Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection.[1] Thank you for the opportunity to discuss the "reasonable demonstration" requirement of the consumer consent provision of the Electronic Signatures in Global and National Commerce Act (ESIGN). (A copy of the joint report submitted to Congress pursuant to Section 105(b) of ESIGN by the FTC and the Department of Commerce is attached as Appendix A.)

I. The FTC's Law Enforcement Authority and Experience

As the federal government's principal consumer protection agency, the FTC's mission is to promote the efficient functioning of the marketplace by taking action against unfair or deceptive acts or practices, and increasing consumer choice by promoting vigorous competition. To fulfill this mission, the Commission enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[2] This experience provided useful grounding for the agency in fulfilling its mandate under Section 105(b) of ESIGN.

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[1] The views expressed in this statement represent the views of the Commission. My oral statement and responses to questions you may have are my own and are not necessarily those of the Commission or any Commissioner.

[2] 15 U.S.C. § 45(a).

II. The Electronic Signatures in Global and National Commerce Act (ESIGN)

A. The Reasonable Demonstration Requirement of the Consumer Consent Provision: Section 101(c)(1)(C)(ii).

On June 30, 2000, the President signed ESIGN into law.[3] The Act's purpose is to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. In enacting this legislation, however, Congress was careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing; thus, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of ESIGN provides that information required by law to be in writing can be made available electronically to a consumer only if the consumer affirmatively consents to receive the information electronically *and* the business clearly and conspicuously discloses specified information to the consumer before obtaining the consumer's consent.

Section 101(c)(1)(C)(ii) states that a consumer's consent to receive electronic records is valid only if the consumer "consents electronically or confirms his or her consent electronically, 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." Section 101(c)(1)(C)(ii) overlays existing state and federal laws requiring that certain information be provided to consumers in writing. It also provides a framework for how businesses can comply electronically with the underlying statutory or regulatory requirement to

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[3] Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq.*). The majority of the statute became effective on October 1, 2000; the remainder went into effect this year.

provide written information to consumers – whether the information is a disclosure, a notice, or a statement of rights and obligations – within the context of a business-to-consumer transaction.

B. FTC and Commerce Mandate under ESIGN Section 105(b)

In Section 105(b) of ESIGN, Congress directed the U.S. Department of Commerce (Commerce) and the FTC to issue a report on the impact on electronic commerce ("e-commerce") and consumers of the reasonable demonstration requirement of the consumer consent provision in Section 101(c)(1)(C)(ii). Specifically, Congress asked Commerce and the FTC to report on the benefits of that provision to consumers; the burdens that the provision imposes on e-commerce; whether the benefits outweigh the burdens; the effect of the provision in preventing fraud; and whether any statutory changes would be appropriate.[4] Our testimony today will be limited to discussing these issues, which were the focus of our review and the Commerce and FTC report.

C. Collection of Information for the Report

To fulfill the mandate set out in Section 105(b), the two agencies conducted outreach efforts, issued a notice in the Federal Register, and conducted a Public Workshop.

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[4] Specifically, Section 105(b) of the Act requires that: "Within 12 months after the date of the enactment of this Act, the Secretary of Commerce and the Federal Trade Commission shall submit a report to Congress evaluating any benefits provided to consumers by the procedure required by section 101(c)(1)(C)(ii); any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses."

1. Outreach Efforts

The agencies conducted extensive outreach to evaluate the technology available to reasonably demonstrate compliance with ESIGN's consumer consent provision, and to learn how companies are implementing the reasonable demonstration requirement. Our contacts included the online business community, technology developers, consumer groups, law enforcement officials, and academics. The industry contacts included high-tech companies involved in infrastructure development for electronic contracting and electronic payment systems, as well as business entities that use, or plan to use, electronic records in consumer transactions. Staff also did its own research to identify the types of businesses that are using the Section 101(c)(1)(C)(ii) consumer consent procedures for providing information "in writing" to consumers in electronic formats, by searching online for sites that were providing required disclosures or other written information to consumers using ESIGN's procedures.[5]

2. Solicitation of Comment

To comply with Section 105(b)'s mandate to solicit comment from the general public, consumer representatives, and electronic commerce businesses, Commerce and the FTC published a notice in the *Federal Register* on February 13, 2001. The notice requested comments on the benefits and burdens of the consumer consent provision in Section 101(c)(1)(C)(ii), and announced a Public Workshop to discuss the issues raised in the notice.[6] To increase awareness of the study and the workshop, each agency issued a press release announcing the Federal

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[5] Printouts of a few examples, primarily on banking and other financial services sites, are attached as Appendix B.

[6] 66 Fed. Reg. 10011 (February 13, 2001). A copy of the notice is attached to the Report in Appendix A.

Register notice, and placed the notice on a special "ESIGN Study" portion of its website. Staff at both agencies also sent copies of the notice to several hundred contacts who had previously expressed interest in issues affecting electronic commerce. In response to the notice, Commerce and the FTC received 32 comments from consumer organizations, software and computer companies, banks, members of the financial services industry and academics.

3. Public Workshop

On April 3, 2001, the agencies hosted a Public Workshop to explore issues raised in the comments and the outreach efforts, to discuss new issues, and to develop a basis for analysis and conclusions.[7] The agenda included a discussion of legal and technological issues, benefits and burdens, and best practices for complying with the reasonable demonstration requirement of the consumer consent provision in Section 101(c)(1)(C)(ii). There was also an "open mike" session for public participation. Several participants provided demonstrations of the technology that has been or could be used by companies to demonstrate the consumer's consent to receive electronic documents.

D. Analysis of the Issues

Although a number of e-commerce businesses, principally in the financial services industry, have implemented the procedures in Section 101(c)(1)(C)(ii), there was consensus among participants and commenters that insufficient time has passed since the law took effect to: (a) allow consumers or businesses to experience the full effect of the provision; (b) develop

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[7] The agenda for the Public Workshop is attached to the Report, Appendix A. All of the information relating to the Section 105(b) Report, including the Federal Register notice, the comments received in response to the notice, the Public Workshop Agenda and transcript, is available on the FTC website at http://www.ftc.gov/bcp/workshops/esign/comments/index.htm.

sufficient empirical data to evaluate quantitatively whether the benefits outweigh the burdens; or (c) determine whether the absence of procedures required by the consumer consent provision would lead to an increase in deception and fraud against consumers.

1. Benefits vs. Burdens of Section 101(c)(1)(C)(ii)

In general, consumer advocates and state law enforcement agencies expressed strong support for the reasonable demonstration requirement of the consumer consent provision as an effective tool to promote e-commerce by increasing consumer confidence in the electronic marketplace. They stated that the benefits of this requirement to consumers and e-commerce businesses outweigh the burdens associated with adapting business systems to comply with the provision. Consumer advocates also suggested that the reasonable demonstration requirement may prevent deception and fraud from occurring by giving consumers more information about the legitimacy of the business they are dealing with and alerting them to the importance of receiving electronic documents. Businesses that have implemented Section 101(c)(1)(C)(ii) also report benefits, including increased protection from liability, increased consumer confidence, and the opportunity to engage in additional dialogue with consumers about transactions.

Some industry commenters indicated that the reasonable demonstration requirement may be burdensome because it adds an extra step that could delay the consummation of the transaction, and may cause confusion that could lead consumers to forgo the use of electronic records. Although some commenters identified burdens, there is insufficient data to assess the likelihood or severity of these burdens quantitatively, or their impact on consumers and e-commerce businesses. In addition, the record suggests that some burdens, such as the additional step entailed to satisfy the reasonable demonstration requirement, may be resolved or minimized

over time as businesses and consumers adjust to the consent procedure and gain experience sending and receiving documents in an electronic form. Similarly, instances of consumer frustration or confusion and the potential for loss of business may be reduced or eliminated by the refining of the consent procedures.

2. Prevention of Deception and Fraud

Although measuring the consequences of omitting a provision like Section 101(c)(1)(C)(ii) is difficult, we believe that the inclusion of this provision helps prevent deception and fraud. The provision ensures that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions. Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a "writing" requirement.

As enacted, ESIGN gives appropriate consideration to the threat that fraud and deception on the Internet pose to the growth and public acceptance of electronic commerce. Most laws protecting consumers against fraud and deception come into play *after* fraud has been committed and documented. ESIGN attempts to discourage fraud before it takes hold. ESIGN incorporates basic consumer protection principles that will help maintain the integrity and credibility of the electronic marketplace, bolster confidence among consumers that electronic records and signatures are safe and secure, and ensure that consumers continue to receive comprehensible written disclosures required by state or federal law.

E. Report Conclusions

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the reasonable demonstration requirement of ESIGN's consumer consent provision outweigh the burdens of its implementation on electronic commerce. The provision facilitates e-commerce and the use of electronic records and signatures while enhancing consumer confidence. It preserves the right of consumers to receive written information required by state and federal law. The provision also discourages deception and fraud by those who might fail to provide consumers with information the law requires that they receive.

The reasonable demonstration requirement in Section 101(c)(1)(C)(ii) appears to be working satisfactorily at this stage of the Act's implementation. Almost all participants in the study recommended that, for the foreseeable future, implementation issues should be worked out in the marketplace and through state and federal regulations. Therefore, Commerce and the FTC in their joint report recommend that Congress take no action at this time to amend the statute.

IV. Conclusion

The Commission greatly appreciates the opportunity to describe its efforts to assess the impact of ESIGN Section 101(c)(1)(C)(ii), particularly its positive effect on preventing deception and fraud in the electronic marketplace.

ONLINE BANKING ELECTRONIC DISCLOSURE AND CONSENT

By your consent below, you agree that we may provide you with all disclosures, notices and other communications, about Online Banking, including your Online Banking Service Agreement and any future amendments, in electronic form. We will provide all future notices by posting them on the Online Banking Sign In page for a period of at least 30 days. You may download or print the notice from your computer if you have the hardware and software described below.

At your request we agree to provide you with a paper copy of such a notice. You may request paper copies of required notices by calling us at **800.933.6262**. Online Banking Customer Service is available from 7:00 a.m. to 10:00 p.m., seven days a week, excluding bank holidays.

You have the right to withdraw this consent, but if you do, we will immediately terminate your participation in Online Banking Services. To withdraw your consent, please contact us at 800.933.6262.

YOUR SYSTEM REQUIREMENTS

In order for you to access and retain records in connection with Online Banking Services, your system must meet the following requirements:

- **An IBM or Macintosh compatible computer**
- Internet Access
- An Internet Browser
  Netscape Navigator 4.08/Netscape Communicator 4.7 or later versions
  Microsoft Internet Explorer 4.01 or later versions (4.51 for Macintosh users.)

To print or download disclosures you must have a printer connected to your PC or sufficient hard-drive space to save the disclosure.

To agree that your system meets the requirements, and that you consent to receive all notices regarding Online Banking Services in electronic form, click here:

I Agree | I Don't Agree

Santa Barbara Bank & Trust
Consent to Conduct Business Electronically

1. **RT Agreement.** If you choose a Refund Transfer ('RT') from Santa Barbara Bank & Trust ('SBBT'), you agree to receive a Refund Transfer Agreement and Disclosure Statement (the 'RT Agreement') electronically. The RT Agreement is set forth below. By selecting the 'I Agree' button on the next screen, you will be agreeing to be bound by the terms and conditions of the RT Agreement.

2. **Electronic Communications.** The RT Agreement, any state and Federal disclosures related to your RT, including your consent to the disclosure of your tax year 2000 Federal income tax return in Section 10 below, and any other communications, all of which we will refer to as the 'Communications,' will be provided to you electronically. However, if you wish to obtain a paper copy of the Communications at no cost, you may contact SBBT by writing to SBBT Refund Anticipation Loan Department, PO Box 1030, Solana Beach, CA 92075 or by logging on to http://cisc.sbbtral.com.

3. **Consenting to Do Business Electronically.** The decision whether to do business electronically is yours, and you should consider whether you have the required hardware and software capabilities described below. RTs are only offered by SBBT electronically, but similar products may be available through non-electronic channels. Your consent to do business electronically, and our agreement to do so, only applies to this RT transaction.

4. **Hardware and Software Requirements.** To access and retain the Communications electronically, the following minimum computer hardware and software requirements must be met: Windows -- 486 DX processor, Windows Me, 2000, 98, 95, NT 4.0 Operating System, 16 MB of RAM, 14400 bps or faster modem and 45 MB of hard disk space. Mac -- PowerPC processor, System 7.6 or higher Operating System, 16 MB of RAM, 14400 bps or faster modem and 45 MB of hard disk space.

5. **Withdrawal of Consent.** The RT and related Communications are provided electronically. If you do not want to obtain a RT and related Communications electronically, select the Back button on the TurboTax screen to return to the Electronic Filing Federal Tax Refund Options page. You have the right to withdraw your consent to doing business electronically at any time by the methods stated in Section 2 above, however, if you do so before we have entered into the RT Agreement we will treat your withdrawal of consent as a withdrawal of your RT Agreement. If we have entered into a RT Agreement with you it will remain in effect, and any Communications (including the RT Agreement) between us during the period after your consent to doing business electronically, and before your withdrawal of such consent, will be valid and binding on all parties. Communications, if any, following withdrawal of your consent will be provided to you by mail or other appropriate non-electronic means.

6. **Changes to Your Contact Information.** You should keep us informed of any change in your electronic or mailing address by contacting SBBT by logging on to http://cisc.sbbtral.com.

7. **Printing.** You may print this document by selecting Print from the File menu. It will also be printed when you choose Print for Your Records. You may review and print out this document at any time by opening up your tax return and selecting Print and File from the EasyStep menu.

8. **Your Ability to Access Communications.** When you select the 'I Agree' button on the next screen, you acknowledge that you are able to access the following Communications: the Consent to Conduct Business Electronically disclosure and the RT Agreement terms and conditions provided below.

9. **Consent to Electronic Communications.** When you select the 'I Agree' button on the next screen, you consent to having all Communications provided or made available to you in electronic form.

Santa Barbara Bank & Trust Refund Transfer Agreement and Disclosure Statement

This RT Agreement contains important terms, conditions and disclosures about your RT. Read this RT Agreement carefully before accepting its terms and conditions, and print a copy and/or retain this information electronically for future reference.

Use of Pronouns

If the 2000 Federal income tax return is a joint return, the pronouns 'I,' 'me,' and 'my' used in this RT Agreement include both the applicant and joint applicant (collectively, 'RT Applicant') and shall thus be read as 'we,' 'us,' and 'our,' respectively, wherever used. At times the terms 'you' or 'yours' will be used in discussing the rights and obligations of the RT Applicant(s) under this RT Agreement.

Authorization to Release Personal Information

10. **Authorization to Release Personal Information.**

(a) I hereby authorize Intuit Inc. ('Intuit') (the transmitter of my tax return) as of _____ to release to SBBT my tax year 2000 Federal income tax return information and any information obtained in the RT Agreement provided below for purposes of facilitating my RT. Your information will not be used by Intuit for any purpose other than stated herein.

(b) I hereby authorize SBBT as of _____ to use and disclose my tax year 2000 Federal income tax return information and any information obtained in the RT Agreement for the purpose of: (i) SBBT facilitating the RT; (ii) SBBT's collection of any indebtedness related to any outstanding or delinquent refund anticipation loan ('RAL') with SBBT or Other RAL Lenders (defined below in Section 14), and (iii) SBBT's role in detecting and preventing fraudulent tax return filings, including its reporting of potentially fraudulent returns to the Internal Revenue Service ('IRS'). Your Bank Account information will not be disclosed to unauthorized third parties. I further authorize SBBT and Other RAL Lenders to share with each other information about their respective credit experience concerning my present or prior RTs or tax refund amounts. The disclosure and use of such shared information by the foregoing parties shall be limited for the foregoing purposes and no other.

Important Information

11. **No Requirement to Obtain RT to File Electronically.** I understand that there is a $10 fee for the RT product. I further understand that my tax year 2000 Federal income tax return can be filed electronically without using the RT service by paying the applicable filing fees to Intuit by credit card at the time I file my tax year 2000 Federal income tax return.

Summary of Terms and Authorizations

12. Summary of Terms

Expected Federal Refund	$ 1,000.00
Less SBBT Refund Transfer Processing Fee	$ 10.00
Less Electronic Filing Transmission Fee [or Service Fee for web users];	$ 11.95
Expected Proceeds (1)	$ 978.05

(1) This is only an estimate. For example, if you have an outstanding RAL from a prior year the outstanding amount will also be deducted from your refund (see Sections 14 and 15 below).

13. **Deposit Account Authorization.** I hereby authorize SBBT to establish a deposit account ("Deposit Account"), subject to the terms and conditions set forth in Section 17, 18 and 20 below, for the purpose of receiving my tax year 2000 Federal income tax refund from the IRS. SBBT must receive an acknowledgement from the IRS that my return has been electronically filed and accepted for processing before the Deposit Account can be opened. I authorize SBBT to deduct from my Deposit Account the following amounts: (i) the $10 Refund Transfer Processing Fee; (ii) the fees and charges related to the preparation, processing and transmitting of my tax return; and (iii) any outstanding RAL amount pursuant to Sections 14 and 15 discussed below. I authorize SBBT to disburse the balance of the Deposit Account to me after making all authorized deductions or payments.

14. **Other RAL Lenders and Collection of Delinquent RALs.** I understand that if I have an outstanding RAL with Bank One; Beneficial National Bank/Household Bank, fsb; County Bank; First Security Bank; Refunds Now; Republic Bank & Trust Company; River City Bank; (the "Other RAL Lenders") or SBBT for any prior tax year that has not been discharged in bankruptcy, I hereby irrevocably authorize SBBT to deduct on my behalf the amount of the outstanding RAL obligation from my Deposit Account after fees and charges have been deducted and apply such funds to my SBBT debt or forward such funds to the appropriate Other RAL Lender.

15. **SBBT as Debt Collector.** If I have an outstanding or delinquent RAL with SBBT or any Other RAL Lender, I understand that SBBT may be acting as a debt collector hereunder in attempting to collect a debt and may use this authorization and instruction and any information obtained, consistent with this RT Agreement, to collect outstanding RALs I owe to SBBT and any the Other RAL Lender as noted above in Section 14.

16. **Acknowledgements.**

(a) I understand that: (i) SBBT cannot guarantee the amount of my tax year 2000 Federal income tax refund or the date it will be issued and (ii) SBBT is not affiliated with the transmitter of the tax return (Intuit) nor warrants the accuracy of the software used to prepare the tax return.

(b) I agree that Intuit is not acting as my agent nor is under any fiduciary duty with respect to the RT product.

17. **Security Interest and Assignment.** I hereby grant SBBT a security interest in the proceeds of my 2000 Federal income tax refund to the extent of all fees or disbursements authorized by this RT Agreement. I also assign to SBBT all my rights, title and interest in the Deposit Account and all funds deposited therein to the extent of all fees or disbursements authorized by this RT Agreement. I agree that SBBT may assign, sell or transfer all or part of its rights arising under this RT Agreement to a third party or affiliate of SBBT and may make any transfers from the Deposit Account necessary to accomplish said assignment, sale or transfer. I may not revoke this authorization to SBBT to make such an assignment, sale or transfer.

18. **Truth in Savings Disclosure.**

The Deposit Account is being opened for the purpose of receiving your (both spouses if this is a jointly filed return) tax year 2000 Federal tax refund. There is no cost to you for opening the Deposit Account. No other deposits may be made to the Deposit Account. No withdrawals will be allowed from the Deposit Account until all fees, charges, disbursements and payments authorized by this RT Agreement have been paid. No interest is payable on the deposit; thus the annual percentage yield and interest rate are 0%. The Deposit Account will be closed after all authorized deductions have been made and any remaining balance has been disbursed to you. Questions or concerns about the Deposit Account should be directed to: SANTA BARBARA BANK & TRUST, attn.: Refund Anticipation Loan Department, PO Box 1030, Solana Beach, CA 92075, or to SBBT via the Internet at http://cisc.sbbtral.com.

19. **Direct Deposit Information.**

I want the balance of my refund to be disbursed to me by ACH Direct Deposit to my personal Bank Account designated below (1). If a joint return is filed, the Bank Account may be a joint account or the individual account of either spouse.

Direct Deposit Account Type: [X] Checking [ ] Savings

RTN #: 123456789 **Account #:** 123456789

Note: To insure that there are no delays in receiving your refund, please contact your financial institution to confirm that you are using the correct RTN and account number.

(1) The account number you are providing here will differ from the account number that will automatically appear on your IRS Form 1040. The account number on your IRS Form 1040 is the number assigned to the temporary Deposit Account established by SBBT to receive your IRS refund.

20. **Other Required Federal Disclosures.**

Electronic Fund Transfer Disclosures: Our business days are Mondays through Fridays, except holidays. Questions or concerns about your Deposit Account should be directed to: **SANTA BARBARA BANK & TRUST, attn.: Refund Anticipation Loan Department, PO Box 1030, Solana Beach, CA 92075, or via the Internet at http://cisc.sbbtral.com.**

Types of Fund Transfers: There are two types of fund transfers that may occur to or from your Deposit Account at SBBT. They are: (1) the deposit of your tax year 2000 Federal income tax refund into the Deposit Account by the IRS, and the subsequent transfer of the funds less any applicable fees to your designated Bank Account, and (2) in the event there is a collection of a delinquent RAL pursuant to Sections 14 and 15, the deposit of the tax year 2000 Federal income tax refund into the Deposit Account by the IRS, and the subsequent transfer to SBBT or to Other RAL Lender of past due amounts.

SBBT and Your Liability. If we do not complete a transfer to or from your Deposit Account on time or in the correct amount according to the RT Agreement, we will be liable for your losses or damages. However, there are some exceptions. We will not be liable, for instance if circumstances beyond our control prevent the transfer, despite reasonable precautions that we have taken. As noted in Section 16, SBBT cannot guarantee the amount of my Federal income tax refund or the date it will be issued. You will not be liable in the event of an unauthorized electronic fund transfer.

Fees. There will be a $10 fee for either type of fund transfers described above.

Documentation. We will notify you via email when the IRS has deposited your Federal income tax refund into the Deposit Account. Included in the email will be a website address **(http://cisc.sbbtral.com)** where you can view your Deposit Account statement, or you may telephone us at 1-800-717-7228.

In Case of Errors or Questions About Your Electronic Transfers. Email us or write us at the address listed above as soon as you can, if you think your statement provided to you on our website at **http://cisc.sbbtral.com** is wrong or if you need more information about the transfer listed on the statement. We must hear from you no later than 60 days after we provide to you access to the FIRST statement on which the problem or error appeared. You must: (1) Tell us your name and account number; (2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information; and (3) Tell us the dollar amount of the suspected error. If you tell us orally, we will require that you send us your complaint or question in writing within 10 calendar days.

We will tell you the results of our investigation within 10 calendar days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 calendar days to investigate your complaint or question. If we decide to do this, we will recredit your Deposit Account within 10 calendar days for the amount you think is in error so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 calendar days following your oral notification, we may not recredit your Deposit Account.

If we decide that there was no error, we will send you a written explanation within 3 business days after we finish our investigation. You may ask for copies of the documents that we used in our investigation and we must make these available to you for your inspection. For a reasonable fee covering our duplication costs we will provide you with copies of any such documents which you request.

If your alleged error concerns a transaction to or from a third party (for example, your tax refund) our investigation may be limited to a review of our own records. If we decide that there was no error, you may want to contact such third party to pursue the matter further.

Confidentiality. We will disclose information to third parties about your Deposit Account or the transfers made under this RT Agreement: (1) where it is necessary for completing transfers, (2) in order to verify the existence and condition of your Deposit Account for a third party, (3) or if you give us permission to do so.

21. **Compensation.** In addition to any fees paid directly by you to Intuit, SBBT will pay to Intuit not more than $6 for each RT for Intuit's network support and transmission services.

22. **Arbitration.** Any and all disputes, controversies or claims ('Claims') between you and SBBT and/or Intuit arising out of or relating to this RT Agreement shall be resolved by final and binding arbitration. Arbitration will be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the 'AAA Rules') and the following procedures. This RT Agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. Subsection 1-16 (the 'FAA').

Arbitration shall be conducted in the state capital of RT Applicant's residence, or, should the RT Applicant reside more than 200 miles from such state capital, in the closest city to RT Applicant's residence with a Federal courthouse, or at any other location to which the parties shall mutually agree. Arbitration will be conducted by one neutral arbitrator selected in accordance with the AAA Rules. The arbitrator shall have the sole authority to resolve issues of arbitrability of any Claims. SBBT shall pay all fees and expenses of the arbitration up to the time of award or other final decision. If RT Applicant prevails, SBBT shall not seek reimbursement for these fees and expenses. Should the arbitrator find against RT Applicant, however, the arbitrator shall award one-half of the expenses of the arbitration to SBBT. If the arbitrator determines that no party prevailed, then the arbitrator, in its sole discretion, shall apportion the fees and expenses of the arbitration between RT Applicant and SBBT. In no event shall RT Applicant's share of the fees and expenses exceed 50%. The arbitrator may conduct proceedings and render an award despite a party's refusal to attend or participate in the proceedings. The award will be made and delivered to the parties within 30 days of the final hearing, and judgment on the award may be enforced by any court of competent jurisdiction. The arbitration proceedings conducted pursuant to this Section 22 will be confidential. Neither party will disclose or permit disclosure of any information about the evidence or documents in the arbitration or the contents of the award without the prior written consent of the other party, except as required by law.

Notice: Arbitration is the sole and exclusive mechanism for resolving any Claims, and no party shall seek to resolve any Claims in a court of law. **I understand that by consenting to arbitration, I am giving up the right to trial by jury and litigation in court, including the right to serve as a class representative or otherwise participate in or share in proceeds of a class action proceeding. By giving up the right to a class action proceeding, I acknowledge that any Claims I have will involve only SBBT, Intuit, and me and no other parties or other persons, even if those other persons have disputes similar to mine. I acknowledge that by signing this RT Agreement, I am giving up important legal rights. I agree that if I do not understand this paragraph, I will obtain legal advice before signing this RT Agreement.**

23. **Governing Law.** The enforcement and interpretation of this RT Agreement and the transactions contemplated therein (including, without limitation, the applicable interest rate) shall be governed by the laws of the State of California applicable to contracts executed and to be performed entirely in the State of California by residents of the State of California, without regard to the conflicts of laws, and, to the extent applicable, by the laws of the United States of America, including the Electronic Signatures in Global and National Commerce Act.

Signature

By selecting the 'I Agree' button below: (i) I understand that I am choosing the RT product offered by SBBT, (ii) I agree to receive all Communications electronically as provided in Sections 1 through 9 of this RT Agreement, (iii) I acknowledge that I have received and reviewed the RT Agreement and agree to be bound by its terms and conditions, including the 'Other RAL Lenders and Collection of Delinquent RALs' authorization in Sections 14 and 15 of this RT Agreement, and (iv) I consent to the release of my 2000 Federal income tax return and RT Agreement information as described in Section 10 of this RT Agreement. I understand that, if I change my tax year 2000 Federal tax return information in a way that affects the amount of my refund, I must review and accept the RT Agreement again. If this is a joint return, selecting the 'I Agree' indicates that both spouses agree to be bound by the terms and conditions of the RT Agreement.

Terms and Conditions:

<- Back | Agree ->

Description of Service
By enrolling in this electronic delivery service, you agree to receive announcements by e-mail about shareholder communications materials. Those materials are made available electronically by issuing corporations, mutual funds and other third parties. Quarterly and annual reports, proxy statements, and newsletters are examples of shareholder communications that may be made available electronically. The announcements will include the Internet address (URL) where the materials can be found. Materials referenced within the e-mail announcement may be viewed electronically via the Internet and printed with a local printer. If the materials are not made available electronically, you will receive the standard printed materials and no announcement will be made by e-mail.

Your enrollment will be effective for all holdings in the specified account on an ongoing basis unless you change or cancel your enrollment.

If you have a security position in an equity or mutual fund as of the record date for a particular shareholder distribution and the materials to be distributed are made available electronically, you will receive an e-mail announcement. The content of the information provided for electronic delivery is the responsibility of the issuing corporation, mutual fund, or third party, presenting it. If your securities are held by a financial institution, the broker or bank that holds your security is not responsible for content of electronic shareowner material.

Failure of E-Mail Address
If, during a distribution, your e-mail address proves to be invalid, your enrollment in this electronic delivery service will be cancelled and you will receive a hard-copy notification of the announcement. This notification will provide the URL to the electronic material, and will contain instructions to visit http://www.investordelivery.com/ to re-enroll.

Option to Receive Hard Copy
If, after enrollment in this electronic delivery service, you would like to receive a printed set of shareowner material for a particular security, in addition to your e-mail notification, you may request hard copy delivery from your broker, bank or directly from the issuing corporation or mutual fund. The broker, bank, issuing corporation or mutual fund may, at their discretion, impose a fee to receive the printed materials in addition to the electronic materials.

To Update Your Information or Cancel Enrollment
By visiting http://www.investordelivery.com/ and entering your unique enrollment number, you may update your contact information, such as e-mail address or personal identification number (PIN), or you may cancel your participation in electronic delivery by selecting the cancellation option.

Hardware and Software Required to Use Service
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You agree and acknowledge that when you use the Electronic Services, you, or you and your investment manager if you have one, are responsible for determining the nature, potential value and suitability for you of any particular investment strategy, transaction (including futures transactions) or security (including equities and options). Schwab has no responsibility under any circumstance for any such determination unless Schwab gives advice directly to you that is clearly identified as a Schwab recommendation for you to enter into a particular transaction or transactions or to buy or sell a particular security or securities. You agree that any such Schwab recommendation will remain in effect only for as long as we tell you that it will remain in effect at the time we make the recommendation.

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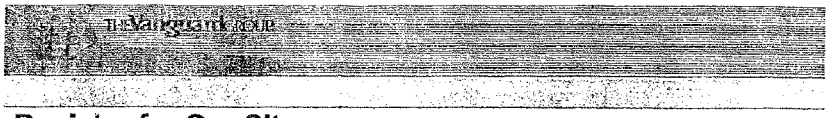

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Consent and Representations

I hereby acknowledge that I have carefully read the terms and conditions above, that I understand and agree to them, and that I consent to electronic delivery. I also agree that I will maintain a valid e-mail address and will continue to have access to the Internet. If my e-mail address changes, I agree to notify Vanguard of my new e-mail address immediately by logging on to Vanguard's website, clicking "Change Web Profile" in the left navigation menu of the "Account Access" area of My Accounts, selecting "E-mail address," and submitting my new e-mail address to Vanguard.

By clicking "Finish," I certify that the information I've provided in the registration process is correct and that I'm authorized to act on the accounts I'm seeking to access.

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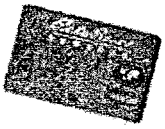
Eddie Bauer®
MASTERCARD®



Eddie Bauer MasterCard Terms and Conditions	
Annual Percentage Rate	For your first six billing cycles, the Introductory Annual Percentage Rate on all Purchases and Balance Transfers will be 6.90%. The Introductory APR does not apply to Cash Advances. After the first six billing cycles, the APR will be a variable rate, currently 13.99% for Purchases and 18.00% for Cash Advances. If a payment is received late once during the introductory period, the Annual Percentage Rate(s) explained in the Variable Rate Information below will apply.
Variable Rate Information	Your APR may vary after the first six billing cycles or if a payment is received late once during the introductory period. The rate is determined each month by adding 4.99% for Purchases and 9.00% for Cash Advances to the Prime Rate, as published in the "Money Rates" section of The Wall Street Journal on the 15th day of the month or the next business day if the 15th is not a business day, with a minimum APR of 13.49% for Purchases and 15.90% for Cash Advances. If you fail to make two consecutive payments when due, we have the right to increase your Annual Percentage Rate up to the greater of 18.49% or Prime Rate plus 9.99% for Purchases and Cash Advances.
Grace Period for Repayment of Balances For Purchases	You have, on average, 30 days between billing cycles to pay the New Balance on your Account to avoid a Finance Charge on Purchases.
Method of Computing the Balance for Purchases	2-cycle average daily balance (including new purchases).
Annual Fee	None.
Minimum Finance Charge	$0.50.
Late Payment Fee	$35 on payments received more than 10 days

	after the Payment Due Date.
Cash Advance Fee	3% of the Cash Advance with a minimum of $3.00
Overlimit Fee	$29

The rate information described in this section is accurate as of 02/01/01. The information is subject to change after that date. For current information, please call 1-800-211-7340.

By applying for an Eddie Bauer MasterCard, I agree to the terms disclosed to me on this site. I agree to comply with all the terms of the Credit Card Account Agreement, a copy of which will be sent to me with my credit card. This agreement and all charges to the account shall be governed by the law of Oregon and applicable U.S. Federal law. I agree to receive disclosures and notices relating to this application and/or the Eddie Bauer MasterCard through electronic means. I authorize First Consumers National Bank (FCNB) to review my credit history and information I provide to FCNB, and obtain a current credit report upon receipt of my application and subsequently for the purpose of an update, reinstatement, extension of credit or any legitimate purposes associated with the account. Upon request, you will inform me if such a report was requested and you will supply the name and address of the consumer-reporting agency. Finance charges not in excess of those permitted by law will be charged on the outstanding balance from month to month. Applicant, if married, may apply for a separate account. This application is subject to approval by First Consumers National Bank, Beaverton, Oregon. I certify that I am at least 18 years old and that the information I have provided in connection with a credit application for an Eddie Bauer MasterCard is accurate and complete.

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Wisconsin Residents Only: Wisconsin law provides that no agreement, court order or individual statement applying to marital property will affect a creditor's interest unless, prior to the time credit is granted, the creditor is furnished with a copy of the agreement, court order, or statement, or has actual knowledge of the adverse provision.

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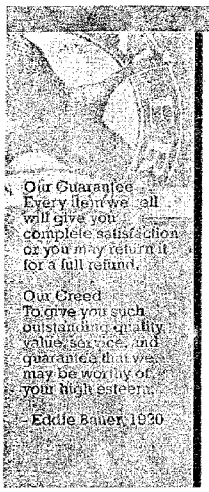

Eddie Bauer MASTERCARD®

INFORMATION ABOUT ELECTRONIC NOTICES

If you are applying for a credit card account from First Consumers National Bank ("FCNB"), FCNB is required by law to provide you with certain disclosures about FCNB's credit card accounts. With your consent, FCNB can deliver those disclosures to you quickly and conveniently by displaying them on this Web site electronically and, in some cases, requesting that you print the disclosure screens and retain them for your records.

This notice contains important information that you are entitled to receive before you consent to electronic disclosures. Please read this notice carefully.

After you have read this information, if you agree to receive disclosures from FCNB electronically, please click on the button at the bottom of the page.

ELECTRONIC DISCLOSURE STATEMENT

You may request to receive disclosures on paper, but if you do not consent to electronic disclosures it will not be possible for you to apply for an FCNB credit card on this Web site.

If you consent to electronic disclosures, you may withdraw that consent by clicking on designated buttons prior to submitting your application for credit. However, withdrawing your consent before submitting your application for an FCNB credit card account on this Web site will prevent you from continuing with the application process over the Internet.

If you consent to electronic disclosures, that consent applies only to disclosures FCNB is required to give you in connection with an application that is submitted through this Web site for an FCNB credit card account.

If you wish to withdraw your consent to electronic disclosures, you must click on the appropriate button at the bottom of this page. There are also designated "click on" buttons to withdraw your consent prior to submitting your application for credit.

After consenting to receive electronic disclosures, you may, upon request, obtain a paper copy of the disclosures by calling 1-800-211-7340.

To access and retain electronic disclosures from FCNB, you must be able to view the disclosures on your monitor and send screen prints to your printer. Most Internet browsers provide a convenient method of printing the material you view on your monitor.

I have read the information about electronic disclosures, and I agree to receive disclosures electronically in accordance with the terms and conditions described in the Statement.

I have read the information about electronic disclosures, and I do not wish to receive disclosures electronically. I understand that my consent to electronic disclosures is required in order to apply for an FCNB credit card account over the Web.

REPORT TO CONGRESS

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

The Consumer Consent Provision in Section 101(c)(1)(C)(ii)

FEDERAL TRADE COMMISSION

Bureau of Consumer Protection

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

June 2001

DEPARTMENT OF COMMERCE

Donald L. Evans, Secretary

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EXECUTIVE SUMMARY

On June 30, 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act[1] ("ESIGN" or "the Act"), to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1)(C)(ii) of the Act requires businesses to obtain from consumers electronic consent or confirmation to receive information electronically that a law requires to be in writing. The Act went into effect in October 2000.

In Section 105(b) of the Act, Congress directed the Department of Commerce (Commerce) and the Federal Trade Commission (FTC) to issue a report on the impact of the consumer consent provision of Section 101(c)(1)(C)(ii). Specifically, Congress asked Commerce and the FTC to report on the benefits of that consumer consent provision to consumers; the burdens that the provision imposes on electronic commerce ("e-commerce"); whether the benefits outweigh the burdens; the effect of the consent provision in preventing fraud; and whether any statutory changes are necessary.

To evaluate these issues, Commerce and the FTC conducted extensive outreach to the on-line business community, technology developers, consumer groups, law enforcement and academia. To solicit public comments from these groups and the general public, the agencies issued a Notice in the *Federal Register*. The agencies also conducted a Public Workshop to explore issues raised in the comments and outreach efforts. The record consists of written comments and public workshop discussion, as well as anecdotal evidence, expert opinion, and independent research. There was consensus among the participants and commenters that not enough time has passed since the law took effect to: a) allow consumers or businesses to experience the full effect of the provision; b) develop sufficient empirical data to evaluate quantitatively whether the benefits of implementation outweigh the burdens; and c) determine whether the lack of the type of procedure required by the consumer consent provision would lead to an increase in deception and fraud against consumers.

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the consumer consent provision of ESIGN outweigh the burdens of its implementation on

1. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq.*).

electronic commerce. The provision facilitates e-commerce and the use of electronic records and signatures while enhancing consumer confidence. It preserves the right of consumers to receive written information required by state and federal law. The provision also discourages deception and fraud by those who might fail to provide consumers with information the law requires that they receive.

The consumer consent provision in ESIGN appears to be working satisfactorily at this stage of the Act's implementation. Almost all participants in the study recommended that, for the foreseeable future, implementation issues should be worked out in the marketplace and through state and federal regulations. Therefore, Commerce and the FTC recommend that Congress take no action at this time to amend the statute.

I. GROWTH OF E-COMMERCE

E-commerce represents a small but vital segment of business-to-consumer transactions. The Census Bureau (Census) estimates that U.S. e-commerce sales by retail establishments for the first quarter 2001 were $7.0 billion, up 33.5 percent from the first quarter of 2000. The first quarter 2001 e-commerce results accounted for 0.91 percent of total retail sales, up from 0.70 percent in the first quarter of 2000, though down from 1.01 percent in the fourth quarter of 2000. Retail e-commerce sales of $25.8 billion in 2000 accounted for 0.8 percent of total retail sales.[2]

E-commerce plays a notable role in other sectors where business-to-consumer transactions are important. According to Census estimates for 1999 (the most recent year available), e-commerce revenues for the securities brokerage industry were $3.8 billion, or 1.9 percent of total revenues of $203.7 billion. E-commerce revenues for the on-line information services industry were $1 billion, which equates to 5.1 percent of total revenues of $20.1 billion; and e-commerce revenues for the travel services sector were $5.3 billion, or over 21 percent of total revenues of $25 billion.[3]

The benefits of e-commerce extend beyond the dollar values that are placed on business activity: it gives consumers access to an unlimited marketplace of goods and services ranging from music and stocks to on-line books and shopping services at their fingertips. To continue enjoying the fruits of this technology, businesses and consumers – domestic and international – must have confidence in the integrity and credibility of this emerging electronic marketplace. Congress intended ESIGN to have a positive impact on the continued growth of e-commerce and consumer confidence.

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2. Estimated U.S. retail e-commerce sales for the first quarter of 2001 are from the U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce release CB01-83, May 16, 2001. They are based on the Standard Industrial Classification (SIC). Estimated U.S. retail e-commerce sales for 2000 are from the U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce release CB01-28, February 16, 2001. Note that these estimates are not seasonally adjusted. For more information see the Census web site at http://www.census.gov/mrts/www/mrts.html.

3. Estimated e-commerce revenues for selected services sectors for 1999 are from *E-Stats*, Mar. 7, 2001, Table 3, U.S. Census Bureau, Economics and Statistics Administration, and are based on the North American Industry Classification System (NAICS).

II. Congressional Mandate: Study of Section 101(c)(1)(C)(ii)

A. ESIGN's Consumer Consent Provision

On June 30, 2000, Congress enacted ESIGN to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically[4] *and* the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.[5]

Moreover, Section 101(c)(1)(C)(ii) states that a consumer's consent to receive electronic records is valid only if the consumer "consents electronically or confirms his or her consent electronically, 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."[6] Section 101(c)(1)(C)(ii) overlays existing state and federal laws requiring that certain information be provided to consumers in writing. It also provides a framework for how businesses can comply with the underlying statutory or regulatory requirement to provide written information to consumers electronically – whether the information is a disclosure, a notice, or a statement of rights and obligations – within the context of a business-to-consumer transaction.

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4. Section 101(c)(1)(A).

5. Section 101(c)(1)(B). The disclosures include: (1) whether the consumer may request to receive the information in non-electronic or paper form; (2) the consumer's right to withdraw consent to electronic records and the consequences – including possible termination of the relationship – that will result from such withdrawal; (3) the transaction(s) or categories of records to which the consent applies; (4) the procedures for withdrawing consent and updating the information needed to contact the consumer electronically; and (5) how the consumer may request a paper copy of the electronic record as well as what fees, if any, will be charged for the copy. Section 101(c)(1)(B)(i)-(iv). In addition, businesses must provide the consumer with a statement of the hardware and software needed to access and retain the electronic record. Section 101(c)(1)(C)(i).

6. In this Report, we refer to the provision as the "consumer consent provision in Section 101(c)(1)(C)(ii)," to distinguish it from the broader consumer consent provision (Section 101(c)), and the affirmative consumer consent requirement in Section 101(c)(1)(A).

B. The FTC/Commerce Study

In addition to including the consumer consent provision in Section 101(c)(1)(C)(ii), Congress sought an analysis of the impact of the provision on both consumers and businesses. Specifically, Section 105(b) of the Act requires that:

> Within 12 months after the date of the enactment of this Act, the Secretary of Commerce and the Federal Trade Commission shall submit a report to Congress evaluating any benefits provided to consumers by the procedure required by section 101(c)(1)(C)(ii); any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses.

The National Telecommunications and Information Administration (NTIA), on behalf of the Department of Commerce, and the FTC conducted the study required by Section 105(b). Based on the narrow mandate in Section 105(b), the agencies have focused their study and this Report on Section 101(c)(1)(C)(ii), and did not evaluate any other consumer protection provisions of the Act.

1. Outreach Efforts

To evaluate the technology available to employ the consumer consent provision, and to learn how companies are implementing Section 101(c)(1)(C)(ii), the agencies conducted extensive outreach to the on-line business community, technology developers, consumer groups, law enforcement, and academia. The industry contacts included high-tech companies involved in infrastructure development for electronic contracting and electronic payment systems, as well as business entities that use, or plan to use, electronic records in consumer transactions. All interested parties were encouraged to submit papers and comments on the benefits and burdens of the requirement, and staff did research to identify the types of businesses that are using the Section 101(c)(1)(C)(ii) consumer consent procedures for providing information "in writing" to consumers in electronic formats.

2. Federal Register Notice

To comply with Section 105(b)'s mandate to solicit comment from the general public, consumer representatives, and electronic commerce businesses, NTIA and the FTC published a Notice in the *Federal Register* on February 13, 2001. The Notice requested comments on the benefits and burdens of the

consumer consent provision in Section 101(c)(1)(C)(ii), and announced a Public Workshop to discuss the issues raised in the Notice.[7] To increase awareness of the study and the workshop, each agency issued a press release announcing the Federal Register Notice, and placed the Notice on a special "ESIGN Study" portion of its website. Staff at both agencies also sent copies of the Notice by e-mail to several hundred contacts who had previously expressed interest in issues affecting electronic commerce.[8]

In response to the Notice, NTIA and the FTC received 32 comments from consumer organizations, software and computer companies, banks, members of the financial services industry and academics.[9] Many of the commenters responded electronically to a special e-mail box. In addition, four commenters submitted supplemental statements after the workshop. NTIA and the FTC posted all written comments on their websites to facilitate public access.

3. Public Forum

On April 3, 2001, the agencies hosted a Public Workshop to explore issues raised in the comments and the outreach efforts, to discuss new issues, and to develop a thorough basis for analysis and conclusions.[10] The agenda included a discussion of legal issues, technology issues, benefits and burdens, and best practices for complying with the consumer consent provision of Section 101(c)(1)(C)(ii), as well as a session for public participation.[11] A total of 21 individuals and organizations participated in the roundtable discussions and several more made comments during the public session of the workshop.[12]

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7. 66 Fed. Reg. 10011 (February 13, 2001). A copy of the Notice is attached to this Report as Appendix A.

8. A list of the individuals and organizations we contacted is attached to this Report as Appendix B.

9. All comments are available on the FTC website at: http://www.ftc.gov/bcp/workshops/esign/comments/index.htm and on the NTIA website at: http://www.ntia.doc.gov/ntiahome/ntiageneral/ESIGN/esignpage.html. A list of commenters and the acronym used to refer to each commenter in this Report is attached as Appendix C. The first reference to each comment will include the full name of the organization, its acronym, and the page number. Subsequent references will be cited as "[Acronym] at [page]."

10. The agenda for the Public Workshop is attached to this Report as Appendix D. The transcript of the workshop was placed on the public record and was also posted on the FTC website at http://www.ftc.gov/bcp/workshops/esign/comments/index.htm and on the NTIA website at http://www.ntia.doc.gov/ntiahome/ntiageneral/ESIGN/esignpage.html. References to the transcript will include the name of the workshop participant, the acronym of the organization represented and the page number (*e.g.*, "[Participant]/[Acronym of organization], tr. at [page]").

11. Several participants also provided demonstrations of the technology that has been or could be used by companies to obtain consumer consent for the provision of electronic documents.

12. The Workshop Participant List is attached to this Report as Appendix E.

The following sections of this Report provide an analysis of the comments and information received in response to the Federal Register Notice and outreach activities, during the workshop discussion and after the workshop. Specifically, Section III provides an overview of the issues raised by the comments and the workshop discussion. Section IV analyzes the benefits and burdens of the consumer consent provision in Section 101(c)(1)(C)(ii), and evaluates the effect of the consumer consent provision in preventing fraud. Section V states the agencies' conclusions.

III. Summary of Public Comments And Workshop

In general, consumer advocates and state law enforcement agencies expressed strong support for the consumer consent provision in Section 101(c)(1)(C)(ii) as an effective tool to prevent fraud and increase consumer confidence in the electronic marketplace. In their responses to the Federal Register Notice and their comments at the workshop, consumer groups and state law enforcement agencies said the benefits of Section 101(c)(1)(C)(ii) to consumers and e-commerce businesses outweigh the burdens associated with adapting business systems to comply with the provision.

Some commenters maintained that the provision adds an unnecessary extra step that at best would delay the consummation of the transaction, and at worst could cause confusion that could lead consumers to forgo the use of electronic records.[13] While a number of the commenters representing e-commerce businesses expressed some concern about the costs and uncertainties of the implementation and interpretation of Section 101(c)(1)(C)(ii), they nevertheless agreed that the enactment of ESIGN provided overall net benefits.[14] Most agreed, however, that because of industry's limited experience with the requirement, it is premature to recommend changes.[15]

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13. Gallagher/Fidelity, tr. at 125-126; AIA at 1; EFSC at 3-4; Wachovia at 3.

14. The e-commerce businesses noted that the national scope of ESIGN provides guidance to e-commerce businesses regarding interstate electronic transactions by eliminating the problems created by attempts to comply with different state laws. *E.g.*, Gallagher/Fidelity, tr. at 124. The fact that many businesses already are providing (or moving towards providing) information electronically, pursuant to ESIGN's consumer consent provision, suggests that any costs or uncertainties created by Section 101(c)(1)(C)(ii) are unlikely to inhibit this process.

15. One commenter noted that Congress should refrain from revising the consumer consent provision of Section 101(c)(1)(C)(ii) when the United Nations Commission on International Trade (UNCITRAL) Working Group on E-Commerce is expected to complete its work on the development of an electronic signatures law by year end. Baker & McKenzie at 3.

A. Benefits to Consumers

The consumer advocates who submitted comments and those who participated in the workshop identified a number of benefits that the consumer consent provision in Section 101(c)(1)(C)(ii) provides.

1. Ensures access to documents and promotes awareness

Section 101(c)(1)(C)(ii) requires that the e-commerce business determine whether the consumer has the ability to receive an electronic notice before transmitting the legally required notices to the consumer.[16] According to several commenters, the provision ensures that the consumer has access to a computer and to the Internet; ensures that the consumer has access to the software necessary to open the documents that are to be transmitted electronically; and raises the consumer's awareness of the importance of the documents received and the importance of receiving the documents electronically.[17] One commenter suggested that increased awareness is particularly beneficial to those consumers who ordinarily are not concerned about receiving information that is required by law to be in writing and can now be made available electronically, or who do not fully consider the implications of receiving this information electronically.[18] Other commenters noted that putting notices in an electronic form that can be easily accessed is likely to lead to the development of a common format. This was cited as an additional benefit for consumers and will also help on-line merchants meet other provisions of ESIGN, such as Section 101(d), the document retention provision.[19]

2. Provides a "bright line" to identify legitimate businesses

The commenters stated that Section 101(c)(1)(C)(ii) also reassures consumers about the legitimacy of an on-line merchant. "Good businesses," the commenters noted, would ensure receipt of documents and make certain that the consumer is comfortable dealing with an electronic format.[20] Discussion at the workshop suggested that compliance with the ESIGN consumer consent provision can provide a "bright

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16. Consumers Union (CU) at 3-4; National Consumer Law Center (NCLC) at 2, 3-4; Richard Blumenthal, Connecticut Attorney General (CT AG) at 2, 3-4.

17. Weinberg/NACAA, tr. at 156-57; National Consumer Law Center Supplementary Comments (NCLC Supp.) at 1; MacCarthy/Visa, tr. at 156; Grant/NCL, tr. at 259-60 (public session remark); CT AG at 1-2; CU at 1.

18. Weinberg/NACAA, tr. at 156-57; Saunders/NCLC, tr. at 157.

19. Silanis Technology (Silanis) at 1-2.

20. Weinberg/NACAA, tr. at 147; *see also* Dayanim, tr. at 135-36.

line" by which businesses can signal their legitimacy to consumers and differentiate themselves from unscrupulous operators, and as a result, enhance consumer confidence in on-line transactions.[21]

3. Helps prevent deception and fraud

Some commenters suggested that Section 101(c)(1)(C)(ii) protects consumers from e-commerce businesses that might misuse the provision of electronic records to circumvent laws requiring that consumers receive certain disclosures, information and other documents. This could include such documents as a confirmation of their transaction, a statement of the terms and conditions of the transaction, a copy of their contract to use in court if a dispute arises, or information about any right to cancel a transaction within a "cooling-off" period.[22]

Several consumer advocates stated that a significant benefit of the consumer consent provision in Section 101(c)(1)(C)(ii) is the prevention of consumer fraud.[23] Most anti-fraud laws provide remedies after the fraud has been committed and proved. ESIGN attempts to prevent fraud *before* it occurs. Both consumer and industry representatives gave specific examples of how Section 101(c)(1)(C)(ii) protects against fraud, noting that the provision:

- discourages the use of electronic records to provide information to a consumer without Internet access;[24]
- reduces the ability of businesses to use product price unfairly to persuade consumers to accept electronic records instead of paper;[25]
- deters companies from fraudulently changing the terms of contracts in cases where consumers electronically sign an agreement and consent to receive electronic disclosures;[26]
- ensures the ability of consumers to access or retain important electronic records;[27]

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21. *Id.*

22. Saunders/NCLC, tr. at 11-12; Yen/Hudson Cook, tr. at 23-24. For example, the FTC's Door-to-Door Sales Rule requires that sellers give consumers three business days to change their mind regarding any purchase that is covered by the rule. *See* 16 C.F.R. § 429.

23. Hillebrand/CU, tr. at 120; CT AG at 2-3.

24. NCLC at 5-6.

25. *Id.* at 6.

26. *Id.* at 7.

27. *Id.* at 2.

- provides a way to gauge the consumer's ability to use electronic equipment;[28] and
- gives the consumer a chance to reflect on what he or she is agreeing to before confirming consent electronically, in a transaction that originates in a face-to-face setting.[29]

B. Benefits and Burdens to Electronic Commerce

Section 105(b) asks whether Section 101(c)(1)(C)(ii) imposes burdens on e-commerce. While the participants in our study identified some burdens on e-commerce, they also identified several benefits. The commenters identified the following benefits and burdens for e-commerce businesses.

1. Legal certainty and protection

Some commenters noted that the consumer consent provision in Section 101(c)(1)(C)(ii) provides legal certainty in on-line business transactions, and may act as a "safe-harbor" for e-commerce businesses that follow the parameters in the Act.[30] Businesses that implement procedures for complying with Section 101(c)(1)(C)(ii) have some assurance that they have obtained consent and provided electronic documents in a manner sufficient to make the electronic transactions legally valid.[31] In addition, they obtain information to show that the record they provided could be accessed by the consumer.[32] As a result, the consumer consent provision may protect e-commerce businesses from baseless legal claims by providing an electronic or paper document trail of the transaction when disclosures or other records are provided electronically to consumers.

2. Technological neutrality

Most commenters agreed that Section 101(c)(1)(C)(ii) is technology-neutral, providing businesses the flexibility to design computer applications that fit their unique needs,[33] and allowing the technology and electronic commerce marketplace to decide which technologies will be most appropriate.[34] Many on-line businesses praised the technology-neutral language, and said that technology, rather than legislation, can

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28. MacCarthy/Visa, tr. at 156.

29. NCLC at 6.

30. Dayanim, tr. at 136, 145-46; Buckley/EFSC, tr. at 196; *see also* Benham Dayanim (Dayanim) at 5.

31. Dayanim, tr. at 136, 145-46; Buckley/EFSC, tr. at 196.

32. Wittie/ICI, tr. at 56.

33. MacCarthy/Visa, tr. at 103, 132; Gallagher/Fidelity, tr. at 124; Winn, tr. at 159.

34. Software & Information Industry Association (SIIA) at 7 & n.4; Selwood Research (Selwood) at 1.

solve future problems concerning technical compatibility.[35]

The commenters also noted that, because ESIGN contains broad parameters for obtaining or structuring consumer consent (including demonstrating ability to access the information), businesses have greater flexibility when implementing new practices and procedures to conduct electronic transactions or comply electronically with federal or state laws and regulations. Thus, brick-and-mortar businesses may be more willing to adopt electronic methods to attract new customers and transact business electronically.[36]

However, the commenters expressed some concern that Section 101(c)(1)(C)(ii) would cause firms to favor certain technologies over others that might actually be better for providing notices to consumers.[37] There also was concern that the consumer consent procedure - while it might benefit consumers by encouraging the development of a common format - would lead firms to stay with existing technologies rather than shift to new technologies because of the need to repeat the process of obtaining consumer consent for any new technology.[38]

3. Loss of potential customers

According to some commenters, Section 101(c)(1)(C)(ii) could result in a loss of business because of the extra steps consumers have to take to agree to receive electronic versions of written documents, particularly for transactions that begin in a face-to-face setting.[39] Several commenters believed that the consumer consent procedures might create frustration and confusion for consumers, which, in turn, could discourage them from completing electronic transactions.[40] For example, in a face-to-face meeting in a business office, it is up to the consumer to later confirm the request to receive information in an electronic

35. Dayanim at 10; MacCarthy/Visa, tr. at 131-32; Gallagher/Fidelity, tr. at 208.

36. *See* Wells/b4bpartner, tr. at 127-28.

37. For example, one participant at the workshop suggested that technological difficulties in transferring between a secure website and a file in an Adobe™ PDF format might encourage firms to shy away from using PDF files for the provision of notices, even though such files might be otherwise preferable because they make it more difficult for anyone to tamper with the contents of the file. Yen/Hudson Cook, tr. at 60-61. *See also* Wood/Household Bank, tr. at 61.

38. *See, e.g.*, Yen Supp. at 2-3. *See also*, Wachovia Corporation (Wachovia) at 4; SIIA at 5 (para. 3); Investment Company Institute (ICI) at 4 (the consumer consent procedure might cause merchants to migrate to the most common formats and those (such as HTML) that are the easiest for demonstrating a consumer's ability to access documents, thus chilling alternative models and inhibiting technological innovation).

39. Gallagher/Fidelity, tr. at 125-27, 140-43; *see also* Wachovia at 3-4; ICI at 3; E*Trade Bank (E*Trade) at 2-3; Yen at 2.

40. *Id.*

form from his or her home computer, if the transaction is to meet the requirements of Section 101(c)(1)(C)(ii).[41] Some e-commerce businesses consider this procedure unduly intrusive and confusing for the consumer and burdensome on e-commerce.[42]

Several commenters stated that the additional step is not necessarily burdensome for businesses.[43] One participant noted that her company already incorporates consent with other documentation that must be legally executed at the start of the relationship (*e.g.*, on-line brokerage agreements that include electronic disclosures).[44] Another workshop participant (an FTC economist) wondered why the on-line industry could not satisfy this additional step by sending the consumer e-mail to initiate the relationship, and continue with the electronic transaction to obtain consent for the receipt of other electronic documents.[45]

4. Underlying laws sufficient

According to some e-commerce businesses, including some on-line financial services companies, the consumer consent provision in Section 101(c)(1)(C)(ii) is unnecessary because existing anti-fraud and unfair trade statutes require businesses to make disclosures to consumers and adequately address any of the on-line problems that may arise.[46]

IV. Analysis of The Issues

Although a number of e-commerce businesses, principally in the financial services industry, have implemented the procedures in Section 101(c)(1)(C)(ii), there was consensus among the participants and commenters that not enough time has passed since the law took effect to: a) allow consumers or businesses to experience the full effect of the provision; b) develop sufficient empirical data to evaluate quantitatively whether the benefits of implementation outweigh the burdens; and c) determine whether the lack of the type of procedure required by the consumer consent provision would lead to an increase in deception and fraud against consumers. Nonetheless, based on industry experience; anecdotal evidence, expert opinion and

41. Gallagher/Fidelity, tr. at 125-26; *see also* ICI at 3; E*Trade at 2-3; Wachovia at 3-4.

42. ICI at 3; E*Trade at 2-3.

43. Gallagher/Fidelity, tr. at 142-43.

44. Stafford/Wachovia, tr. at 220.

45. Anderson/FTC, tr. at 139.

46. Buchman/E*Trade, tr. at 170.

other information collected through outreach activities with consumer advocates and members of the e-commerce community; independent research; written comments submitted in response to the Federal Register Notice; and discussion during the workshop, it is reasonable to conclude that, thus far, the benefits provided to consumers by the procedures in the provision outweigh the burdens imposed on electronic commerce.

A. Benefits vs. Burdens

Consumer advocates suggest that Section 101(c)(1)(C)(ii) may prevent deception and fraud before it occurs by giving consumers more information about the legitimacy of the business they are dealing with and alerting them to the importance of receiving electronic documents. Businesses that have implemented Section 101(c)(1)(C)(ii) also report benefits, including protection from liability, increased revenues resulting from increased consumer confidence, and the opportunity to engage in additional dialogue with consumers about the transactions.

Although the record indicates that Section 101(c)(1)(C)(ii) causes some burdens, a number of commenters stated that the added step to obtain the consumer's consent is not significantly burdensome. To the degree they identified burdens, there is insufficient data to quantitatively assess their likelihood or severity, or their impact on consumers and e-commerce businesses. In addition, the record suggests that some burdens, such as the added step created by the consumer consent provision in Section 101(c)(1)(C)(ii), may be resolved or minimized over time as businesses and consumers adjust to the consent procedure and gain experience sending and receiving documents in an electronic form. In addition, given the pace of technological development, there is reason to believe that some issues, such as technical incompatibility in file formats, will be resolved by existing or future technology.

Similarly, instances of consumer frustration or confusion and the potential for loss of business may be solved by the creative structuring of the consent provision. For example, solutions may include incorporating the consent procedure of Section 101(c)(1)(C)(ii) in documents that must be legally executed at the beginning of the relationship (such as an on-line brokerage agreement) or initiating the relationship with a consumer using electronic mail that requires a response. The technology-neutral language of the provision encourages creativity in the structure of business systems that interface with consumers, and provides an opportunity for the business and the consumer to choose the form of communication for the transaction. Moreover, as allowed under Section 104 of the Act, federal regulatory agencies and states can

issue regulations to provide guidance about the implementation of ESIGN in specific industries.[47] These regulations may resolve many of the issues that have surfaced since ESIGN was enacted.

B. PREVENTION OF DECEPTION AND FRAUD

Section 105(b) also requires Commerce and the FTC to address the issue of whether the absence of Section 101(c)(1)(C)(ii) would cause an increase in consumer fraud. While it is difficult to measure whether the lack of a provision would produce a certain result, we believe that the presence of the provision will help prevent deception and fraud. ESIGN's consumer consent provision ensures that consumer protections that exist in traditional commercial transactions extend to business-to-consumer electronic transactions. ESIGN overlays, rather than preempts, state and federal laws that provide for consumers to receive certain information "in writing" in connection with a transaction, thereby preserving consumers' rights under those laws in the world of e-commerce transactions.

ESIGN's consumer consent provision in Section 101(c)(1)(C)(ii) provides a framework for how businesses can meet the "in writing" requirements of existing state and federal laws and regulations when providing information to consumers electronically. The provision ensures that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions. Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a "writing" requirement. The consumer consent provision in Section 101(c)(1)(C)(ii) provides substantial benefits as a preventive measure against deceptive and fraudulent practices in the electronic marketplace.[48]

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47. *See e.g.,* Truth in Lending, Interim Rule and Request for Comments, Federal Reserve System, 66 Fed.Reg. 17329 (March 30, 2001).

48. The electronic marketplace has not been immune from the types of deceptive and fraudulent practices that have plagued the traditional marketplace. The rapid rise in the number of consumer complaints related to on-line fraud and deception bears this out: in 1997, the FTC received fewer than 1,000 Internet fraud complaints through its complaint database, Consumer Sentinel. A year later, the number had increased eight-fold. In 2000, over 25,000 complaints - about 26 percent of all fraud complaints logged into Consumer Sentinel that year - related to on-line fraud and deception. *See* Prepared Statement of Eileen Harrington, Associate Director of the Division of Marketing Practices of the Bureau of Consumer Protection, FTC, on "Internet Fraud," before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives, May 23, 2001, available at the FTC's website at: http://www.ftc.gov/os/2001/05/internetfraudttmy.htm.

The consumer safeguards adopted by Congress in ESIGN are consistent with well-established principles of consumer protection law. A keystone of consumer protection law is to ensure that the consumer can receive accurate information necessary to decide whether to enter into a particular transaction. The information must be delivered in a way that is timely and clear and conspicuous. That is, it must be presented at a time and in a way that the consumer is likely to notice and understand.

As enacted, ESIGN gives appropriate consideration to the threat that fraud and deception on the Internet pose to the growth and public acceptance of electronic commerce. It establishes safeguards that can avert many of the abusive practices that marked earlier technological innovations in the marketplace. Most laws protecting consumers against fraud and deception are implemented after fraud has been committed and documented. ESIGN attempts to address fraud before it occurs. Nothing is more likely to undermine consumer confidence in the electronic marketplace than exploitation by unscrupulous marketers, who would take advantage of electronic records and signatures as yet another way to deceive consumers. ESIGN incorporates basic consumer protection principles that will help maintain the integrity and credibility of the electronic marketplace, bolster confidence among consumers that electronic records and signatures are safe and secure, and ensure that consumers continue to receive comprehensible written disclosures required by state or federal law. Section 101(c)(1)(C)(ii) protects consumers who wish to receive electronic records by ensuring that they have access to the same information and protections as consumers who choose to use traditional paper-based transactions.

Section 101(c)(1)(C)(ii)'s consumer consent provision plays an integral role in achieving the goal of ESIGN: to facilitate e-commerce and the use of electronic records and signatures, and to ensure that consumers can access information businesses send electronically, which an underlying law requires to be in writing.

V. Conclusion

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the consumer consent provision of ESIGN outweigh the burdens of its implementation on electronic commerce. The provision facilitates e-commerce and the use of electronic records and signatures while enhancing consumer confidence. It preserves the right of consumers to receive written information required by state and federal law. The provision also discourages deception and fraud by those who might fail to provide consumers with information the law requires that they receive.

The consumer consent provision in Section 101(c)(1)(C)(ii) appears to be working satisfactorily at this stage of the Act's implementation. Almost all participants in the study recommended that, for the foreseeable future, implementation issues should be worked out in the marketplace and through state and federal regulations. Therefore, Commerce and the FTC recommend that Congress take no action at this time to amend the statute.

APPENDIX A: *FEDERAL REGISTER NOTICE*

Federal Register / Vol. 66, No. 30 / Tuesday, February 13, 2001 / Notices 10011

Dated: February 6, 2001.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 01–3640 Filed 2–12–01; 8:45 am]

BILLING CODE 3510–DS–P

FEDERAL TRADE COMMISSION

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Request for Comment and Notice of Public Workshop: Electronic Signatures in Global and National Commerce Act

AGENCIES: Federal Trade Commission, and the National Telecommunications and Information Administration, Department of Commerce.

ACTION: Notice requesting public comment and academic papers and announcing public workshop.

SUMMARY: Section 105(b) of the Electronic Signatures in Global and National Commerce Act ("ESIGN" or "the Act"), Public Law 106–229, 114 Stat. 464 (2000), requires the Federal Trade Commission ("FTC" or "the Commission") and the Secretary of Commerce to study and report to Congress on the benefits and burdens of requiring consumer consent to receive information electronically pursuant to § 101(c)(1)(C)(ii). In connection with preparing this report, the FTC and the National Telecommunications and Information Administration ("NTIA") seek public comment and academic papers and plan to hold a public workshop to inform this study.

DATES: Written comments and papers are requested to be submitted on or before March 16, 2001. The workshop will be held on April 3, 2001, from 8:30 a.m. until 5:00 p.m., at the Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

ADDRESSES: Six hard copies of each written comment or paper should be submitted to: Secretary, Federal Trade Commission, Room H–159, 600 Pennsylvania Ave., NW., Washington, DC 20580. An additional copy of written comments should be sent to: Sallianne Fortunato, National Telecommunications and Information Administration, Room 4716, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Alternatively, comments and papers may be submitted to the following email addresses: "*esign-study@ftc.gov*" and "esign-study@ntia.doc.gov." The content of any comments or papers submitted by email should be organized in sequentially numbered paragraphs. All submissions should be captioned "ESIGN Study-Comment P004102."

To enable prompt review and accessibility to the public, written comments and papers also should be submitted to the FTC, if possible, in electronic form, on a 3½ inch computer disk, with a label stating the name of the person or entity submitting the comment and the name and version of the word processing program used to create the document. Programs based on DOS or Windows are preferred. Files from other operating systems should be submitted in ASCII text format. Individual members of the public filing comments need not submit multiple copies or comments in electronic form.

Written comments and papers will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations, 16 CFR 4.9, on normal business days between the hours of 8:30 a.m. and 5:00 p.m. at Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580. The Commission will make this notice and, to the extent possible, all comments or papers received in electronic form in response to this notice available to the public through the Internet at the following addresses: *http://www.ftc.gov and http://www.ntia.doc.gov.*

FOR FURTHER INFORMATION: For questions about this request for comment and academic papers and notice of public workshop, contact: April Major, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, telephone 202–326–2972; Marianne Schwanke, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, telephone 202–326–3165; or Sallianne Fortunato, Telecom Policy Analyst, Office of Policy Analysis and Development, National Telecommunications and Information Administration (NTIA), Room 4716, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone 202–482–1880.

SUPPLEMENTARY INFORMATION:

I. Background: Electronic Signatures in Global and National Commerce Act

On June 30, 2000, Congress enacted ESIGN to facilitate the use of electronic records and signatures in interstate or foreign commerce and to remove uncertainty about the validity of contracts entered into electronically. Under the Act, businesses that are required to provide or make available information to consumers in writing may provide consumers with that information using electronic records only if the consumer affirmatively consents in a manner that reasonably demonstrates the consumer's ability to access the electronic record. The Act requires the Secretary of Commerce and the Federal Trade Commission to study the burdens and benefits of this specific consent requirement on consumers and electronic commerce and submit a report to Congress by June 30, 2001.

II. Statutory Language Requiring a Report to Congress

The statutory language requiring the Secretary of Commerce and the Federal Trade Commission to submit a report to Congress regarding the benefits and burdens of requiring consumer consent to electronic transactions is found in § 105 (b) of ESIGN and is set forth below.

Sec. 105. Studies

* * * * *

(b) *Study of Electronic Consent.*—Within 12 months after the date of the enactment of this Act, the Secretary of Commerce and the Federal Trade Commission shall submit a report to the Congress evaluating any benefits provided to consumers by the procedure required by section 101(c)(1)(C)(ii); any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses.

The language of § 105(b) specifically limits its scope to § 101(c)(1)(C)(ii) which reads:

Sec. 101(c) Consumer Disclosures

(1) *Consent to Electronic Records.*—Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if:

* * * * *

(C) the consumer—

* * * * *

(ii) consents electronically, or confirms his or her consent electronically, 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.

* * * * *

In summary, if a statute, regulation, or other rule of law requires information relating to a transaction to be provided or made available to a consumer in writing, § 101(c) allows this information to be provided or made available electronically only if certain consumer protection conditions are met. Section 101(c)(1)(C)(ii) is one such condition and provides that the consumer must consent electronically or confirm his or her consent electronically, in a manner that reasonably demonstrates the consumer's ability to access the information.

Under § 105(b), the Federal Trade Commission and the Secretary of Commerce are tasked with submitting to Congress a report that evaluates five aspects of § 101(c)(1)(C)(ii). First, we must assess the benefits to consumers of the procedures required by § 101(c)(1)(C)(ii). Second, we are to identify any burdens imposed by these procedures. Third, we must balance the benefits and burdens and discuss whether the benefits outweigh the burdens. Fourth, we are to consider whether the absence of the consent procedure would increase consumer fraud. Finally, we are to suggest improvements or changes to the statutory language that we deem appropriate.

III. Invitation To Comment

The FTC and NTIA request that interested parties, including industry members, electronic commerce businesses, consumer representatives, law enforcement, regulatory agencies, and academics, submit written comments on any issue of fact, law, or policy that may inform the study of the procedure required by § 101(c)(1)(C)(ii). We invite comment on ESIGN generally to inform our examination of the narrower issues associated with the consumer consent procedure found in § 101(c)(1)(C)(ii). Please provide copies of any studies, surveys, research, or other empirical data referenced in responses. The questions set forth below are intended only as examples of the issues relevant to our examination. Commenters are invited to discuss any relevant issue, regardless of whether it is identified below.

General Issues

1. How does the requirement of section 101(c)(1)(C)(ii) of the ESIGN Act, that businesses allow consumers an opportunity to provide consumer consent or confirmation of consent electronically prior to providing consumers electronic versions of information, affect electronic commerce? How will electronic commerce be affected in the future by this requirement?

2. What statutory changes, if any, should be made to the ESIGN Act to assist businesses and consumers in domestic and/or international business markets in implementing and adapting to the consumer consent and consent confirmation provisions under section 101(c)(1)(C)(ii) of the Act?

3. What, if any, are the benefits and burdens to consumers and electronic commerce resulting from the affirmative consent provisions in the statute? Do any such benefits outweigh any burdens?

4. What, if any, improvements or changes should Congress make to the statutory language of section 101(c)(1)(C)(ii)?

5. Are there any additional issues that should be considered during this study?

Business Issues

6. If your business provides information electronically to consumers that is required by law to be in writing, do you request that consumers provide electronic consent or confirm their consent before the electronic information is transmitted?

7. Describe in detail the method used to obtain electronic consumer consent.

8. If you allow consumers to provide electronic consent to receive legally-required information electronically, please explain whether the electronic consent practice of your business is a result of section 101(c)(1)(C)(ii) of the ESIGN Act. Explain any other legal basis for this practice.

9. For what types of transactions do you seek electronic consumer consent or confirmation prior to sending information electronically that is required by law to be sent to consumers in writing?

10. Provide an estimate of the percentage of business transactions you conduct per month that requires the production of legally-required information to consumers in written form.

11. Does your business incur additional costs directly related to providing customers with the option of electronically consenting to or confirming the consent to receive information electronically, whether or not you provide the information pursuant to section 101(c)(1)(C)(ii)?

12. Are there burdens associated with providing information electronically to consumers that is required by law to be provided to them in written form? Are there burdens associated with allowing consumers to provide electronic consent or confirmation of consent prior to receiving the electronic information from your business pursuant to section 101(c)(1)(C)(ii)?

13. Explain any economies or benefits to your business resulting from the distribution of information electronically to consumers (e.g. storage, administrative processing), whether or not the information is provided pursuant to section 101(c)(1)(C)(ii). Are there economies or benefits related to allowing customers to provide electronic consent or confirmation of consent prior to receiving electronic information as required by ESIGN?

14. Do the benefits of providing electronic versions of information that is legally required to be provided in writing outweigh the burdens of allowing consumers an opportunity to provide electronic consent or confirmation of consent in order to receive the information?

15. Describe any feedback you have received from consumers or employees regarding the electronic consumer consent or confirmation procedures your business employs, also specifying whether the procedures are those required by ESIGN or were in place prior to ESIGN.

16. Describe the methods your business uses to verify:

A. That a consumer's consent or confirmation demonstrates the consumer's ability to access the requested information; and

B. That the electronic consents and confirmations are provided by the customers entitled to and intended to receive the electronic information.

17. What method, if any, in addition to the consent procedure in section 101(c)(1)(C)(ii) of the ESIGN Act could be employed to prevent consumer fraud? Would consumer fraud increase in the absence of the consent procedure of section 101(c)(1)(C)(ii)?

18. With regard to international business transactions, explain whether your company requests electronic consumer consent or consent confirmation prior to sending information electronically that is required to be provided to the consumer in written form. If so, explain if the method has had positive or negative consequences in international commerce.

19. If your business does not provide consumers the opportunity to receive information electronically by sending an electronic consent or consent confirmation, explain why your business does not provide this opportunity. Discuss any implementation problems.

Consumer Issues

20. As a consumer, how often do you conduct electronic transactions in which you request information electronically or agree to receive legally-required information electronically?

21. Have you obtained information electronically that was required by law to be provided to you in writing? If so, did the company or business provide an opportunity for you to provide electronic consent or confirm your consent before sending an electronic version of the information to you?

22. For an electronic transaction that provided an opportunity for you to submit electronic consent or consent confirmation before you received the information electronically, describe the effect of the process on you as a consumer. Were you made aware of any legal requirements regarding your options to receive the information in a different manner, such as on paper? If so, were you made aware of the legal requirements before you consented or confirmed your consent to receive the information in an electronic format?

23. As a consumer, what are the benefits, if any, of receiving electronic versions of information required by law to be provided in written form?

24. Explain whether the benefits of receiving electronic versions of information outweigh any burdens associated with providing electronic consent or consent confirmation prior to receiving the information.

Technology Issues

25. Are software programs that enable consumers to provide electronic consent or consent confirmation to companies readily available? Describe.

26. What technology or methods are available that would enable companies to verify that electronic consent or consent confirmation is transmitted by the specific persons entitled to receive electronic information?

27. Please explain whether additional technology is necessary to accomplish either the electronic consumer consent or company verification methods discussed in Questions 25 and 26, above.

28. Does the development of newer technologies impact the implementation of the consumer consent and consent confirmation provisions of section 101(c)(1)(C)(ii) of the ESIGN Act? If so, how.

IV. Public Workshop

Staff of the FTC and NTIA will conduct a public workshop to discuss issues raised by the comments received in response to this notice. Notification of interest in participating in the public workshop should be submitted in writing, separately from comments, to April Major, Division of Marketing Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, or to Sallianne Fortunato, Telecom Policy Analyst, Office of Policy Analysis and Development, National Telecommunications and Information Administration (NTIA), Room 4716, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. We will select a limited number of parties from among those who submit comments to represent the significant interests affected by the issues raised in the notice. These parties will participate in an open discussion of the issues, including asking and answering questions based on their respective comments. In addition, the workshop will be open to the general public. The discussion will be transcribed and the transcription placed on the public record. The FTC and NTIA will consider the views and suggestions made during the workshop, in conjunction with the written and email comments, in formulating its report to Congress.

Parties will be selected on the basis of the following criteria:

1. The party submits a comment during the comment period.
2. During the comment period the party notifies FTC or NTIA of its interest in participating in the workshop.
3. The party's participation would promote a balance of interests being represented at the workshop.
4. The party's participation would promote the consideration and discussion of a variety of issues raised in this notice.
5. The party has expertise in activities affected by the issues raised in this notice.
6. The number of parties selected will not be so large as to inhibit effective discussion among them.
7. The party agrees to review the comments of all of the other workshop participants prior to the workshop.

The workshop will be held on April 3, 2001, from 8:30 a.m. until 5:00 p.m., at the FTC, 600 Pennsylvania Ave, NW., Washington, DC. Prior to that date, parties selected will be provided with copies of the comments from all other participants selected to participate in the workshop.

Public Participation

The workshop will be open to the public and is physically accessible to people with disabilities. To facilitate entry to the Federal Trade Commission building, please have a photo identification available and/or a U.S. Government building pass, if applicable. Any member of the public wishing to attend and requiring special services, such as sign language interpretation or other ancillary aids, should contact Sallianne Fortunato at least three (3) days prior to the meeting via the contact information provided above.

Donald S. Clark,

Secretary, Federal Trade Commission.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 01–3609 Filed 2–12–01; 8:45 am]

BILLING CODE 6750–01–U

APPENDIX B: LIST OF CONTACTS

ACADEMIA

Becker, Shirley A., Florida Institute of Technology, Department of Engineering, Computer Science Program
Braucher, Jean, University of Arizona College of Law,
Clifford, Donald F., Jr., University of North Carolina School of Law
Effross, Walter, American University College of Law
Hillman, Robert A., Cornell University School of Law
Kobayashi, Bruce, George Mason University Law School
Koopman, Philip, Carnegie Melon University
McManis, Charles, Washington University Law School
Perritt, Henry H., Dean, Chicago Kent College of Law
Pierce, Richard, George Washington University
Post, David, Temple Law School
Rachlinski, Jeffrey, Cornell University School of Law
Reichman, Jerome H., Duke University School of Law
Reidenberg, Joel R., Fordham University
Reitz, Curtis R., University of Pennsylvania Law School
Ribstein, Lawrence, George Mason University Law School
Rice, David, Roger Williams University School of Law,
Schmidt, Jim, San Jose State University
Wheeler, Michael, Harvard Business School
Winn, Jane Kaufman, Southern Methodist University School of Law

GOVERNMENT

Federal:
Federal Communications Commission, Wireless Telecommunications Bureau
Federal Reserve System, Board of Governors, Division of Consumer & Community Affairs
State:
Connecticut, Office of Attorney General
Maryland, House of Delegates
Maryland, Office of Attorney General
New York, Office of Attorney General
North Carolina, Office of Attorney General
Washington, Office of Attorney General, Consumer Protection Division, Internet Bureau
State groups:
National Association of Attorneys General
National Conference of Commissioners on Uniform State Law

LEGAL PROFESSION

American Bar Association, Subcommittee on Electronic Commerce
Law Firms:
Akin, Gump, Strauss, Hauer & Feld
Arent, Fox, Kintner, Plotkin & Kahn

Bingham Dena, LLP
Callister, Nebeker & McCullough
Clifford, Chance, Rogers & Wells
Collier, Shannon, Scott
Fried, Frank, Harris, Shriver & Jacobson
Goodwin, Procter & Hoar
Hall, Dickler, Kent, Goldstein & Wood
Hogan & Hartson
Holland & Knight
Keller & Heckman
Morrison & Foerster
Pillsbury Winthrop
Piper, Marbury, Rudnick & Wolfe
Shook, Hardy & Bacon
Wiley, Rein & Fielding
Wilmer Cutler & Pickering
Individual Attorneys:
Chow, Steven Y., Esq.
Dayanim, Benjamin, Esq.
Kunze, Carol A., Esq.
Sarna, Shirley, Esq.

CONSUMER GROUPS/NON-PROFITS
AARP
CATO Institute
Center for Democracy and Technology
Center For Media Education
Consumer Action
Consumer Alert
Consumer Federation of America
Consumers International
Consumer Project on Technology
Consumers Union
Council of Better Business Bureaus
    BBB Online Privacy
    National Advertising Division
Electronic Privacy Information Center
Global Public Policy
Global Telecommunications Policy
Internet Consumers Organization
Internet Education Foundation
Internet Law & Policy Forum
Internet Public Policy Network
National Association of Consumer Agency Administrators
National Consumer Law Center

National Consumers League
National Consumer Coalition
Privacy Foundation
Privacy Right, Inc.
U.S. Public Interest Research Group
World Wide Web Consortium

TRADE ASSOCIATIONS
American Advertising Federation
American Association of Advertising Agencies
American Bankers Association
American Council of Life Insurers
American Electronics Association
Association of National Advertisers
Business Software Alliance
Cellular Telecommunications Industry Association
Commercial Internet eXchange Association
Direct Marketing Association, Inc
Direct Selling Association.
Electronic Financial Services Council
Electronic Retailing Association
Grocery Manufacturers of America
Information Technology Industry Council
Interactive Digital Software Association
ITAA
Investment Company Institute
National Auto Dealers Association
North American Securities Administrators Association
Promotion Marketing Association, Inc.
Software & Information Industry Association
U.S. Chamber of Commerce (eCommerce & Internet Technology)
U.S. Council for International Business
U.S. Telecom Association
Wireless Advertising Association
Wireless Location Industry Association (AdForce Everywhere)

BUSINESSES
24/7 Media, Inc.
Adforce Everywhere
AlphaTrust
American Express
America Online, Inc.
American Telecast Corporation
AT&T Labs
AT&T Wireless Services, Inc.

Aether Systems, Inc., Software Product Division
Banc One Corporation
Bankers Roundtable
bizrate.com
Blitz! Media, Inc. (The Upsell Experts)
Cable & Wireless
CACI
California Digital Library
Capital One Services, Inc.
CertifiedMail.com
ClickaDeal.com
Clicksure
Columbia House
Compaq
Price Waterhouse
CommerceNet
Compaq Computer
Crosswalk.com
Darden Communications
Disney
Diversinet
Edventure Holdings
E-Lock Technologies, Inc.
Entrust Technologies
Expedia.com
Fannie Mae
Fiderus Strategic Security and Privacy Services
FitnessQuest
Forrester Research, Inc.
Gateway, Inc.
Grey Matter, LLC
Hewlett Packard
IBM, Pervasive Computing Division
IDCide
IDQualified.com
Ignition
iLumin Corporation
Infotech Strategies
Intel Corporation, Security Technology Lab
Invertix Corporation
Leo Burnett Company
Leslie Harris & Associates
Lot21, Inc.
Lucent Technologies
MARS, Inc.

MEconomy, Inc.
Metricomn
Microsoft Corporation
Mitretek Systems, Inc.
NationsBank Corporation
Network Solutions
Nextel Communications, Inc.
Nortel
One Accord Technologies
PenOp, Inc.
Persona, Inc.
Podesta.com
PricewaterhouseCoopers, LLP
Proctor & Gamble
Prudential Securities
PSINet
QUALCOMM, Inc.
QVC
SAFEcertified.com, Inc.
Sallie Mae
Samsung Electronics
Charles Schwab & Associates
Security Software Systems
Silver Platter Information, Inc.
Simon Strategies
Sprint PCS
Square Trade
State Farm Insurance
Stewart & Stewart
Sun Microsystems Computer Corp.
Terra Lycos
Time Warner, Inc.
True Position, Inc.
TRUSTe
ValiCert
Van Scoyoc Associates, Inc.
VeriSign
Verizon
Verizon Wireless
Vindigo Company
Visa U.S.A., Inc.
Warner Lambert
WindWire
Wireless Internet and Mobile Computing
World Wide Marketing - iXL

Xypoint Corporation
Yahoo!
Zero-Knowledge Systems, Inc.

MEDIA
Privacy Times
The Wall Street Journal

APPENDIX C: LIST OF COMMENTERS AND ACRONYMS

ACRONYM	COMMENTER
ACLI	American Council of Life Insurers
AIA	American Insurance Association
Baker & McKenzie	Baker & McKenzie
b4bpartner	b4bpartner Inc.
CT AG	Richard Blumenthal, Connecticut Attorney General
California	California Department of Consumer Affairs
Crocker	Thomas E. Crocker
CU	Consumers Union
CF	Customers Forever, LLC
Dayanim	Behnam Dayanim
DST	Digital Signature Trust Co.
EFSC**	Electronic Financial Services Council
E*Trade	E*Trade Bank
Fidelity	Fidelity Investments
GAO	U.S. General Accounting Office
Greenfield	Michael M. Greenfield
Household	Household Bank (Nevada), N.A., et al.
iLumin	iLumin Corporation
ICI	Investment Company Institute
Mandy	David Mandy, for Authentidate
NACAA	National Association of Consumer Agency Administrators
NCLC**	National Consumer Law Center
NewRiver	NewRiver, Inc.
Notaries	Pennsylvania Association of Notaries
SIA	Securities Industry Association
Selwood	Selwood Research
Silanis	Silanis Technology, Inc.
SIIA	Software & Information Industry Association
VeriSign	VeriSign Corporation
Visa	Visa U.S.A., Inc.
Wachovia	Wachovia Corporation, et al.
Winn	Jane Kaufman Winn
Yen**	Elizabeth C. Yen, Esq.
Yuroka	Yuroka

** Denotes that commenter also submitted a supplemental comment after the Public Workshop. References in the Report to supplemental comments will be cited as [Acronym] Supp. at [page].

APPENDIX D: WORKSHOP AGENDA

Federal Trade Commission

Federal Trade Commission and National Telecommunications and Information Administration, Department of Commerce

Esign Public Workshop

April 3, 2001

FTC Headquarters, Room 432, 600 Pennsylvania Ave., Washington D.C.

This workshop is part of the Federal Trade Commission ("FTC") and the National Telecommunications and Information Administration's ("NTIA") effort to gather information to report to Congress on the benefits and burdens of § 101(c)(1)(C)(ii) of the Electronic Signatures in Global and National Commerce Act ("ESIGN") which authorizes the use of an electronic record to send legally required information to consumers if the consumer consents or confirms consent "in a manner that reasonably demonstrates that they can access the information." Congress mandated this report under § 105(b) of ESIGN and required the submission of this study by June 30, 2001.

Through this workshop we hope to advance our understanding of the benefits and burdens to businesses and consumers resulting from the consumer consent provision of § 101(c)(1)(C)(ii). The workshop will consist of moderated round table discussions with representatives from industry, government, consumer advocate groups and other interested parties. We hope to foster discussion about best practices in obtaining electronic consent and to allow workshop participants to demonstrate their best practices, and the technologies that are available for companies to obtain consumer consent.

Technology Exhibits: Starting at 12:00p.m. and continuing until the end of the day, attendees may visit technology exhibits in Room 532.

The forum is open to the public, and there is no formal registration process for those wishing to attend.

AGENDA

8:30 - 9:00 **Registration**

9:00 - 9:05 **Opening remarks**
Jodie Bernstein Director, Bureau of Consumer Protection, *Federal Trade Commission*

9:05 - 9:30 **Setting the Stage: What are the Issues?**

Moderator:
Eileen Harrington Associate Director, Bureau of Consumer Protection, *Federal Trade Commission*

This session will identify the relevant issues regarding § 101(c)(1)(C)(ii) of ESIGN, explore the areas of consensus, controversy and disagreement, and set the stage for the rest of the day's discussion.

Panelists:
Margot Saunders *National Consumer Law Center* (NCLC)
Jerry Buckley Counsel for *Electronic Financial Services Council* (EFSC)
Benham Dayanim *Paul, Hastings, Janofsky & Walker, LLP*

9:30 - 10:30 Legal Issues

Moderator:
April Major Attorney, Bureau of Consumer Protection, *Federal Trade Commission*

A moderated roundtable discussion to explore the legal issues that face all parties when implementing the consumer consent provision found in § 101(c)(1)(C)(ii) of ESIGN.

Panelists:
Margot Saunders *National Consumer Law Center*
Jerry Buckley Counsel for *Electronic Financial Services Council*
Benham Dayanim *Paul, Hastings, Janofsky & Walker, LLP*
Elizabeth Yen *Hudson Cook*
Robert A. Wittie Counsel for *Investment Company Institute* (ICI)
Jane Stafford *Wachovia Bank*
Mark MacCarthy *Visa Payments Systems*
Jeff Wood *Household Bank*

10:30 - 10:45 **Break**

10:45 - 11:45 **Technology Issues**

Moderator:
Fran Nielson PhD, Senior Computer Scientist, *National Institute of Science and Technology, U.S. Department of Commerce*

Technical Expert:
William Burr Manager, Security Technologies Group, Computer Security Division, *NIST, U.S. Department of Commerce*

This moderated roundtable discussion will explore the technology issues and the available software and computer technologies that enable companies to employ the consumer consent provision.

Panelists:
Christopher Smithies *Selwood Research*
Michael Laurie *Silanis Technology*
Mark Bohannon *SIIA*
Thomas Wells *b4bpartner*
Virgina Gobats *NewRiver*

James Brandt *VeriSign*
Jane Winn Professor of Law, *SMU*
Dr. Bruce E. Brown *iLumin*
Thomas Greco *Digital Signature Trust*
Margot Saunders *NCLC*

11:45 - 1:00 **Lunch**

1:00 - 3:00 **Benefits and Burdens**

Moderator:
Kathy Smith Chief Counsel, *National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce*

Economists:
Keith Anderson Bureau of Economics, *Federal Trade Commission*

Lee Price Deputy Under-Secretary for Economic Affairs, *Economics and Statistics Administration, U.S. Department of Commerce*

This moderated roundtable discussion will focus on the benefits and burdens to consumers and businesses of ESIGN's consumer consent requirement, set forth in § 101(c)(1)(C)(ii). The workshop will also explore whether the benefits outweigh the burdens.

Panelists:
Mark MacCarthy *Visa Payments System*
Michael Laurie *Silanis Technology*
Paul Gallagher *Fidelity*
Elizabeth Yen *Hudson Cook*
Jane Winn Professor of Law, *SMU*
Gail Hillebrand *Consumers Union*
Behnam Dayanim *Paul, Hastings, Janofsky & Walker, LLP*
Thomas Wells *b4bpartner*
John Buchman *E*Trade Bank*
Jeremy Newman *Selwood Research*
Margot Saunders *NCLC*
Wendy Weinberg *NACAA*
Jerry Buckley *EFSC*

3:00 - 3:15 **Break**

3:15 - 4:15 **Best Practices**

Moderator:
Eileen Harrington Associate Director, Bureau of Consumer Protection, *Federal Trade Commission*

This will be a moderated roundtable discussion from the standpoint of both businesses and consumers. We will also explore whether similar best practices apply to all industries or whether some are industry-specific.

Panelists:
Virginia Gobats *NewRiver*
Gail Hillebrand *Consumers Union*
Margot Saunders *NCLC*
Robert A. Wittie Counsel for *ICI*
Mark Bohannon *SIIA*
Jeff Wood *Household Bank*
Jane Stafford *Wachovia Bank*
Dr. Bruce E. Brown *iLumin*
Wendy Weinberg *NACAA*
Paul Gallagher *Fidelity*

4:15 - 4:55 **Public Participation**

Public attendees will have an opportunity to ask questions and offer insight on the day's dialogue.

4:55 - 5:00 **Closing: What's next?**
U.S. Department of Commerce

APPENDIX E: WORKSHOP PARTICIPANTS

1. b4bpartner, Inc. (Thomas Wells)
2. Consumers Union (Gail Hillebrand)
3. Behnam Dayanim, Esq.
4. Digital Signature Trust (Thomas Greco)
5. Electronic Financial Services Council (Jerry Buckley)
6. E*Trade Bank (John Buchman)
7. Fidelity Investments (Paul Gallagher)
8. Household Bank (Jeff Wood)
9. Investment Company Institute (Robert A. Wittie)
10. iLumin Corporation (Dr. Bruce E. Brown)
11. National Association of Consumer Agency Administrators (Wendy Weinberg)
12. National Consumer Law Center (Margot Saunders)
13. NewRiver, Inc. (Virginia Gobats)
14. Selwood Research (Christopher Smithies, Jeremy Newman)
15. Software & Information Industry Association (Mark Bohannon)
16. Silanis Technology, Inc. (Michael Laurie)
17. VeriSign Corporation (James Brandt)
18. Visa (Mark MacCarthy)
19. Wachovia Corporation (Jane Stafford)
20. Jane Kaufman Winn, Professor of Law
21. Elizabeth C. Yen, Esq.

TESTIMONY
OF
CHRISTOPHER ROE
VICE PRESIDENT OF FIREMAN'S FUND INSURANCE COMPANIES
ON BEHALF OF
THE AMERICAN INSURANCE ASSOCIATION
ON ESIGN - ENCOURAGING THE USE OF ELECTRONIC SIGNATURES
IN THE FINANCIAL SERVICES INDUSTRY
BEFORE THE
SUBCOMMITTEE ON DOMESTIC MONETARY POLICY, TECHNOLOGY AND
ECONOMIC GROWTH OF THE HOUSE COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

JUNE 28, 2001

1130 Connecticut Avenue, NW, Suite 1000 ▼ Washington, DC 20036 ▼ Phone: 202/828-7100 ▼ Fax: 202/293-1219 ▼ www.aiadc.org

Robert C. Gowdy *Chairman* | Bernard L. Hengesbaugh *Chairman Elect* | Robert P. Restrepo Jr. *Vice Chairman* | David B. Mathis *Vice Chairman* | Robert E. Vagley *President*

Thank you, Mr. Chairman, and other Members of the Domestic Monetary Policy, Technology, and Economic Growth Subcommittee, for providing me with an opportunity to testify before you today regarding the "Electronic Signatures in Global and National Commerce Act ("E-Sign")."

My name is Christopher Roe, vice president – legal counsel at the Fireman's Fund Insurance Company. Fireman's Fund, established in 1863 in San Francisco, California, is among the nation's top writers of property/casualty insurance writing over $4 billion in gross premiums and employing over 8,000 people. My primary responsibilities include representing Fireman's Fund in state insurance legislative and regulatory issues. During the past four years, I have helped shape Fireman's Fund's and AIA's policies with regard to electronic commerce, financial privacy, and financial modernization.

I am pleased to appear before you today on behalf of the American Insurance Association (AIA) to discuss the Electronic Signatures in Global and National Commerce Act. The AIA is the principal trade association for property and casualty insurance companies, representing more than 370 major insurance companies which provide all lines of property and casualty insurance and write more than $60 billion in annual premiums.

Overview

Because of its recent passage and more recent implementation, insurance companies have had limited, practical experience with the E-Sign law. In fact, the electronic records provisions of E-Sign, which are of great significance to the insurance industry, became effective only on March 1, 2001. As a result, insurance companies have only recently begun to establish pilot projects or roll out online insurance products that take advantage of this new law. We believe that more time is needed to test the workability of the E-Sign provisions before advocating specific changes to the Act.

Yet, the passage of E-Sign is an important ingredient to the evolution of e-commerce within the insurance industry and, in a more immediate context, completing online insurance transactions and meeting the online expectations of our customers. We believe that E-Sign, coupled with state passage of the Uniform Electronic Transaction Act (UETA), will ultimately allow insurers to better deliver speed, efficiency, and cost savings in future online insurance transactions. In particular, some of the advantages of E-Sign are already evident:

- E-Sign sets a *higher degree* of legal uniformity among the states than currently existed, which is more conducive to an online marketing strategy for the 50 states;

- E-Sign establishes a higher degree of predictability and stability in the states which allows insurers to more confidently provide their customers with the online services they are increasingly seeking; and

- E-Sign now allows customers to execute an online insurance transaction completely online.

Even with these immediate advantages, non-uniformity of UETA provisions among the states still remains a serious threat to the ability of insurers to most effectively deliver services online, and many questions remain regarding the legal interpretation of many of the provisions in E-Sign or UETA (UETA may reverse-preempt E-Sign). Absent complete adoption of a uniform UETA, we believe that regulatory action by the federal agencies in this area should help to address these unanswered questions, but this guidance will only be persuasive, not mandatory, to our state insurance regulators.

For insurance, uniformity of state laws is critical and the adoption of UETA, as adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), provides this necessary uniformity. About 20 states have adopted an exact version of UETA as recommended by NCCUSL, and another 15 have adopted a UETA-styled version but with modifications. UETA essentially takes a "meeting of the minds" approach with regard to consumer consent; no consumer is forced to conduct business electronically. We believe that the consent provisions of UETA are workable for individuals and companies because they allow for flexibility in obtaining consent as new technologies evolve.

Insurers' Need for Electronic Signatures and Records

The insurance industry is extremely paper intensive. Policy contracts and forms are used at every step in the insurance transaction, beginning with the application process, through the issuance of insurance binders and policies, to renewal and cancellation notices, and finally, to the submission of claims. Throughout a typical insurance transaction, numerous contracts, endorsements, and notices legally require a signature from the customer and the insurance company. Similarly, insurers must maintain this information in order to meet
various record retention laws and requirements surrounding the rules of evidence.

The generation, use, and retention of these forms and documents in insurance transactions are regulated at the state level through a myriad of non-uniform restrictions on everything from delivery to recordkeeping. Most state insurance laws require several aspects of insurance transactions to be "in writing" and to meet certain delivery requirements such as "by mail" or "certified mail." Of course, our complex state insurance codes were written before the advent of the Internet and these legal requirements do not easily transfer to an online environment.

In order to address these legal impediments, AIA and the broad insurance industry supported state passage of UETA, as approved by NCCUSL. Essentially, UETA overlays upon the state code and expressly allows electronic signatures and records to satisfy the requirements of a paper world. In addition, the National

Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators adopted resolutions in support of UETA. The industry, regulators, and state legislators alike were committed to a uniform law which, in theory, would bring greater certainty and permit a smooth transition for moving many insurance sales and account transactions to the online world, as requested by our customers.

Benefits of E-Sign to Insurers and Their Customers

Like many other businesses, the business of insurance is increasingly moving online but, because of legal uncertainties surrounding current state laws, this process has been slower than in other financial services sectors. Traditional insurers are working diligently to integrate e-commerce into their business models and responding to customer preferences for conducting business over the Internet. While many insurers are at different points in the evolution of e-commerce into their business operations, most national insurance companies are currently building and enhancing their websites to facilitate online sales, and some are engaged in actual online sales. Newer, non-traditional insurance aggregators are also competing and adding their own technology and Internet experiences to the mix. According to Conning & Company and other sources, online sales and lead generation by an Internet visit represents just 1% of today's premiums. Within the next few years, many in the industry believe that this number will explode. On the back end of the process, Forrester Research estimates that web-based claim technologies will annually save $10 billion in industry claim expenses by 2003.

Without E-Sign and UETA, customers and their insurers could not close an insurance transaction online. Many customers naturally became discouraged after completing information for an insurance quote online and then not being able to finalize the transaction. Often, the customer would receive an e-mail that an agent would contact them in the next few days or that they would have to wait to receive a package in the mail to complete the process. E-Sign will help smooth this transition and allow us to meet customer expectations, including 24-hours-a-day service, greater efficiency and convenience, and cost savings.

My company, Fireman's Fund, believes annual savings of millions of dollars can be achieved if consumers sign policy applications and receive coverage notices and renewals online. Mailing expenditures alone cost Fireman's Fund $8 million annually. By the end of the year, we expect to begin using electronic signatures and records in some of our commercial divisions.

Even insurers that are not transacting insurance online may find substantial cost savings through the electronic record retention provisions. While many states already allow insurers to retain paper records in other formats, such as microfilm or digital, non-uniform state laws represent a challenge for setting a national document retention strategy. Under E-Sign and UETA, insurers are now re-exploring the merits of electronic document retention.

The Need for Uniformity

In this new world of e-commerce, the Internet offers consumers the benefits of speed, efficiency, and cost savings in future insurance transactions. However, inconsistent and contradictory state laws can stifle these benefits and prevent customers from obtaining the conveniences that they expect on the Internet. Many companies, in having to comply with different and conflicting technology requirements or different procedures for obtaining consent, may decide that the Internet does not offer a cheaper and better alternative to other distribution mechanisms; or, they may focus their energies on those states with less friction costs, if the regulatory bar is set too high.

With the passage of E-Sign, we believe that no major legal barriers with regard to the state insurance code currently exist for online insurance transactions. Yet, the text of the insurance code may not reflect practices in the real world. Insurance regulation is famous for its "desk drawer rules" and like any statute, various provisions are open to subjective interpretation. The 50 state legislatures, regulators, and the courts will have some input on how E-Sign or UETA is interpreted. In response to concerns from the insurance industry, the NAIC is polling the insurance departments in order to determine whether any legal impediments still exist for insurance.

In addition, the NAIC recently adopted an e-commerce insurance bulletin that provides guidance on issues such as E-Sign, document retention, and format. Recently, Ohio was the first state to adopt the bulletin, and adoption by other states will demonstrate a commitment to uniformity and help to ease the concerns of insurers.

Yet, even with the constraints of E-Sign, state laws still deviate from federal law. Some non-uniform provisions were adopted before E-Sign, while other provisions, such as a prohibition on fees for paper copies in North Carolina, were adopted after passage. Remaining on the books in other states are more questionable provisions that impact infrastructure costs, such as legal presumptions for specific technologies. Few insurers want to be the legal test case for federal preemption of these laws.

State legislatures in 1999 began to adopt UETA, but many enacted the law with certain modifications, such as exclusions for various insurance transactions from the act or requiring specific technologies. For example, New York adopted a non-UETA definition for electronic signatures, and the New York Office for Technology issued regulations for identifying technologies that would meet the criteria of this non-UETA definition for an electronic signature. As a result, business plans became murky or delayed because of the concern that some technologies would not qualify. This process of favoring certain technologies is clearly preempted by E-Sign's expressed standard of technology neutrality.

California became the "poster child" for such non-uniformity when it adopted its own version of UETA, but effectively prevented most insurance transactions from being completed online. Essentially, homeowners and automobile insurance consumers were

required to complete their transactions offline. We believe that these limitations of the California UETA are preempted by E-Sign, and a bill has been introduced in the California legislature to remedy the problem. Similarly, Hawaii adopted a provision that prevents a customer from making an online material change to the insurance contract, such as adding an additional driver to the automobile policy. In the last year, other state legislatures toyed with similar exclusions while some states were slow to take any action on UETA.

Recently, nine states have locked the E-Sign consent provisions into their state UETA. This scenario is ripe for creating an unlevel playing field between the financial sectors. Because these provisions are still untested, the Federal Trade Commission and the U.S. Secretary of Commerce were asked to examine the consumer consent provisions, and federal regulatory agencies were given the power to waive consumer consent provisions for a category or type of record. However, a similar regulatory waiver provision does not exist in these nine states, except for Texas.

While most other financial sectors receive uniform treatment from federal regulators with regard to online transactions, many insurers and agents fear that they have been saddled with inconsistent and conflicting state laws impacting the Internet. In particular, the life insurance industry contends that if state laws create addition burdens not imposed upon federally regulated entities, consumers will be more likely to direct their investment dollars to other financial sector web sites that are less cumbersome to use. Regulatory parity among the financial sectors may be further exacerbated if state regulators do not have the same regulatory flexibility enjoyed by the federal regulators.

Lack of Uniformity and Questions Relating to Consumer Consent

The AIA and Fireman's Fund support a process whereby the parties must consent to an electronic transaction, and the basic premise that no party should be *required* to enter into an electronic or non-electronic transaction. Businesses and consumers should be able to choose the type of transaction that best meets their needs. As a result, for businesses and consumers, E-Sign does not require any person to use or accept electronic records or electronic signatures.

Similarly, in those states that adopt UETA, businesses and consumers must agree to use electronic transactions. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. UETA essentially takes a "meeting of the minds" approach with regard to consent.

E-Sign requires one more step regarding consent for consumer transactions by regulating the actual content of the notice and the procedures necessary for obtaining consent. Specifically, a seller can provide an electronic record to a consumer (i.e., those purchasing products for personal, family, or household purposes) only if the

seller: (1) obtains affirmative, electronic (but non-oral) consent from the consumer to receive electronic records; (2) provides the consumer with a statement of his rights to receive records on paper, including an indication of whether fees will be charged for receiving a paper copy; (3) provides the consumer with an indication of how he can withdraw consent, as well as the conditions and consequences of such withdrawal; and (4) provides the consumer with the hardware and software requirements for accessing and retaining electronic records.

Fundamentally, most of these procedures represent good business practices and should help to set proper expectations between the parties. On the other hand, several parts of the consent procedures raise questions. For example, E-Sign requires that the consent should "reasonably demonstrate" that the consumer can access or retain the electronic record. Yet, it is unclear how this test should be met. Some have argued that in an e-mail context, the
"reasonably demonstrate" test is met if the consumer acknowledges by e-mail that the information in a PDF format can be accessed. Others argue that the consumer must actually open the PDF file, and the operation of consenting itself must acknowledge that the PDF file was opened. However, in the offline world we do not require consumers and businesses to prove that they opened their mail. And, creating a test for opening the document greatly complicates the design of the web site when an affirmative response from the consumer that the information can be accessed would seem to be sufficient.

Similarly, the E-Sign consent provisions provide the consumer with the right to withdraw consent to have the record provided or made available in an electronic form. Obviously, we strive to meet the needs of our consumers, but the right to withdraw has created a unilateral "right" for the consumer when coupled with other state insurance laws that severely restrict terminating coverage or surcharging the consumer. As a result, the act may impede the "virtual insurer" as a business model and limit the ability of insurers to use pricing to encourage business on the Internet. Once the consumer converts to paper, the "virtual insurer" will then be required to provide services to that customer in a manner contradictory to its business model. In addition, any insurer that used pricing as an incentive to attract online consumers may have to carry forward this price when the consumer moves to the offline world. In a larger sense, provisions like these have the effect of discouraging insurers from considering "virtual" business models and using price to attract business to their site.

Because of the complexity of the E-Sign consumer consent provisions, we understand that some insurers are more likely to start with commercial transactions and then move to consumer transactions as the level of comfort improves. Unfortunately, the untested provisions of E-Sign consent are already becoming embedded in state law.

AIA and Fireman's Fund believes that UETA, as adopted by NCCUSL, provides a simpler approach with regard to consent. Whether the parties have consented to engage in an electronic transaction under UETA is determined by their actions and the surrounding facts and circumstances. Rather than regulating the manner of receiving

and accessing consent notices electronically, UETA §5 does not apply to electronic records where the parties to a transaction have not agreed to deal electronically. The finding of agreement is dependent on
the context of the transaction and the parties conduct. About half the states have adopted a relatively pure version of UETA, and our experiences over the next year will provide insights on whether the simpler approach of UETA is superior.

Conclusion

In conclusion, we applaud the passage of E-Sign and the benefits it has brought to conducting insurance transactions over the Internet. E-Sign has brought a higher degree of uniformity to the law surrounding online insurance transactions. As a result, our consumers may now execute an online insurance transaction completely online, at their request.

Even though questions remain on such issues as "consumer consent," the legal environment has vastly improved. We continue to support adoption of UETA in the states in order to maintain uniformity. In the meantime, non-uniformity, particularly for the business of insurance, still remains a nagging and unfortunate reality.

As this subcommittee and all of Congress mulls over the implementation of E-Sign provisions and other e-commerce issues, we urge you to take the following action:

(1) Contact the NAIC and state insurance regulators to encourage the states to strive for the highest level of uniformity possible in implementing E-Sign or UETA so that insurance companies can have the highest level of confidence in delivering services to its customers online in a way that utilizes the best technology available.

(2) Recognize that, in many policy/regulatory areas, but particularly in e-commerce, a strong federal preemption is vital in giving businesses greater certainty and confidence in using technology and the Internet to serve their customers.

In the next year, we will learn valuable insights on whether the E-Sign consent provisions are successful and whether UETA provides an equally effective and simpler approach to consent. We look forward to continuing to share those perspectives with you, as well as the FTC and U.S. Commerce Department.

Again, we appreciate having the opportunity to testify before you today and would be happy to answer any questions you may have.

Statement of

Thomas E. Crocker

Before the Subcommittee on Domestic Monetary

Policy, Technology and Economic Growth

Committee on Financial Services

U.S. House of Representatives

June 28, 2001

Mr. Chairman and Members of the Committee, my name is Thomas E. Crocker. I am a partner with the Washington office of the law firm of Alston & Bird LLP.

My involvement with the E-Sign Act goes back to 1997 when, representing the then-Citicorp, I helped draft a predecessor version of the E-Sign Act in the 105th Congress. More recently, we represented Charles Schwab & Co., Inc. and the Securities Industry Association in all phases of the development, consideration and eventual enactment of the E-Sign Act in the 106th Congress. Growing out of this experience, I have written a lengthy article on the E-Sign Act entitled "The E-Sign Act: In Facilitation of E-Commerce," published in the March 2001 issue of *Mealey's Cyber Tech Litigation Report*. I ask that a copy of this article be included in the Record as an appendix to my prepared statement.

Today, however, I am testifying today solely on my own behalf, as an attorney in private practice who has assisted a number of clients in implementing the E-Sign Act and as one who, therefore, has had some practical experience with the types of real world concerns that businesses have been having in complying with the Act.

The Importance of Uniformity, Consistency and Legal Certainty

Almost exactly one year ago -- on June 30, 2000 -- the President signed the E-Sign Act into law. At the time, it was hailed as "the single most important piece of e-commerce legislation enacted in the 106th Congress." Now, one year later, it is appropriate to ask whether the E-Sign Act has lived up to its promise and, if not, why not.

The significance -- and the promise -- of the E-Sign Act lay in its central attribute of being a technology-neutral, uniform federal law designed to encourage the use of electronic records and signatures. *Uniformity* and *consistency* were -- and remain -- the most important ingredients to providing industry with the *legal certainty* that it needs to conduct e-business on a national and global scale. These touchstones -- uniformity, consistency, legal certainty -- are important measures by which the success or failure of the E-Sign Act will appropriately be judged.

As part of our representation of clients seeking to implement the E-Sign Act, we recently conducted an informal website survey to try to determine how widespread reliance on the E-Sign Act has actually been. This survey was aimed primarily at the financial services industry -- banks, broker dealers, insurance companies -- but also touched on other business sectors, such as health care, technology and on-line sales. Our findings confirmed what we had long suspected to be the case -- that use of the E-Sign Act has been slow to take off and that compliance with it is limited at best. Indeed, except for certain financial services companies many of which were instrumental in seeking enactment of the E-Sign Act, its embrace by U.S. industry at large has been spotty.

Why is this so?

Based on our work with various clients seeking to understand and implement the E-Sign Act, we believe that, although well intended, the E-Sign Act in its present form fails to deliver on its promises of uniformity, consistency and legal certainty.

This failure is compounded by the unusual absence of a Statement of Managers as part of the legislative history of the Act which would help in its interpretation, as well as by the fact that the Act is studded with well over two dozen vague terms in its critical provisions (such as "reasonably demonstrates," "material risk," "accurately reproduced," and so forth) which inject uncertainty into its meaning.

Against this background, our clients' practical concerns focus on three specific areas in the Act -- consumer consents, preemption and agency rulemaking.

Consumer Consents

Throughout the Congressional debate on the E-Sign Act there was wide support by industry for reasonable consumer protection provisions. As originally drafted, the bill envisaged an even playing field between electronic and traditional media, with existing consumer protections very much in place and unaffected by the legislation. However, as is well known, the Act as signed into law contains consumer consent provisions that go beyond those that exist in the paper world.

Compliance with these requirements has been feasible. Nonetheless, two elements of the consumer consent requirements continue to cause concerns which contribute to a reluctance to use the Act.

First, the "reasonably demonstrates" requirement at section 101(c)(1) is vague. It has, however, proven workable, provided it is interpreted to allow firms flexibility in meeting its requirements and it is used in its simplest form -- one company, one consumer, one electronic system. However, the concern is that the "reasonably demonstrates" requirement is in a sense a straightjacket because it requires a company to communicate with its customer only through the identified single system that the customer has originally chosen to access the information in electronic form. This rigid, narrow procedure does not take account of the reality that some consumers own multiple computers or of the increased market presence of handheld terminals. It creates issues when a customer deals with a firm through a variety of access channels.

The second major concern with the consumer consent provisions is the requirement, also at section 101(c)(1), governing what happens if the hardware or software requirements needed to access or retain electronic records change after the consumer has given affirmative consent. If that change "creates a *material risk* that the consumer will not be able to access or retain a subsequent electronic record [italics added]" then the party providing the electronic record must go through the entire consumer notice, consent and reasonable demonstration process all over again. The very vagueness of the term "material risk" creates uncertainty as to when it must be invoked. For example, does a simple system upgrade require a company to go through the costly process of notifying all of its customers and obtaining consents *de novo*? The uncertainty of this contingency in particular has proved discouraging to companies that wish to take advantage of the E-Sign Act.

Preemption Provisions

Another reason that business have shied away from relying on the E-Sign Act is the mind-numbing complexity of its preemption provisions and the uncertainties that they raise in connection with the Act's interface with the Uniform Electronic Transactions Act ("UETA"). Put yourself in the shoes of a company that wants to rely on the E-Sign Act. You must first ask yourself whether the state whose law you want to govern has enacted a clean version of UETA, as reported by the National Conference of Commissioners on Uniform State Laws. If it has, then that state's enactment of UETA should govern, at least in theory. But not many states have done that. You must therefore ask whether the changes by the state to UETA are pursuant to section 3(b)(4) of UETA. If they are, then the E-Sign Act preempts that state's UETA only *to the extent* those changes are inconsistent with Titles I or II of the E-Sign Act. However, if the changes by the state are not pursuant to section 3(b)(4) -- and many are not -- then you go to the second prong of the two-prong preemption test under section 102 of the E-Sign Act, which seemingly would preempt the state's version of UETA unless further tests are satisfied. In fact, there is considerable debate among commentators about whether preemption under the second prong of the test would merely be section-by-section or of the entire UETA as enacted by the state.

Ultimately, in any given case, whether the E-Sign Act preempts state law may have to be determined through litigation, with the very real possibility that courts in different states would produce different results as to any given state's law. This uncertainty about the preemption provisions has made industry hesitant to rely on the E-

Sign Act. As one in-house counsel at a large insurance company recently told me: "I was very excited about the E-Sign Act when it passed. But once I worked through what was is in it ... well, just *forget* it."

Agency Rulemaking

The third major concern is the agency rulemaking procedures at section 104 of the Act. This section is designed to govern the interface of the Act with federal and state agency rulemaking. However, it also is confusingly and complexly drafted so that the goals of uniformity, consistency and legal certainty come up short. Federal agencies have been struggling with the effect of this section on their rules for months, leaving regulated industries in limbo. To the extent interpretations have been issued, they have varied widely in approach. On the one hand, the Federal Reserve Board has issued interim rules which require compliance with the E-Sign Act -- and certain additional requirements that some in industry fear may impermissibly go beyond the Act -- for the electronic delivery of federally mandated disclosures under five consumer protection regulations (Regulations B, E, M, Z and DD). On the other hand, shortly after enactment of the E-Sign Act, the prior Administration's Office of Management and Budget, citing only the views of the minority in the House and Senate, issued an interpretive guidance memorandum to the federal agencies which construed the Act's applicability so narrowly as to raise eyebrows among those who had actually been involved in development of the Act. Consistent with this approach, for example, just recently the Department of Justice and OMB reportedly have taken the position, at least informally, that the E-Sign Act does

not apply to doctors' signatures on medical prescriptions because they do not affect interstate commerce and are a "governmental" function and thus outside the scope of the application of the E-Sign Act. Similarly, recent interpretations of the Act by the Securities and Exchange Commission ("SEC") are, in the view of some companies, so narrow and lacking in the required findings that they threaten to read portions of the E-Sign Act out of existence for the broker-dealer community.

* * *

In conclusion, there are those who say it is premature to consider amending the E-Sign Act, that the best approach is "wait and see." However, based on my experience, the complexities and ambiguities of the statute have already resulted in a tangible level of discomfort in industry that procedures, once adopted, might be held inadequate or out of compliance when the law is eventually interpreted by the courts or federal or state agencies. Ironically, the e-commerce industry's position has long been that the government should refrain from creating regulations and guidelines and should allow the market to determine the best procedures. In the case of the E-Sign Act, it appears that the law of the marketplace has indeed ruled and that much of industry has voted with its feet. It therefore is not clear what further "wait and see" will achieve. If the Congress wishes to adjust the E-Sign Act to accord it more closely with the three original goals of uniformity, consistency and legal certainty, the time to commence that process may well be now.

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Commentary

The E-Sign Act: In Facilitation Of E-Commerce

By
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On June 30, 2000, at a ceremony in Philadelphia's Congress Hall, near the site of the signing of the Constitution, President Bill Clinton signed the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act" or the "Act")[1] into law. Hailing the Act as a "big deal,"[2] the President used a smart card to sign the Act electronically — but not before he had first signed the legislation using a wet signature to ensure that his signature was in fact valid.

The E-Sign Act is landmark legislation because it gives recognition and effect to electronic signatures, contracts and records. It not only authorizes so-called "digital signatures" but also empowers the use of online contracting and provision of notices. The Act's coverage of "electronic records," which include a wide variety of notices and other documents, is particularly significant. No longer should these electronic methods be open to question. Billions of dollars of business-to-business and business-to-consumer transactions could potentially be facilitated as written signatures and paper notices will at least in principle no longer be required.

This article is divided into two parts. Part I is a brief legislative history of the E-Sign Act.[3] Part II is a section-by-section analysis of the content of the Act which focuses on the legal and practical questions that companies are likely to face as they implement the Act.

Part I. History Of The E-Sign Act

1. The 1997 Technical Amendments To The Bank Protection Act Of 1968

The genesis of the E-Sign Act was a growing perception in Congress and the financial services community in late 1996 and early 1997 that the piecemeal enactment by states of individual state electronic authentication laws would produce a regulatory and compliance nightmare that would inhibit the growth of electronic commerce on a national scale.[4] In April 1997 a group of financial services companies met to devise a federal

legislative solution. This group eventually evolved into the "Ad Hoc Committee for Electronic Authentication" (the "Ad Hoc Committee"). The goal of the group was to seek legislation to empower financial institutions and their affiliates to engage in the electronic transmission and execution of documents, acceptance of such documents and signatures from others, and reliance on third-party assurances as to the integrity of electronic documents and signatures, with the federal bank supervisory agencies to be charged with overseeing these activities by financial institutions.

The decision to limit the proposed legislation to financial institutions was dictated primarily by the committee jurisdictional system in Congress. The consensus of the Ad Hoc Committee was that if jurisdiction over the legislation were limited to the House and Senate Banking Committees, the bill would move more quickly and stand a better chance of reaching the floor for a vote. Moreover, the bill focused on financial institutions because the Ad Hoc Committee perceived them to be uniquely situated. Thus, financial institutions are accustomed to assuming "trusted third-party" roles. They serve as trustees and offer notary and signature guarantee services. The Ad Hoc Committee viewed offering electronic authentication services to be a logical outgrowth and functional equivalent of such technical activities by banks. Also, financial institutions are highly regulated entities, and this unique layer of regulation sets financial institutions apart from other providers of electronic authentication. The Ad Hoc Committee concluded that limiting the legislation to financial institutions was particularly appropriate as a first step or "confidence-building" measure designed to facilitate the broader and ultimate national growth of electronic commerce.[5]

Creating a core drafting group, the Ad Hoc Committee prepared a proposed bill in the form of an amendment to the Bank Protection Act of 1968.[6] The proposed legislation was a minimalist approach, financial services-specific in nature. It authorized financial institutions to use electronic authentication to (i) authenticate the sender of the document, (ii) determine that the document was not altered, changed or modified during its transmission and (iii) verify that the document received was in fact sent by the identified party. It allowed financial institutions to enter into agreements using electronic authentication and to allocate among the various parties' rights, obligations and liabilities. It authorized other parties dealing with financial institutions to use electronic authentication and vice versa. However, coverage was optional, in that financial institutions, broadly defined to include insured banks, bank holding companies and their subsidiaries and affiliates, were to elect coverage under the legislation. By so electing and notifying the Federal Reserve Board, they would be entitled to benefits of the bill insofar as it protected them from conflicting state regulation. However, by so electing, a financial institution would become subject to such regulations as the Federal Reserve Board might promulgate on electronic authentication. To protect financial institutions from competing or conflicting requirements under state law, the bill precluded a state from requiring the registration or licensing of a financial institution to engage in or use electronic authentication services, from regulating the financial institutions with respect to such activity or imposing a fee as to such services or requiring or limiting the financial institution's fee structure with its contracting parties. The bill explicitly did not affect consumer protections afforded by the Truth-in-Lending Act and the Electronic Fund Transfer Act. However, the bill was not technology-neutral as originally drafted because it defined "electronic authentication" to mean a "cryptographic technique" (the bill was later amended to be technology neutral before it was introduced.)[7]

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On July 9, 1997 the House Banking Committee's Domestic and International Monetary Policy Subcommittee, Chaired by Rep. Michael Castle (R-DE), held a hearing on the broad question of the need for federal legislation in the area of electronic authentication (the hearings did not focus on the Ad Hoc Committee's proposed draft because no bill had yet been introduced). The hearings were a follow-up to a series of hearings held in the 104th Congress by the Subcommittee on "The Future of Money." Representatives of Citibank, Visa International, Barclays, Digital Signature Trust Co., the Information Technology Division of the Commonwealth of Massachusetts and the Electronic Commerce Forum ("ECF") testified. All participants endorsed the need for federal legislation in one form or another. The testimony of P. Michael Nugent, General Counsel for Technology and Intellectual Property at Citibank, touched on the central issues:

> The problem is that if there are 50 state regimes governing electronic authentication, the implementation of secure electronic banking and commerce over the Internet will become costly and inefficient. Fifty differing legal regimes will diminish the likelihood of seamless and uniform electronic banking laws and commerce which by their very nature are interstate in nature. Fifty different regimes will reduce the incentive for new market entrants to offer electronic commerce and banking products and services. Fifty different regimes will confuse consumers doing business over the Internet and will result in a patchwork quilt of different legal protections, commercial standards and levels of security.
>
> There is also a competitiveness issue. Foreign countries are allowing electronic authentication without a variety of conflicting intra-country rules and regulations. They thus facilitate commerce and the competitiveness of their financial institutions and companies. For the U.S. financial services to compete in the world market it needs uniformity and simplicity at home.[8]

On October 28, 1997 the Subcommittee on Financial Services and Technology of the Senate Committee on Banking, Housing and Urban Affairs (the "Senate Banking Committee"), chaired by Senator Robert R. Bennett (R-UT), held a hearing on the broad subject of "Legislation to Provide a Uniform Framework and Guidelines for Electronic Authentication Protecting Transactions Over the Internet." Witnesses at the October 28 hearing included representatives of Citicorp, the Bankers Roundtable, Digital Signature Trust Co., Bank of America (representing the Coalition of Service Industries ("CSI"), Ford Motor Credit Company (representing the ECF) and the Deputy General Counsel of the Information Technology Division of the Commonwealth of Massachusetts. In a nod to what the ECF viewed as the "bank-centric" nature of the Ad Hoc Committee's draft proposal, the ECF representative criticized the Ad Hoc Committee's draft by stating in his testimony that "Electronic authentication should not become the exclusive domain of one industry or industry segment."[9] Nonetheless, all witnesses testified in favor of the general need for federal legislation.

However, in separate testimony, also on October 28, before the House Science Committee's Technology Subcommittee, Department of Commerce General Counsel Andrew J. Pincus

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("Pincus") urged Congress *not* to enact electronic authentication legislation, despite varying laws adopted by the states. "It is too early — and we do not know nearly enough — for the Federal Government to endorse a particular legislative approach," Pincus stated.[10]

On February 2, 1998 Chairman Bennett introduced a bill based in part on the Ad Hoc Committee's draft as the "Digital Signature and Electronic Authentication Law (SEAL) of 1998" (S. 1594), which was referred to the Senate Banking Committee.[11] However, the Bennett bill died in that Committee at the end of the 105th Congress.

2. Legislative Efforts In The 106th Congress

So matters remained until the start of the 106th Congress in January, 1999, almost a year after the introduction of Chairman Bennett's bill. During the interim, Internet usage and electronic commerce continued to grow at startling rates. E-commerce landmarks were reached with unexpectedly strong online sales during the 1998-99 Christmas Holiday season, and the Department of Commerce began for the first time to segregate and track online retail sales statistics.[12] In addition to the mushrooming "dot.com" companies, major U.S. retailers and manufacturing companies began to migrate to the Internet for both business-to-business and business-to-consumer transactions. The financial services industry continued to see a need for electronic authentication legislation, and it was joined by other industries which shared a concern about the stifling effect that the patchwork quilt of state laws might have on e-commerce. Accordingly, when the 106th Congress convened in January 1999 there was a growing industry consensus that Congress should once again attempt to address itself to electronic authentication legislation. This time the effort was successful and resulted in the enactment of the E-Sign Act.

A. The Senate Effort: The Millenium Digital Commerce Act (S. 761)

By early February 1999, Senator Spencer Abraham (R-MI) became interested in introducing electronic authentication legislation. Senator Abraham, a Republican facing reelection in 2000, was an early advocate of technology issues, as demonstrated by his introduction in the prior session of Congress of the Government Paperwork Elimination Act,[13] which was successfully enacted. That measure, however, was limited in scope in that it only required the Office of Management and Budget ("OMB") to develop procedures for the use and acceptance of electronic signatures by the Executive Branch of the federal government. Senator Abraham wanted to build on this measure and the abortive Bennett bill with broader legislation that could significantly assist e-commerce. Accordingly, by mid-February 1999 discussions were underway to develop broader legislation which would give recognition and effect to electronic authentication and provide a baseline standard on which e-commerce companies could rely.

At the same time there was a growing awareness at the federal level of the emergence of the Uniform Electronic Transactions Act ("UETA"). This model legislation, designed to give validity and effect to electronic records, signatures, contracts and writings, was due to be adopted in final form by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") at its annual conference July 23-30, 1999. It was expected that following its approval by NCCUSL, numerous state legislatures would consider and enact UETA on a state-by-state basis. However, because of the concern that it might be years before there was widespread adoption of UETA at the state level, a concern compounded by the rapidity with which e-commerce was growing and Internet-related

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technology was changing, there was apprehension that UETA might not be implemented rapidly enough to answer the current needs of e-commerce. Thus, one of the purposes of the federal legislation was to serve as interim or "bridge" legislation until such time as the states enacted UETA.[14]

Within the relatively short period of just over one month, Senator Abraham introduced the "Millenium Digital Commerce Act" (S. 761) on March 25, 1999. Senate Commerce Committee Chairman John McCain (R-AZ), as well as Senators Ron Wyden (D-OR) and Conrad Burns (R-MT), joined Abraham in co-sponsoring the bill on a bipartisan basis. The measure was referred to only one committee, the Senate Commerce Committee. S. 761, as introduced, was "minimalist" in approach.[15] It provided that "a contract relating to an interstate transaction shall not be denied legal effect solely because an electronic signature or electronic record was used in its formation" (Section 6(a)). By limiting this operative provision to "contracts," the bill did not go as far as UETA in expressly providing validity and effect to both electronic signatures and electronic records. However, section 6(b) of S. 761 provided for party autonomy (and, at least implicitly, technology neutrality) by stating that the parties to an interstate transaction may establish by contract, electronically or otherwise, the technologies or business models they wish to use, including legal or other procedures, to create, use, receive, validate or invalidate electronic signatures and electronic records. On preemption, section 6(c) of S. 761 provided that the bill would not preempt the law of a state that enacted legislation governing electronic transactions that was consistent with sections 6(a) and (b) of the act and, moreover, provided that a state that enacted UETA "substantially as reported" to state legislatures by NCCUSL would satisfy this criterion, provided the legislation was not inconsistent with sections 6(a) and (b).

On April 29, 1999, Senators Abraham, McCain and Trent Lott (R-MS) introduced a companion bill, the "Electronic Securities Transactions Act" (S. 921). This legislation was specific to the securities industry and provided that registered broker-dealers, transfer agents and investment advisers could accept and rely upon electronic signatures on any application to open an account or other document. S. 921 was referred to the Senate Committee on Banking, Housing and Urban Affairs (the "Senate Banking Committee") but was never reported out of committee.[16]

The Senate Commerce Committee held an initial hearing on the legislation on May 27. Witnesses included representatives of Charles Schwab & Co., Inc., GTE Internetworking, the Information Technology Association of America and the Information Technology Division of the Commonwealth of Massachusetts. All witnesses favored the legislation.

On June 23 the Senate Commerce Committee met in a markup session to finalize the language of the bill before sending it to the floor and ordered the bill to be reported favorably with an amendment in the nature of a substitute by voice vote.[17] The amended version of S. 761 changed the bill as introduced by modifying section 6(a) to conform more closely to UETA by giving validity and effect to electronic records, signatures, contracts and writings. It also added an intent section at section 6(c) governing attribution of electronic records and electronic signatures to persons, a provision at section 6(d) governing use of electronic agents[18] and a new section 6(e) that modified the preemption provision by stating that "this section does not apply in any state in which the Uniform Electronic Transactions Act is in effect," thereby dropping the vaguer "substantially as reported" language as contained in prior section 6(c) of the bill as introduced.

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Significantly, the scope of the bill was modified by revising section 6(a) to apply only to a "commercial" transaction affecting interstate commerce, thereby eliminating governmental transactions which were more appropriately covered by the Government Paperwork Elimination Act.

At first the Administration was supportive of S. 761. In a June 22, 1999 letter to Senator Abraham, Pincus stated:

> The substitute version of the S. 761 would in our view provide an excellent framework for the speedy development for uniform transactions legislation and an environment of partnership between the Federal Government and the states. We look forward to working with the Committee on the bill as it proceeds through the legislative process.

Consistent with this position, on August 4, 1999 the Office of Management and Budget issued a formal Statement of Administration Policy ("SAP") which declared "the Administration supports Senate passage of S. 761 . . ." The SAP went on to say:

> The Administration is pleased that the scope of S. 761 is limited to commercial transactions between private parties that affect interstate commerce. Further, the Administration applauds the preemption provisions of S. 761. Those provisions strike the appropriate balance between the needs of each state to develop its own laws relating to commercial transactions and the needs of the Federal Government to ensure that electronic commerce will not be impeded by the lack of national consistency in the treatment of electronic authentication.[19]

However, even after the Senate Commerce Committee's mark-up of S. 761, concerned parties continued to discuss changes to the bill. Most of these discussions centered on the formulation for preemption of state laws and the inclusion of "electronic records" in the bill, a provision that the Administration strongly opposed despite its earlier SAP in support of the bill.

Shortly after the Commerce Committee's reporting of S. 761, the measure also began to garner opposition from Senators Patrick Leahy (D-VT) and Paul Sarbanes (D-MD) because of its coverage of "electronic records" and alleged lack of consumer protections. Because of Senate procedural rules that allow a single Senator to prevent legislation from moving to the floor,[20] S. 761 was held up for some months until Senator Abraham agreed in November to drop its coverage of electronic records and adopt a substitute amendment for the language of S. 761 offered by Senator Leahy and supported by Senator Sarbanes.[21] The Leahy substitute language, inserted into S. 761 on the Senate floor, was identical to a separate Democratic Leadership Amendment offered to H.R. 1714 on November 9 in the House by Minority Leader Richard Gephardt (D-MO) and co-sponsored by the senior Democrats on the House Banking (John LaFalce (D-NY)), Commerce (John Dingell (D-MI)) and Judiciary (John Conyers (D-MI)) Committees. That substitute, which had the endorsement of President Clinton, failed in the House by a vote of 276-128, with another 29 members not voting.[22] The Leahy amendment to S. 761, like its

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House counterpart, offered no effective preemption of state law or recognition of electronic records (see discussion of H.R. 1714 *infra*).[23]

On November 19, 1999 the Senate passed the Leahy substitute version of S. 761 by unanimous consent without a recorded vote.

B. The House Effort: The Electronic Signatures In Global And National Commerce Act (H.R. 1714).

On May 6, 1999, House Commerce Committee Chairman Tom Bliley (R-VA), along with Reps. Tom Davis (R-VA), Billy Tauzin (R-LA) and Mike Oxley (R-OH), introduced the "Electronic Signatures in Global and National Commerce Act" ("the E-Sign Act") as H.R. 1714. The bill was initially referred solely to the House Commerce Committee. However, the House Judiciary Committee also obtained sequential jurisdiction over the bill.

Sections 101(a)(1) and (2) of the bill gave recognition and effect to electronic records and electronic signatures used in a contract or agreement entered into or affecting interstate or foreign commerce. Their validity was thus tied to their use in a contract or agreement.

Section 101(b) of the bill provided for party autonomy, while section 102 contained provisions dealing with preemption of state law. In brief, under section 102(a) a federal or state statute or regulation enacted after the date of enactment of the Act could modify, limit or supercede the provisions of section 101 if it made "specific reference" to those provisions, specified "alternative procedures or requirements" for the use of electronic records or electronic signatures and, in the case of state statutes or regulations, was enacted within two years of the date of enactment of the federal act. Thus, the provision allowed future state override for a limited period and as long as it was consistent with section 101. It did not address existing state laws, only those enacted within two years following enactment of the bill. In addition, section 102(b) provided that any state statute or regulation that modified, limited or superceded section 101 would not be effective to the extent that it discriminated in favor of or against a "specific technology," discriminated in favor of or against a "specific type or size of entity," was not based on "specific and publicly available criteria" or was otherwise inconsistent with the provisions of section 101.

In addition, section 102(c) vested enforcement authority in the Department of Commerce by granting injunctive authority to Commerce to enjoin the enforcement of any nonconforming state statute or regulation. Section 103 provided specific exclusions to section 101 for statutes and regulations governing the creation and execution of wills, codicils or testamentary trusts, as well as governing adoption, divorce or other matters of family law.

The definitions used in the bill were partially based on the UETA definitions, except for the definition of "electronic signature."

Title II of the bill vested the Department of Commerce with a number of missions, including to study and report on foreign and domestic barriers to e-commerce, to negotiate away trade barriers to e-commerce, to pursue certain principles in international negotiations on e-commerce and to conduct a study on state statutes and regulations enacted after the date of enactment of the act to determine the extent to which they com-

plied with section 102(b). Title III of the bill contained a separate securities section designed to provide validity and effect to electronic contracts, agreements and records as used by the securities industry.

Two subcommittees of the House Commerce Committee held hearings on H.R. 1714. The first was the Subcommittee on Telecommunications, Trade and Consumer Protection, which held its hearing June 9, 1999. Witnesses included Pincus, the Secretary of Technology of the Commonwealth of Virginia, Ford Motor Credit Company, the Deputy General Counsel of the Information Technology Division of the Commonwealth of Massachusetts, the President of Stamps.com, Inc., the President of IriScan, Inc. (testifying on behalf of the International Biometrics Association) and Capital One Financial Corporation. The second hearing, held by the Subcommittee on Finance and Hazardous Materials, was on June 24, 1999. It received testimony from Charles Schwab & Co., Inc., DLJ Direct Inc. and Quick & Reilly/Fleet Securities, Inc.

In an August 4, 1999 letter conveying the combined views of the Department of Commerce and Administration on H.R. 1714 to Chairman Bliley, Pincus stated that "we support the overall goal of this legislation" but nonetheless went on to list a "number of significant problems with H.R. 1714 in its present form" which caused it to "fall short of achieving its goal." In particular, Pincus voiced concerns about the need to give "significant deference" to state law and to the NCCUSL process. Pincus stated that "section 102 of H.R. 1714, . . . places significant, and we believe inappropriate, limits upon states' ability to alter or supercede the federal rule of law that the bill would impose. Even when states adopt the UETA, their laws would remain subject to federal preemption 'to the extent' that any State rule — including the UETA — fails to meet a number of criteria, which in themselves are not clearly defined." Pincus observed that "most significantly," section 102(b) "takes away" the authority of states to avoid federal preemption that is granted by subsection (a) of that section. Pincus also objected to the enforcement authority of the Department of Commerce as "counterproductive." Other issues raised by Pincus in the letter included the need to exclude government transactions, the need to limit the scope of the bill to "commercial" transactions affecting interstate commerce rather than "any contract or agreement" affecting interstate commerce (thus aligning its scope with that of S. 761) and the need to retain the ability of governments to regulate "certain private party transactions in the public interest" notwithstanding the party autonomy provision.[24]

The two House Commerce Subcommittees subsequently met on July 21 and 29 to mark up the bill, and on August 5, 1999 the full Committee met and ordered H.R. 1714 reported to the House, as amended by a voice vote, but with no recorded votes taken. The version of H.R. 1714 reported out of the Commerce Committee was essentially the same as the bill as introduced, with some modifications. The differences between the original and reported versions of the bill included revision of the preemption formula in section 102(a) to cover an enactment of UETA "as reported to the State legislatures" by NCCUSL, expansion from two to four years of the grace period within which a state may enact a law that is not preempted by section 102(a), modification of the definition of "electronic signature" to accord more closely with that in UETA and the addition of a definition and provision dealing with "electronic agents."

In explaining inclusion of the modified preemption provision, the Committee Report stated that:

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> The Committee commends NCCUSL's work on UETA. Both UETA and H.R. 1714 share many of the same basic principles. The Committee remains concerned, however, about the prospect for adoption of UETA by the States. Failure to adopt UETA by a substantial majority of the States in a short time period will perpetuate a patchwork of inconsistent and conflicting state laws. Further, some states will inevitably choose not to follow the work of NCCUSL on electronic signatures and will develop their own standards, which may or may not be compatible with UETA or may even be harmful to the development of electronic signatures if designed or implemented incorrectly.
>
> There is, therefore, a clear need for a uniform, nationwide legal standard to be in place until states have the opportunity to enact their own laws or to ensure that there is a nationwide legal standard in case states fail to or refuse to enact their own electronic signature legislation. H.R. 1714 fills this need.[25]

The sequential handling of H.R. 1714 by the House Judiciary Committee resulted in no changes to the text of the bill. On September 30, 1999 the Committee's Courts and Intellectual Property Subcommittee held a hearing on H.R. 1714. Immediately prior to the hearing, Judiciary staff prepared a draft revised version of H.R. 1714 in the nature of a substitute amendment (the "Coble amendment," named after Subcommittee Chairman Howard Coble (R-NC)).[26] At the same time, Rep. Howard Berman (D-CA), ranking minority member of the Subcommittee, produced a draft amendment to the Coble amendment which essentially gutted the substantive provisions of the legislation.[27] Witnesses at the Subcommittee's September 30 hearing included Pincus, as well as representatives from the Department of Justice, NCCUSL, Hewlett-Packard, National Association of Manufacturers ("NAM") and National Consumer Law Center, Inc. The testimony of most of the witnesses was critical of both the Bliley and Coble versions of the bill, with Pincus' testimony repeating many of the objections raised in his earlier letter to Chairman Bliley.

The Subcommittee met for markup on October 7, 1999 and ordered the Coble amendment version of H.R. 1714 favorably reported by a voice vote. However, at the full Committee markup on October 13, the Committee adopted the Berman amendment by a vote of 15 to 14, with Reps. Bob Barr (R-GA) and Lindsey Graham (R-SC) breaking ranks with the other Republicans to support the Berman amendment.[28]

The two competing versions of H.R. 1714 were then referred to the House Rules Committee which ultimately decided to move Bliley's Commerce Committee version of the bill to the floor rather than the Judiciary Committee version.[29]

The Judiciary Committee's attempt to influence the legislation was perhaps most significant for the public debut at the September 30 hearing of consumer advocates in the debate over the E-Sign Act. Because of the important role played by consumer concerns in the eventual development of the E-Sign Act, a brief summary of the criticisms made by the National Consumers Law Center, Inc. of H.R. 1714 is instructive. NCLC Manag-

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ing Attorney Margot Saunders stated in her September 30 testimony before the Coble Subcommittee (she followed up with a white paper entitled "Major Issues Regarding H.R. 1714") that there was "considerable risk" to consumers in H.R. 1714. As examples, she cited her belief that H.R. 1714 "would permit electronic disclosures to substitute for paper notices even when the consumer doesn't know that he or she has consented through electronic communication, doesn't have a computer, or can't print the information when it is received" and that "the bill directs the courts to give electronic signatures the same weight as their handwritten counterparts without addressing the heightened risks of forgery, duplication and identity theft evident in today's online marketplace." As remedies, Ms. Saunders argued that electronic contracts should only be allowed to replace paper contracts when the transaction "truly occurs" in electronic commerce and that electronic contracts should not be permitted to replace paper contracts when the transaction has actually occurred in person. She also argued, importantly, that the "consumer must have the capacity to receive, retain and print the electronic contract" and that "specific rules" should be developed to "ensure that the consumer continues to have the capacity and willingness to receive the electronic records."[30]

Concurrently with the activation of consumer groups in the debate, Senators Wyden and Leahy began to develop additional consumer-oriented provisions to insert in the legislation beyond those already in the bill. Although this Wyden-Leahy language was not publicly released until far later in the legislative process when the two bills were about to go to conference,[31] the Wyden-Leahy draft contained several dozen consumer-oriented changes to H.R. 1714,[32] including in particular the electronic consent provisions which the Administration and Democratic Senators came to view as non-negotiable and which were ultimately incorporated into section 101(c) of the final enacted version of the E-Sign Act.[33]

In an October 12, 1999 letter to House Judiciary Committee Chairman Henry J. Hyde (R-Ill.), Pincus stated that H.R. 1714, as amended in the Coble Subcommittee (but not as approved the following day by the full Judiciary Committee),"would still preempt state law unnecessarily, both in degree and duration; invalidate numerous state and federal laws and regulations designed to protect consumers and the general public; and otherwise create legal uncertainty where predictability is the goal. We therefore must strongly oppose the measure in its current form." In addition to stating that the Administration did not "understand why it is necessary to override existing federal laws governing commercial transactions," Pincus viewed H.R. 1714 as placing "inappropriate limits upon states' ability to alter or supercede the federal rule of law . . ." Pincus argued that the legislation should be limited to a temporary federal rule to ensure the validity of electronic agreements entered into before states have a chance to enact the UETA. Once UETA is adopted by a state, Pincus argued, "the federal rule is unnecessary, and it should 'sunset.'" In addition to a number of other objections to the bill, Pincus also raised the consumer issue: "Consumer protection is another important area where the public interest has been found to require government oversight. States, as well as the federal government, must not be shackled in their ability to provide safeguards in this area. Yet this is precisely what this legislation would do." In a footnote in the letter, Pincus signaled a shift in the Administration's position:

> The provisions are similar to some contained in S. 761, as reported by the Senate Commerce Committee. I expressed support for that measure because it ensured that contracts

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> could not be invalidated because they were in electronic form or because they were signed electronically. At the time that the bill was reported, the spillover effect of these provisions on existing consumer protection and regulatory standards had not been identified. Now that this effect has become clear, and it is equally clear that enactment of this measure is desired by some precisely because of the spillover effect, we must oppose these provisions as currently drafted.[34]

A further development in the dynamic of the legislation process that occurred during this period of late October and early November, 1999 was the sudden interest taken in the legislation by an expanded group of representatives of the financial services industry. Although certain financial services companies and trade associations had long been involved in the debate over the E-Sign bill, prior to this time the financial services industry as a whole had been focused on obtaining Congressional passage of the Financial Services Modernization Act. However, with that project behind it,[35] the broader financial services industry awoke to the importance of the E-Sign Act. A variety of banking and insurance trade associations, as well as a number of their individual members, began to engage on the issue.

The House of Representatives passed H.R. 1714 by a 356 to 66 vote on November 9. The key to this vote was a coalition of Republicans and some 65 so-called "New Democrats" (many from suburban and "high tech" districts and thus inclined to be more sensitive to the issues surrounding e-commerce than traditional urban Democrats).[36] In enacting the bill, the House rejected a substitute measure backed by the Administration and offered by House Majority Leader Richard Gephardt, Rep. John Dingell (Ranking Democrat on the Commerce Committee), Rep. John Conyers (Ranking Democrat on the Judiciary Committee) and Rep. John LaFalce (Ranking Democrat on the Banking Committee).[37] That substitute was based on the proposed compromise in the Senate (see *supra*) and would have provided no effective recognition of electronic records or preemption of state law.

In addition to its other provisions described above, the bill incorporated new detailed consumer protection provisions which were added by a floor amendment offered by Rep. Jay Inslee and other New Democrats immediately prior to its passage as part of the compromise between the Republicans and New Democrats to assemble the votes to ensure its passage. These requirements stated that if a law requires a record to be provided to a consumer in writing, that requirement is satisfied by an electronic record if (i) the consumer has affirmatively consented by means of a consent that is "conspicuous and visually separate from" other terms to the use of such electronic record and has not withdrawn that consent, (ii) prior to consenting, the consumer has been provided with a statement of the hardware and software requirements for access to and retention of electronic records and (iii) the consumer has affirmatively agreed to notify the provider of the electronic record of any change in the consumer's e-mail address and to give an e-mail address or other location to which the provider may send records if the consumer withdraws consent. In addition, the record must be capable of review, retention and printing by the recipient if accessed using the hardware and software specified at the time of the consumer's consent. (Section 101(b)(2)). The content or timing of any disclosure required to be provided to any consumer under law was not affected (Section 101(e)).[38]

As Congress recessed for the Christmas and Hanukah holidays, the scene was therefore set for the two bills to go to Conference Committee early in the new year.

The House of Representatives appointed its conferees on February 16, 2000, shortly after Congress returned from recess.[39] The appointment of Senate conferees was delayed for six weeks. On March 29 the Senate appointed its delegation to the conference, naming 17 members from three Senate Committees — Commerce, Banking and Judiciary.[40] The two passed measures, H.R. 1714 and S. 761, provided the initial frame of reference for the Conference Committee's work. These two bills, as they stood at the time of the naming of the conferees, contrasted sharply with each other.

The Conference Committee initiated its work in early May. The text of the House-passed H.R. 1714, renumbered as S. 761, served as the base document for the Committee's work. The Conference Committee produced its final report on June 8,[41] the House thereupon passed the bill by an overwhelming 426-4 vote on June 14, and the Senate did the same by a vote of 87-0 on June 16. It then went to President Clinton for signature.

However, unlike most legislation, the E-Sign Act, by the decision of the majority of the conferees, has a conference report which is simply the text of the Act, with no accompanying statement of managers.[42] Therefore, there is no dispositive legislative history to illuminate what the text of the E-Sign Act is intended to mean. Although a number of conferees engaged in extended colloquies and inserted statements into the *Congressional Record* on the floor, their eventual legal significance as legislative history is unclear.[43]

Part II. S. 761 Electronic Signatures In Global And National Commerce Act

1. Title I — Electronic Records And Signatures In Commerce

Section 101. General Rule Of Validity

Section 101(a): general rule of validity. Section 101(a) establishes the general rule of validity for electronic signatures, contracts and records. It is based on Section 7 of UETA.[44] It sets forth the fundamental premise of the Act that the medium in which a record, signature or contract is created, presented or retained does not affect its legal significance. The fact that the information is set forth in an electronic, as opposed to paper, form is irrelevant.

Section 101(a) provides that "Notwithstanding any statute, regulation or other rule of law, . . . a signature, contract, or other record" relating to a transaction[45] in or affecting interstate commerce "may not be denied legal effect, validity, or enforeeability solely[46] because it is in electronic form."[47] Moreover, a contract relating to such transactions "may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."[48]

This subsection reflects the E-Sign Act's intention to operate broadly to permit the use of electronic signatures in a wide range of business, consumer, commercial, financial and governmental contexts.[49] Although generally clear in its UETA-based wording, there is a question as to what is meant by the term "any other rule of law," which is not found in UETA. It would appear that this term was meant as a "catch-all" designed to expand the scope of the general rule of validity rather than to apply to any specific type

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of legal authority. However, it arguably might cover a legal rule which is less than or different from a full statute or regulation, such as a phrase within a statute or regulation, or a court ruling or agency guidance short of a regulation.

Section 101(b): preservation of rights and obligations. Section 101(b) (1) acknowledges that Title I affects only requirements in statutes, regulations, or rules of law that contracts or other written records be written, signed or in nonelectronic form. Laws — including common law rules — that prohibit fraud, unfair or deceptive trade practice or unconscionable contracts are not affected by the E-Sign Act."[50] Further, section 101(b)(2) clarifies that Title I does not require any person to agree to use or accept electronic records or electronic signatures other than a governmental agency with respect to a record other than a contract to which it is a party.[51]

Consent to use of electronic media is thus voluntary.[52] In contrast, section 5(b) of UETA provides that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means."[53] Congress presumably was familiar with the phrasing in UETA (and perhaps the earlier drafts of the E-Sign Act) and meant for the E-Sign Act to establish a different rule from UETA. Does section 101(b)(2) mean that the parties do not have to agree affirmatively to use electronic records or electronic signatures but that a party may object to the use electronic records and signatures? Alternatively, might Congress have intended by section 101(b)(2) to require affirmative agreement of the parties to use or accept electronic records and signatures, notwithstanding the phrasing?

In this connection, is it significant that section 101(c) requires affirmative consumer consent to the provision of certain kinds of records? On the one hand, one might argue that section 101(c) is the only place in the E-Sign Act where consent of any form is expressly required, implying that no affirmative consent is required from anyone, consumer or not, in other contexts, including section 101(b). On the other hand, one might argue that the sole purpose of section 101(c) is to set forth more stringent disclosure and consent requirements to ensure that consumers do not give consents to the use of technologies that they cannot, in fact, access. One frequently proffered example of this concern contemplates an unsophisticated consumer who owns no computer contracting with a car dealership for the purchase of a vehicle, on the dealer's premises and using the dealer's computer, and inadvertently agreeing to use an Internet browser or email to access or receive important records relating to that transaction.

If affirmative agreement is required, how must such an agreement be manifested? Section 5(b) of UETA states that "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." Can an implied agreement under the E-Sign Act be demonstrated by the actions of the parties (*i.e.*, voluntary use or acquiescence in the use of electronic means), even in the absence of a provision similar to section 5(b) of UETA? Can express agreement be a provision of the larger agreement into which the parties are entering electronically?

If no affirmative agreement is required, but parties are entitled to refuse to use electronic records and electronic signatures (*i.e.*, "opt-out"), how and when is such "opt-out" required to be manifested?

Section 101(c): consumer disclosures. Section 101(c) is an important provision which imposes significant consumer[54] disclosure and consent provisions with respect to electronic records, which were among the more contested elements of the bill during its consideration by Congress. Section 101(c)(1) allows for an electronic record to be used when "a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing" if the following four criteria, outlined in 101(c)(1)(A-D), are satisfied.[55]

First, the consumer must affirmatively consent to such use and must not have withdrawn such consent.[56]

Second, the consumer must be provided with "a clear and conspicuous statement"[57] which meets four conditions, *viz*:

> (i) It must inform the consumer of "any right" or option to have a record provided or made available in a nonelectronic form and of his or her right to "withdraw the consent to have the record provided or made available in electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal . . .;"[58]
>
> (ii) It must inform the consumer of whether the consent applies only to a particular transaction which gave rise to the obligation to provide the record or to the entire course of the parties' relationship;[59]
>
> (iii) It must describe the procedures for withdrawing consent and for changing a consumer's electronic contact information;[60] and
>
> (iv) It must inform the consumer of how, upon request, the consumer "may" obtain a paper copy of an electronic record and whether any fee will be charged in connection therewith.[61]

These requirements raise a number of practical questions. Does the language in section 101(c)(1)(B)(i)(I) (by using the term "any right" instead of "the right") imply that a company may refuse to do business with consumers that do not consent to the receipt of records in electronic form? That conclusion appears to be the implication because a party able to terminate a relationship if the consumer revokes his or her consent should be able to condition creation of the relationship on consent to electronic receipt of required records. Therefore, does the language imply that a consumer who has consented to electronic delivery of records also always has a right to have those records provided or made available in nonelectronic form? Or does the language merely require a statement as to whether or not the company will make such records available? Does a company have the ability to deny access to paper records? It appears under section 101(c)(1)(B)(iv) that the company possibly might have a continuing obligation to make paper copies of electronic records available on request, even if consent is not withdrawn,

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although the company may charge a fee for such access. On the other hand, use of the word "may" in this subsection is permissive and suggests that the right to a paper copy is optional. It does not appear that the disclosure must state the actual amount of the fee.

How specific must the statement be with respect to the section 101(c)(1)(B)(ii) disclosure of "conditions, consequences (which may include termination of the parties' relationship), or fees" in the event of a consumer's withdrawal of consent? A clear and conspicuous statement of the fees that will have to be paid as a result of a withdrawal of consent may be impracticable, as companies will not be able to predict with accuracy the fees that might apply at a point which may be years in the future (this issue reappears in section 101(c)(1)(D)).

In addition, section 101(c)(1)(B)(ii) requires that the statement inform the consumer of whether the consent applies to the particular transaction which gave rise to the obligation to provide the record or other categories of records arising during the entire course of the parties' relationship. How specific must the statement be with respect to the subject of the consumer consent? What is considered a "particular transaction?" When is a new transaction created? What constitutes a "new transaction?" For example, one might argue that the purchase of one policy of insurance is a "transaction" that gives rise to on-going records delivery requirements, including policy renewal notices, annual statements and the like, and that other "transactions" arising in the course of the parties' relationship would include such matters as the purchase of additional policies. Alternatively, one might argue that the "transaction" is the initial purchase of a policy and that the consent would address records delivery requirements relating only to the purchase (*e.g.*, delivery of the written policy) but that later events such as policy renewals and claims adjudications would be other "transactions" that would arise in the "course of the parties' relationship." Either interpretation does not answer the question of how specific the disclosure must be about the "categories of records" to which the consent applies. Moreover, it may be difficult in practice for the party obtaining the consent to identify at the outset all of the possible categories of records that could arise during the course of the parties' relationship.

Third, prior to consenting, the consumer must be provided with a "statement of the hardware and software requirements for access to and retention of the electronic records."[62]

There also is some question as to how specific this statement of hardware and software requirements must be. Can the provider simply inform the consumer that he or she needs a computer and access to the Internet or is something more required, such as a statement that the consumer needs Windows 98? If a range of hardware or software allows access, must the statement be illustrative or does it have to be exhaustive? What precisely is meant by "access to" and "retention of?"

The consumer is then required to consent electronically, or confirm his or her consent electronically, "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."[63]

As noted *supra*, this provision came from the Wyden-Leahy proposal and ultimately appears to be based on a requirement articulated by the National Consumer Law Cen-

ter, Inc. There are questions as to how difficult this procedure will be in practice and as to what constitutes a "reasonable demonstration" that the consumer can access the information. There also is a question of whether it unnecessarily limits the effectiveness of paper consents to electronic delivery by creating new requirements which in any event are not consistent with those in the paper world.[64] It is not enough for the consumer to consent. The consent itself must demonstrate the fact of consent. What happens if a contractual relationship is initiated in person or by mail? Must the consumer then return home and consent by using his or her PC? What if the consumer has more than one PC, for example at home and at the office? Is the consumer limited to receipt of electronic records at only one PC?

If a company is required to provide information to a consumer and chooses to do so in one particular form (*e.g.*, monthly emails) but also decides to make it available at the consumer's option in another electronic form (*e.g.*, access to web site), does the consumer have to consent to the provision of the information in both electronic forms? If the records are going to be provided in a variety of formats, it may well be impossible for a single consent to demonstrate the consumer's ability to access all of them. Are providers and consumers therefore required either to consent over and over again or go through an onerous, multi-part consent? In a related vein, if a company offers a menu of access options for a consumer to access information, must the consumer consent to each manner in which the information may be made available electronically by the company or just the way or ways the consumer plans to access it?

Finally, there also is a potential concern that the vagueness of the "reasonably demonstrates" standard could provide opportunities for disgruntled consumers and plaintiffs' attorneys to renege on consents once given.

As a general matter, Senate Democrats argued that it is essential that a consumer consent electronically to the provision of electronic records so that the provider can verify that the consumer will in fact be able to access the information in the electronic form in which it will be sent.[65] They believed that this electronic consent mechanism would provide an additional assurance that a technologically unsophisticated consumer actually has an operating email address and other technical means for the opening of the disclosures. ("Most simply will not know whether they have the necessary hardware and software even if the technical specifications are provided; few consumers would understand: '433 MHz; 32 mg RAM; Windows 98, version 2'").[66] However, are the colloquies on the floor of Congress reliable on this point? In a colloquy on the Senate floor during debate on the Conference Committee report of the E-Sign Act,[67] it was stated that an email response from a consumer that confirmed that the consumer could access electronic records in the specified formats would satisfy the "reasonable-demonstration" requirement. Other examples given in the colloquys as to what might satisfy this requirement included an affirmative response to an electronic query asking if the consumer could access the electronic information. As noted in Footnote 63, *supra*, Senators McCain and Abraham, in their colloquy, also stated that the requirement could be satisfied if it was shown that the consumer actually accessed the electronic records in the relevant format, *i.e.*, "reasonably demonstrate" by usage.

Fourth, and finally, if the hardware or software requirements needed to access or retain electronic records change after the consumer has given affirmative consent and that change "creates a material risk that the consumer will not be able to access or retain a subse-

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quent electronic record that was the subject of the consent," then the party providing the electronic record must provide the consumer with two statements. First, the provider must give a statement of the revised hardware and software requirements for access to and retention of the electronic records.[68] Second, the provider must also give a statement of the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under the "clear and conspicuous statement" prior to consent.[69] After these statements are provided to the consumer, the consumer must again "reasonably demonstrate" that he or she can access the information that will be used to provide the information that is the subject of the consent.[70] For the reasons outlined above as to the initial consent, critics opposed this re-consent as unnecessary and burdensome, out of concern that the accumulation of consumer consents and disclosures may confuse and intimidate consumers and discourage their use of e-commerce. There also remains the question of what is meant by the undefined term "material risk." How does one determine whether a change in hardware or software requirements will create a "material risk" that the consumer will not be able to access or retain information? If the company offers multiple means to access information, does a change in just one method trigger these requirements or does the availability of other methods (to which the consumer consented?) imply there is no "material risk" of inaccessibility? Must the change notice be given prospectively (before the change is made) and, if so, how can the consumer's consent "reasonably demonstrate" his or her ability to access the records through the new hardware and software? If the notice may be given after implementing the new hardware and software, how must the notice be given, especially if the consumer can no longer access the notice? Does this standard require re-notification and renewed consent every time there is simply a system upgrade?

Other provisions in Section 101(c). Section 101(c)(2) preserves consumer protections by not allowing Title I to affect the "content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation or other rule of law."[71] Further, it provides for electronic records to be used in a situation where a law enacted prior to the E-Sign Act requires a verification or acknowledgement of receipt, provided the electronic method used gives verification or acknowledgement of receipt.[72]

Section 101(c)(2) thus preserves existing non-electronic consumer protections by not allowing Title I to affect the content or timing of any disclosure or other record legally required to be provided or made available to any consumer. However, it is a concern that the E-Sign Act does not provide a clear federal rule concerning how the Act is intended to affect legal requirements that information be sent, provided, or otherwise delivered? Section 101(c)(2)(B) touches on the delivery issue, but only with respect to specified methods that require verification or acknowledgement of receipt, such as registered or certified mail. If a pre-E-Sign Act state law requires that a consumer notice be sent by first-class mail or personal delivery, without a verification or acknowledgement of receipt, does the E-Sign Act preempt that requirement? If the state law writing requirement is preempted by section 101(a) of the E-Sign Act, but the delivery method is not, can that delivery requirement be satisfied by mailing a computer disk through the U.S. mail (assuming the consumer consented to receipt of the electronic record on a floppy disk under section 101(c)(1)(C))? The reporters' comment to section 8(b) of UETA indicates that is the intent of the comparable provision of UETA, but the specific wording of the section in UETA varies somewhat from that in section 101(c)(2)(B) of the E-Sign Act.[73]

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Section 101(c)(3) offers a narrow savings clause: "The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii)."[74] This subsection implies that a failure to meet the requirements of section (c) other than (c)(1)(C)(ii) could be grounds for denying the legal effectiveness, validity or enforceability of a consumer contract. For example, if the person providing the record failed to include in the clear and conspicuous statement, required by section 101(c)(1)(B), the procedures necessary for the consumer to update the information needed to contact the consumer electronically, would that mean that the consumer's affirmative consent was not valid? Would it therefore mean that the person providing the records did not have the right to deliver the records electronically and, as a result, was not meeting its legal requirement to provide the information to the consumer in writing, even though the consumer was in fact receiving and able to access and retain the electronic records required to be provided? If the contract is enforceable, but the company provides notices required by law and the contract in electronic form without obtaining proper consumer consent, is it in breach of the contract? (the savings clause covers only contracts; the electronic record itself would clearly be invalidated by failure to meet the electronic consent requirements).

Section 101(c)(4) deals with the prospective effect of withdrawal of a consumer's consent. If a consumer withdraws consent, the legal effectiveness, validity, or enforceability of electronic records provided or made available prior to implementation of the consumer's withdrawal of consent is not affected.[75] Moreover, a consumer's consent becomes effective within a "reasonable period of time" after the provider receives the withdrawal.[76] Further, if a change of hardware or software requirements needed to access or retain electronic records results in a material risk and the provider fails to comply with section 101(1)(D), such a failure may, "at the election of the consumer, be treated as a withdrawal of consent for purposes of section 101(c)(4)."[77] Although this provision is noncontroversial, it is unclear what constitutes a "reasonable period of time" after which a consumer's withdrawal of consent would be considered effective. Would it be as soon as a company is able to process the change and start sending the paper records?

Section 101(c)(5) clarifies that section 101 does not apply to "any records that are provided or made available to a consumer who has consented prior to the effective date of [Title I] to receive such records in electronic form as permitted by statute, regulation or other rule of law."[78]

Finally, section 101(c)(6) provides that neither an oral communication nor a recording of an oral communication shall qualify as an electronic record except as otherwise provided under applicable law.[79] This subsection was inserted by the conferees late in the process to protect consumers by closing a perceived loophole that would allow an oral communication or record of an oral communication to substitute for written notices to consumers.

This section raises several separate issues. First, does this language mean that a company may not utilize voice-response technology to deliver through voice recordings information contained in electronic records that are required to be made available pursuant to some statute. Section 101(a) seemingly would permit an electronic record to consist of oral recordings, but section 101(c)(6) would prohibit an oral communication or recording of an oral communication to qualify as an electronic record "except as other-

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wise provided under applicable law" and thus to substitute for written notices to consumers under subsection 101(c). One implication of section 101(c)(6) is to permit oral recordings in commercial, non-consumer contexts.

Second, where applicable law would permit oral delivery of a record, would section 101(c)(6) permit the use of an oral recording to "reasonably demonstrate" the consumer's consent to receipt of oral recordings for purposes of section 101(c)(1)(B)(iv)?

Finally, can a consumer's voice recording be used to confirm a customer's acceptance of an electronic contract or other record? For example, to the extent that a consumer has orally "signed" a contract (which is clearly permissible under section 101(a)), and a statute requires delivery of a written copy or other record of that contract, can the company deliver to the consumer an electronic record that makes notation of the fact that the contract was orally signed or, alternatively, include a copy of the voice recording?

Section 101(d): retention of contracts and records. Section 101(d) provides the protocol for the retention of electronic contracts and electronic records that are required to be retained pursuant to applicable law (it does not apply if they are not legally required to be retained). This section is intended to ensure that information stored electronically will remain effective for audit, evidentiary, archival and similar purposes.[80]

Under section 101(d)(1), when a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, an electronic record can satisfy the requirement if two criteria are met.[81] First, information in the contract or other record must "accurately reflect the information set forth."[82] Second, the electronic record must remain "accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required . . . in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise."[83]

The vagueness of the term "accurately reproduced" potentially raises questions. Does it mean that the provider has to be able to reproduce only the substantive portion of a document or verbatim reproduction, providing non-substantive formatting information? The floor statements provide little effective guidance.

With respect to the requirement that the information remain accessible, Senator Abraham stated that section 101(d)(1)(B) "only requires retained records to remain accessible to persons entitled to access them by statute. [It] does not require the business to provide direct access to its facilities nor does it require the business to update electronic formats as technology changes — the records must, however, be capable of being accurately reproduced at the time that reference to them is required by law."[84] This statement appears to be in contrast to the official comments to a similar provision of UETA which state that, "The requirement of continuing accessibility addresses the issue of technological obsolescence and the need to update and migrate information to developing systems." Thus while the provisions of section 101(d)(1) clearly appear to permit information originally stored in one form, such as the hard drive of a computer, to be transferred to another form such as CD-ROM or converted to an updated file format to preserve accessibility, it is not clear if such conversion or updating will be deemed to be required by the terms of this section.

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This section also permits parties to convert original written records to electronic records for retention, provided the requirements of section 101(d)(1) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The section significantly refers to the information contained in the contract or record, rather than referring to the contract or record itself, thereby clarifying that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an email is relevant, then that information should also be retained. However if it is the substance of the email that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

Section 101(d)(2) affords a limited exception. "A requirement to retain a contract or other record in accordance with [101(d)(1)] does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received,"[85] such as IP packet header information.

Additionally, if an original record is required, an electronic record that complies with section 101(d)(1) will suffice.[86] Similarly, if the retention of a check is required, an electronic record of the information on the front and back of the check will satisfy the requirement if in accordance with section 101(d)(1).[87] This provision specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. This section provides that, as long as the information on both the front and the back of the check is retained in an electronic record that meets the other requirements of section 101(d), the paper original of the check no longer needs to be retained.

Section 101(e): accuracy and ability to retain contracts and other records. Section 101(e) requires, despite section 101(a), that if a statute, regulation or other rule of law requires that a contract or other record be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record "may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record."[88] Other than self-destructing tapes (the so-called "Mission Impossible" exception?), what electronic forms should a company avoid using because they are not in "a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record"? This issue is important because if an electronic contract, record or signature does not meet the section 101(e) requirements, section 101(a) will not apply to situations where law requires the contract or other record to be in written form (*e.g.*, Statute of Frauds). To what extent does section 101(e) require that the form of the record be updated as technology develops?

In addition to the vagueness of the "accurately reproduced" standard, Section 101(e) possibly might be viewed as confusing the evidentiary requirements for authenticating a

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contract or record with the legal validity of the agreement itself or the enforceability of the obligations contained in the parties' agreement. In this view, this section implies that an entire contract might be invalidated if an electronic record relating to the contract is not retained in a way that meets the "accurately reproduced" standard.

Section 101(f): proximity of warnings, notices, etc. Section 101(f) states that nothing in Title I affects the proximity required by any statute, regulation, or rule of law with respect to any warning, disclosure, or other record required to be posted, displayed or publicly fixed.[89] However, it is unclear how a company that is using electronic records should meet proximity requirements for warnings, notices, disclosures, etc. that were developed for the paper world. There possibly could be physical difficulties in translating these requirements onto a screen.

Section 101(g): treatment of notarization and acknowledgement. Section 101(g) states that a notarization, acknowledgement, verification or other oath may be satisfied by an electronic signature if "the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record."[90] Given the absence of attribution or association provisions in the E-Sign Act (which are present at section 9 of UETA), there is a question as to what rules of attribution or association apply if the E-Sign Act, rather than UETA, is operative under the E-Sign Act's preemption provisions. The use of the term "logically associated with" provides little guidance as to what a party can legally accept.

Section 101(h): treatment of electronic agents. Section 101(h) addresses electronic agents. Provided the action of an electronic agent is legally attributable to the person to be bound, a contract or other record may not be denied legal effect, validity or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents.[91]

This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programming and use of the machine. This provision is consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, such as law of mistake or law of contract formation, unaffected to the greatest extent possible. However, a question arises as to what standards should apply to determine whether the action of an electronic agent is "legally attributable." Unlike section 9 of UETA, the E-Sign Act contains no formal attribution rules.

Sections 101(i) and 101(j): treatment of insurance industry, agents, and brokers. The McCarran-Ferguson Act[92] provides that regulation of the insurance industry is normally the sole province of the states. Congress does have the *power* to regulate the insurance industry, however, and federal law trumps state insurance law if Congress clearly states that its intent is to do so. Section 101(j) of the Act plainly states that Titles I and II of the E-Sign Act apply to the business of insurance,[93] thereby prohibiting states from refusing to enforce an insurance contract solely because it used an electronic signature or electronic record in its formation.

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Section 101(j) expands on this basic premise by exculpating insurance agents and brokers who act under the direction of a party to enter into a contract by means of electronic record or electronic signature "for any deficiency in the electronic procedures agreed to by the parties under that contract" but only if (i) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct; (ii) was not involved in the development or establishment of such electronic procedures; and (iii) did not deviate from such procedures.[94]

Section 102. Preemption

Section 102 is a significant provision which preempts state laws, while trying to take into account the interests of the states.[95] This section raises some of the most complex issues in the E-Sign Act for a party which is trying to determine whether it can or should take advantage of the E-Sign Act or UETA.

Section 102(a): general rule of preemption. Section 102(a) provides that a state statute, regulation or other rule of law may modify, limit or supersede the provisions of section 101 with respect to State law only if such statute, regulation or other rule of law satisfies the criteria laid out in either sections 102(a)(1) or 102(a)(2).

Under the first option, section 102(a)(1), the State statute, regulation, or other rule of law must constitute:

> . . . an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or Title II, or would not be permitted under paragraph [102(a)(2)(A)(ii)].[96]

This subsection closes the so-called "UETA section 3(b)(4) loophole" under which a state that enacts UETA may exempt from its enactment of UETA specific transactions governed by particular laws identified by the state when it enacts UETA.[97] This loophole had been a particular concern of advocates of a uniform nationwide standard because some states, most notably California, have enacted versions of UETA that contain numerous departures from the version of UETA approved by NCCUSL. Also, by expressly including the cross reference to section 102(a)(2)(A)(ii), the provision incorporates a technology neutrality provision, i.e., if a state enacts UETA with section 3(b)(4) exceptions those exceptions must not require, or accord greater legal status or effect to, a specific technology or technical specifications for electronic records or signatures.

However, there is a question as to whether all laws excepted by a state under section 3(b)(4) would be preempted because, as a practical matter, they are bound to be "inconsistent with" Titles I and II of the E-Sign Act, if only because, for example, they do not affirmatively contain the detailed consumer consent provisions found in Title I. The answer to this question hinges on what section 102(a)(1) means by "inconsistent with." If that term is construed broadly as suggested above, the section 3(b)(4) exception option will prove illusory. However, note that under section 102(a)(1) preemption exists

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only "to the extent that" such exception is inconsistent with Titles I and II of the E-Sign Act. Thus, the remainder of a state enactment of UETA (other than the section 3(b)(4) exceptions) presumably would not be preempted.

A separate issue arises in examining the placement of the comma in subsection (a)(1) (". . . this title or title II, or would not be permitted under paragraph 2(A)(ii) of this subsection"). The comma possibly suggests that the state law is not preempted by the E-Sign Act if it either is (i) an enactment of NCCUSL-approved UETA (except that any section 3(b)(4) exception thereto must be consistent with Titles I and II of the E-Sign Act) or (ii), if it is not an enactment of NCCUSL-approved UETA, it is technology neutral. There arguably is some sense to this interpretation, as it would allow flexibility for non-substantive changes to the version of UETA approved by NCCUSL, provided these changes do not "specify alternative procedures or requirements for the use or acceptance" of electronic records or signatures, in which case subsection (a)(2) would come into play. However, this reading of subsection (a)(1) is based on a close, technical reading of the text of that subsection and places much reliance on a single comma. There also is the question of whether this reading, which would result in a major loophole to the preemption provisions, is what Congress intended. There is no relevant legislative history which dispositively answers this question.[98]

Alternatively, the comma cited above could be read as an error in drafting so that the phrase "or would not be permitted under paragraph (2)(A)(ii)" is meant only to refer to and modify the state's enactment of NCCUSL-approved UETA as provided for in subsection (a)(1). The effect would be to disallow variations from the NCCUSL-approved version of UETA other than those contemplated by section 3(b)(4) and which are consistent with Titles I and II and are technology neutral.

Under the second preemption alternative, section 102(a)(2), the state law must specify the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records if three conditions are satisfied.[99] First, the alternative procedures or requirements must be consistent with Titles I and II of the E-Sign Act.[100] Second, the alternative procedures or requirements must "not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures."[101] Finally, if the state law is enacted or adopted after the date of the enactment of the E-Sign Act, it must make specific reference to the E-Sign Act.[102]

The net effect of these rules is to require an analysis that examines whether and to what extent the E-Sign Act preempts state law on a state-by-state basis. Thus, a party must examine whether the state adopted a clean version of UETA with no section 3(b)(4) exceptions, whether it adopted a clean version of UETA with section 3(b)(4) exceptions (and if so, whether those exceptions are consistent or inconsistent with Titles I and II of the E-Sign Act) or whether it adopted an unclean version of UETA (either with or without section 3(b)(4) exceptions that are either consistent or inconsistent with the E-Sign Act). Other variants that might have to be examined would be whether the state enacted a clean or unclean version of UETA plus the consumer consent provisions of the E-Sign Act or whether it adopted an unclean version of the E-Sign Act with consumer provisions that are different from but similar to those of the E-Sign Act.[103] Differing

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results as to preemption could occur, assuming the party could predict with certainty what is meant by the term "consistent."[104]

Several of the more obvious permutations under the first alternative of section 102(a)(1) are as follows:

A. *State Adopts a "Clean" Version of UETA.* In this example, if a state simply adopts the official version of UETA, UETA would supersede section 101 of the E-Sign Act with respect to state law.

B. *State Adopts a "Clean" Version of UETA But Also Exercises Its Authority Under UETA Section 3(b)(4).* In this example, if a state adopts the official version of UETA, but also exercises its authority under Section 3(b)(4) of UETA to make exceptions to the application of UETA to certain state laws, UETA would supersede section 101 with respect to state law. But the additional section 3(b)(4) exceptions would be preempted to the extent they are inconsistent with the E-Sign Act or mandate a specific technology. One of four outcomes is possible:

1. *The Excluded State Laws Match Those in the E-Sign Act.* For example, the state might exclude from UETA matters relating to adoption, divorce and other matters of family law. That exception is consistent with the E-Sign Act and is not preempted.

2. *The Excluded State Laws Go Beyond Those in the E-Sign Act.* For example, the state might exclude certain health care records requirements from UETA. That exception is "inconsistent with" the E-Sign Act and is preempted.

3. *The Excluded State Laws Do Not Contain Elements in the* E-Sign Act. For example the E-Sign Act. That exception arguably is "inconsistent with" the E-Sign Act, the state law might not contain the consumer consent provisions in and is preempted.

4. *The Excluded State Laws Might Mandate a Particular Technology.* For example, the state might exclude certain documents unless digital signatures are used for record retention and access matters. The state's UETA exceptions would not be permitted under the technology neutrality section 102(a)(2)(ii) and would be preempted.

On the other hand, if a state were to enact a law other than the official version of UETA (either a non-UETA statute or a version of UETA that contains non-conforming provisions or exceptions), the following examples illustrate how section 102(a)(2) would apply:

A. *State Adopts an "Unclean" Version of UETA.* In this example, the entire statute would be reviewed for consistency with the E-Sign Act. If any of the provisions (whether conforming or not to the official version of UETA) are inconsistent with the E-Sign Act or violate the technology neutrality requirements of the E-Sign Act, the entire statute should be preempted.

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B. *State Adopts an "Unclean" Version of UETA, But Also Exercises Its Authority Under UETA Section 3(b)(4).* The same analysis described in the example (A) immediately above should apply. Both the UETA statute and the exceptions to the application of UETA to certain state laws made pursuant to section 3(b)(4) of UETA would be reviewed for consistency with the E-Sign Act. Thus, if any of the provisions are inconsistent with the E-Sign Act or violate the technology neutrality requirements of the E-Sign Act, the entire UETA statute and the exceptions should be preempted.

Under section 102(a)(2), this result would be the case even if the non-conformity with the official version of UETA were limited to a UETA change that is "consistent" with the E-Sign Act (*e.g.*, deleting "governmental" from the definition of "transaction") and to the exercise of authority under section 3(b)(4) of UETA to exclude state laws beyond the categories provided in the E-Sign Act. Under this scenario, the entire statute would be preempted. However, this approach produces what might appear as an odd result compared to section 102(a)(1). Because section 102(a)(2) does not include language corresponding to the section 102(a)(1) preemption of inconsistent UETA section 3(b)(4) state laws, inconsistent UETA section 3(b)(4) provisions will always fail the section 102(a)(2) consistency test, leading, arguably, to failure of the entire statute under section 102(a)(2).

One might take the position that "clean" provisions of a non-conforming version of UETA are *per se* "consistent" with the E-Sign Act, pointing to the existence of section 102(a)(1), and that the only inquiry into "consistency" required by section 102(a)(2) is with respect to the expressly nonconforming provisions. Advocates of this view would point to statements by Chairman Bliley to the effect that "a State that enacted a modified version of UETA would not be preempted *to the extent* that the enactment or adoption . . . met the conditions imposed in subsection (a)(2)."[105]

Critics of the Bliley statement might point to the plain language of section 102(a)(2), which is not modified by the language "to the extent that," and argue that Congress, having used the "to the extent" phrase in section 102(a)(1), expressly intended a "strict" preemption analysis by deliberately omitting the phrase from section 102(a)(2). Supporters of Chairman Bliley's statement might counter that UETA is not a single statute, but consists of several statutes, each of which should be separately assessed for conformity under section 102(a)(1). This counter argument in turn raises the question of what Congress meant by a "statute, regulation, or rule of law" in section 102(a). For example, would an individual section (or even a particular sentence) from UETA constitute a "statute, regulation, or rule of law"? Will courts resort to such granular analysis to avoid preemption of a state statute that is mostly consistent with the E-Sign Act, but inconsistent in a few respects, preempting those few provisions and upholding the others? Did Congress really intend an "all or nothing" analysis?

As a practical matter, parties examining these issues will likely have to make an educated guess as to whether the E-Sign Act preempts state law in any given case and take the business risk of future court rulings that either agree or disagree with that determination.

Section 102(b): exceptions for actions by states as market participants. Under the section 102(a)(2) alternative to the UETA option for states, the technology neutrality condition, section 102(a)(2)(A)(ii), need not be satisfied if a state statute, regulation or other rule of law pertains to a state acting as a "market participant,"[106] another undefined term.

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Section 102(c): prevention of state circumvention. Section 102(c) closes the so-called "section 8(b)(2) loophole" by not permitting states to circumvent Titles I or II of the E-Sign Act through "the imposition of nonelectronic delivery methods under section 8(b)(2)" of UETA.[107] Section 8(b)(2) of UETA states: "If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply: . . . (2) Except as otherwise provided in (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law." Closing of the section 8(b)(2) loophole was a priority of the financial services industry, which alerted to the problem while the bill was in conference committee. Their concern was that this loophole would allow states to impose nonelectronic delivery requirements.

Section 103. Specific Exceptions

Section 103(a): exception of certain requirements from section 101. These provisions were much debated during the legislative process, and the list of exclusions expanded and contracted numerous times. The list that emerged is a compromise.

Section 103(a)[108] states that section 101 shall not apply to a contract or other record to the extent that it is governed by a statute, regulation, or other rule of law with respect to (i) the creation and execution of wills, codicils, or testamentary trusts;[109] (ii) adoption, divorce, or other matters of family law;[110] or (iii) the Uniform Commercial Code ("UCC"), as in effect in any state, other than sections 1-107[111] and 1-206[112] and Articles 2[113] and 2A of the UCC.[114] These exceptions are based on those in UETA.

Section 103(b): additional exceptions to section 101. Additionally, section 103(b)[115] excludes the following from the provisions of section 101: (i) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;[116] (ii) any notice of the cancellation of utility services (including water, heat, and power);[117] (iii) any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;[118] (iv) any notice of the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);[119] (iv) any notice of recall of a product, or material failure of a product, that risks endangering health or safety;[120] and (vi) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.[121]

Most of these exclusions were inserted by the conferees to answer concerns that consumers might not receive the notice or document in question because they had changed their e-mail address or installed different software since they gave their consent. In effect, these types of notices and documents were considered too important to rely solely on electronic records.

Unlike section 13 of UETA, the E-Sign Act does not specifically provide that electronic contracts, records and signatures may not be excluded from evidence solely because of their electronic form. One might reasonably infer that if electronic contracts, records and signatures subject to the E-Sign Act could be denied admissibility in court it would defeat Congress' intent in enacting section 101(a).

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Section 103(c): required future review of exceptions to section 101. Section 103(c)(1) directs the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, to review the operation of the exceptions to section 101 over a period of three years to evaluate whether the exceptions continue to be necessary for the protection of consumers.[122] Within three years after the enactment of the E-Sign Act the Assistant Secretary must submit a report to Congress on the results of this evaluation.[123] However, a federal regulatory agency may, with respect to a matter within its jurisdiction, determine after notice and opportunity for public comment, and publishing of a finding, that one or more of the exceptions are no longer necessary for the protection of consumers and that eliminating such exceptions will not increase the material risk of harm to consumers. It may then apply section 101 to the exceptions identified in its finding.[124]

Section 104. Applicability To Federal And State Governments

Section 104 addresses the applicability of the E-Sign Act to federal and state governments, and specifically to agency rule making.[125]

Section 104(a): effect on federal and state regulatory agencies' filing and access requirements: Subject to section 104(c)(2),[126] section 104(a) states that nothing in Title I limits or supercedes any requirement by a federal regulatory agency, self-regulatory organization (SRO), or state regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.[127] This limited inclusion of SROs is the only reference to SROs in the E-Sign Act.

Section 104(b): preservation of federal and state regulatory agencies' existing rulemaking authority. Section 104(b)[128] preserves federal and state regulatory agencies' existing rule making authority,[129] limits the interpretation authority,[130] sets performance standards,[131] and gives an exception for government acting as a market participant.[132]

First, section 104(b)(1) allows a federal or state regulatory agency, that is responsible for rulemaking under any other statute, to interpret section 101 with respect to such statute through the issuance of regulations pursuant to a statute or, to the extent the agency is authorized, by issuing orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a federal regulatory agency).[133]

Second, section 104(b)(2) limits the federal and state agencies' ability to interpret section 101. Federal agencies are prohibited from (and state agencies are preempted from) adopting any regulation, order, or guidance unless: (i) it is consistent with section 101 or (ii) it does not add to the requirements of section 101.[134] The agency may also adopt a regulation, order, or guidance if the agency finds that: (i) there is a "substantial justification" for the regulation, order, or guidance; (ii) the methods selected to carry out that purpose (a) are "substantially equivalent" to the requirement imposed on records that are not electronic records and (b) will not impose "unreasonable costs" on the acceptance and use of electronic records; and (iii) meets the technology neutrality provision, which is an essential component of a national baseline, specifically that "the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signature."[135]

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The wording of this provision raises a number of questions. What qualifies as a "substantial justification?" How does one determine that the selected methods for electronic transactions and records are "substantially equivalent" to requirements for non-electronic transactions and records? Additionally, the regulation cannot impose "unreasonable costs on the acceptance and use of electronic records." What is an unreasonable cost? Acceptance by whom? Does the reasonableness of the cost depend upon whether the cost imposed is ultimately borne by a consumer or a business?

Another important question that arises under the above two subsections is whether they negate prior rulemakings or similar actions by federal or state agencies which facilitate electronic delivery of records, perhaps in ways that are not identical to section 101 of the E-Sign Act. Examples would include SEC Release No. 33-7288; 34-37182; IC-21945; IA-1562 (May 9, 1996) 1996 SEC LEXIS 1299, an interpretive release in which the SEC published its views with respect to the use of electronic media by broker-dealers, transfer agents and investment advisers to deliver information. It is unclear at this point whether the SEC and other agencies which have issued similar rules to allow electronic delivery under certain circumstances and subject to specified criteria now have to revise and reissue those rules to meet the standards of section 104(b) of the E-Sign Act. A related question is whether affected industries can continue to rely on such existing agency rules in the interim.

Section 104(b)(3) defines the performance standards under the E-Sign Act for federal and state regulatory agencies.[136] Under section 104(b)(3)(A) federal or state regulatory agencies may interpret section 101(d) to specify performance standards to ensure accuracy, record integrity, and accessibility of records to be retained, even if in violation of section 104(b)(2)(C)(iii), if the requirement (i) serves an "important governmental objective" and (ii) is "substantially related" the achievement of that objective.[137] However, section 104(b)(3)(A) does not grant any federal or state regulatory agency the authority to require use of a particular type of software or hardware in order to comply with section 101(d).[138]

As above, the use of terms like "important governmental objective" and "substantially related" are sources of uncertainty and possibly of future litigation.

Most importantly, with respect to retention of records in a tangible printed or paper form, a federal or state regulatory agency may interpret section 101(d), in contravention of section 104(b)(2)(C)(iii), to require such retention if (i) there is a "compelling government interest" relating to law enforcement or national security for imposing such requirement and (ii) imposing such a requirement is "essential" to attaining such interest.[139] Thus, there is an "escape valve" that allows a federal or state agency to require paper records, not just for filings with it but for transactions by the industry it regulates. However, terms like "compelling governmental interest" and "essential" may invite litigation.

If the government is acting as a market participant, then section 104(b)(2)(C)(iii) does not apply to the statutes, regulations, or other rules of law governing procurement by the federal or any state government or any of their agencies or instrumentalities.[140]

Section 104(c): additional limitations on federal and state regulatory agencies. Additionally, section 104(c) makes clear that nothing in section 104(b), except for section 104(b)(3), is to be construed to grant any federal or state regulatory agency authority to impose or

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reimpose any requirement that a record be in a tangible printed or paper form.[141] Further, nothing in sections 104(a) or 104(b) relieves any federal regulatory agency of its obligations under the Government Paperwork Elimination Act.[142]

Section 104(d): authority granted to federal and state regulatory agencies to exempt certain categories of records from section 101(c) consent requirement. Finally, section 104(d) addresses the authority of federal and state agencies to exempt from the consent provisions. First, 104(d)(1) enables a federal regulatory agency, "with respect to a matter within its jurisdiction, by regulation or order issued after a notice and an opportunity for public comment, to exempt without condition a specified category or type of record from the section 101(c) requirements if the exemption is necessary to eliminate a 'substantial burden on electronic commerce' and will not increase the 'material risk' of harm to consumers."[143]

Further, section 104(d)(2) directs the SEC to issue a regulation or order pursuant to 104(d)(1) within 30 days after the date of enactment of the E-Sign Act, exempting from section 101(c) any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940, or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 2(a)(10)(A) of the Securities Act of 1933.[144] This provision was inserted late in the process at the conference in order to meet concerns that the Act not interfere with the electronic delivery (without consumer consent) of prospectuses which must accompany or precede the provision of sales literature.

The SEC fulfilled the requirement of Section 104(d)(2) on July 27, 2000, with the issuance of interim final Rule 160 under the Securities Act of 1933.[145] Consistent with the SEC's interpretations of existing law, the rule permits a registered investment company to provide its prospectus and supplemental sales literature on its web site or by other electronic means without first obtaining investor consent to the electronic format of the prospectus. The SEC also clarified its interpretation on the responsibility of registered investment companies for hyperlinks to third-party web sites from their advertisements or sales literature. Rule 160 is effective October 1, 2000, which also the general effective date for Title I of the E-Sign Act (see *infra*, however).

Section 104(e): Federal Communications Commission ("FCC") electronic letters of agency. Section 104(e) directs the FCC to "not hold any contract for telecommunications service or letter of agency preferred carrier change, that otherwise complies with the Commission's rules, to be legally ineffective, invalid, or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization."[146]

Section 104(e) applies the general rule of validity of electronic records and electronic signatures to specific papers filed with the FCC, directing that it shall not find a contract or record that otherwise meets its requirements legally to be ineffective or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization. Senator Abraham stated that this section was included because the FCC "has been very slow, even reticent, to clearly authorize the use of an Internet letter of agency for a consumer to conduct a preferred carrier change." As a result of the FCC's failure to act on this matter, the E-Sign Act provides specific direction to the FCC to recognize Internet letters of agency for a preferred carrier change.[147]

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Section 105. Studies

Section 105(a): delivery of studies. Within 12 months of enactment of the E-Sign Act the Secretary of Commerce must conduct a study and report to Congress regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared to delivery of records via the U.S. Postal Service and private express mail services.[148]

Section 105(b): study of electronic consent. Additionally, within 12 months after the date of the enactment of the E-Sign Act, the Secretary of Commerce and the Federal Trade Commission ("Commission") must submit a report to the Congress evaluating (i) any benefits provided to consumers by the "reasonable demonstration" procedure required for consumer consent to receive electronic records in section 101(c)(1)(C)(ii); (ii) any burdens imposed on electronic commerce by section 101(c)(1)(C)(ii); (iii) whether the benefits of section 101(c)(1)(C)(ii) outweigh the burdens; (iv) whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and (v) suggesting any appropriate revisions to section 101(c)(1)(C)(ii).[149] This subsection was added as a concession to industry and Chairman Gramm, both of whom were concerned about the electronic consent provisions.

Section 106. Definitions

The defined terms in the E-Sign Act are in large part based on the UETA defined terms.[150] Thirteen terms are defined in the E-Sign Act. Four terms involve the base term "electronic." First, the term "electronic" is broadly defined and means "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[151] Second, the term "electronic agent" means "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response."[152] Third, "electronic record" means "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."[153] Finally, "electronic signature" is defined as "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."[154]

Five of the defined terms relate to parties who will interact under the E-Sign Act. "Consumer" is defined as "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."[155] 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."[156] The term "federal regulatory agency" in Title I, is defined as an agency, as defined in section 552(f) of Title 5, United States Code: ". . . the term 'agency' . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[157] Under the E-Sign Act a 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

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organization or entity, by a Federal regulatory agency, or by another self-regulatory organization."[158] Finally, a "State" is defined as including "the District of Columbia and the territories and possessions of the United States."[159]

The final four remaining terms of the E-Sign Act, are "information," "records," "requirements" and "transactions." "Information" is defined as "data, text, images, sounds, codes, computer programs, software, databases, or the like."[160] The important term "record" is broadly defined to mean "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[161] It thus covers a wide variety of notices and other communications. However, it is notable that "electronic record" is defined to include "a contract or other record," whereas the definition of a "record" does not expressly include a contract, although it may implicitly include the term. The term "requirement" is defined to include a prohibition.[162] Finally, "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[:] (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof."[163] The financial services industry argued unsuccessfully for a more expansive definition that expressly included a number of investment products by name. However, the existing definition should reasonably be construed to include most, if not, all financial services.

Section 107. Effective Date

Section 107(a): general effective date. In general, Title I of the E-Sign Act is effective on October 1, 2000.[164]

Section 107(b): exceptions to general effective date. However, with respect to any records required to be retained under federal or state statute, regulation or other rule of law, the effective date for Title I of the Act is March 1, 2001.[165] The scope of this delayed effective date covers many records, including basic transactional records, which are required to be maintained by regulated industries such as banks and broker-dealers. Thus, under the wording of section 107(b)(1), "this title" (meaning Title I of the Act, with all of its substantive provisions in section 101) will not be effective as to any record covered by section 107(b)(1). Therefore the substantive benefits of the E-Sign Act probably will largely not be available to regulated industries until March 1, 2001.

Moreover, this March 1, 2001 effective date as to retained records will be further delayed until June 1, 2001 if on March 1, 2001 a federal or state regulatory agency has announced, proposed or initiated, but not completed, a rulemaking proceeding to prescribe a regulation under section 104(b)(3)(A).[166]

Two additional delayed effective dates are incorporated in the E-Sign Act for certain government-guaranteed or insured loans and for student loans. First, as to any transaction involving a loan guarantee or loan guarantee commitment made by the United States government or involving a program listed in the Federal Credit Supplement of the FY2001, Budget of the United States, Title I applies on or after June 30, 2001.[167] Second, as to records provided to a consumer under a student loan application or student loan pursuant to the Higher Education Act of 1965, section 101(c) of the E-Sign Act does not apply

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until the earlier of June 30, 2001 or "such time as the Secretary of Education publishes revised promissory notes under section 432(m) of the Higher Education Act of 1965."[168]

2. *Title II — Transferable Records*

Section 201(a): definitions for section 201(a). Section 201 sets forth the criteria for electronic negotiable instruments, referred to as "transferable records," inserted to facilitate increased use of electronic media in the secondary mortgage market.[169] It is based on section 16 of UETA.

Section 201 provides legal support for the creation, transferability and enforceability of electronic notes as against the issuer or obligor. The certainty created by section 201 is intended to provide the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents. Section 201 provides for the creation of an electronic record which may be controlled by the holder, who in turn may obtain the benefits of holder in due course and good faith purchaser status.

A transferable record is defined as "an electronic record that[:] (i) would be a note under Article 3 of the [UCC] if the electronic record were in writing; (ii) the issuer of the electronic record expressly has agreed is a transferable record; and (iii) relates to a loan secured by real property."[170] Under Title II, a transferable record may be executed using an electronic signature.[171]

Sections 201(b-g): treatment of transferable records. Under Section 201 acquisition of "control" over an electronic record serves as a substitute for "possession" of the paper instrument. "Control" under Section 201 serves as a substitute for delivery, endorsement and possession of a negotiable promissory note. Section 201(b) allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving a third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment.

Section 201(c) then sets forth a list of requirements for such a system. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

If a person establishes control, section 201(d) provides that that person is the "holder" of the transferable record, which is equivalent to a holder of an analogous paper negotiable instrument. If the person acquired control in a manner which would make it a holder in due course ("HIDC") of an equivalent paper record, the person acquires the rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses.

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Section 201(e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HIDC rights under section 201(d), the obligor has all the rights and defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record. Finally, section 201(f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay, thereby allowing the obligor to protect its interest and obtain the defense of discharge by payment or performance.

Section 202: effective date of Title II. Title II is effective 90 days after enactment of the E-Sign Act.

3 Title III — Promotion Of International Electronic Commerce

Section 301: principles governing the use of electronic signatures in international transactions. Title III directs the Secretary of Commerce to promote electronic commerce on an international level.[172] It requires the Secretary to promote the acceptance and use, on an international basis, of electronic signatures in a manner consistent with section 101 of Title I and to eliminate or reduce the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.[173] Title III directs the Secretary to follow four principles in international negotiations: (i) remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law; (ii) permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced;[174] (iii) permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid; and (iv) take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.[175]

4. Title IV — Commission On Online Child Protection

Section 401: authority to accept gifts. Title IV amends the Child Online Protection Act to include a new subsection.[176] This subsection allows the Commission on Online Child Protection to accept, use and dispose of gifts, bequests or devises of services or property, both real and personal for the purpose of aiding or facilitating the work of the Commission.[177]

ENDNOTES

1. Pub. L. 106-229.

2. *See* Lawrence L. Knutson, "Clinton Signs E-Signature Bill," *AP U.S. News*, June 30, 2000. The E-Sign Act was long sought by both the financial services and the technology indus-

tries. If it lives up to its sponsors' expectations, it could soon allow businesses to seal multimillion-dollar mergers and consumers to apply for loans, close mortgages or trade stocks with a simple click of a computer key. The E-Sign Act could potentially have a profound effect on both business-to-business and business-to-consumer E-commerce. According to two recent estimates, U.S. online users will account for 75 percent of all U.S. retail spending (both online and offline) in 2005, up to 43 percent in 1999, with U.S. Internet B-to-B trade soaring to $6 trillion in 2005. *See* Jupiter Communications, Inc. Forecasts, "Online Retailers Missing Greatest Opportunity: Web-Influenced Spending To Exceed $630 Billion in 2005" (May 18, 2000) and "U.S. Internet B-to-B Trade Soars to $6 Trillion in 2005" at *http://www.jupiterresearch.com/company/pressrelease.jsp?doc.*

3. The author wishes to acknowledge, with gratitude, the assistance of Patricia Wick in the preparation of this article. The ideas expressed herein are solely those of the author and not necessarily those of Alston & Bird LLP or any of its clients.

4. As of July 31, 2000, some 48 states had enacted or were in the process of enacting legislation to regulate electronic authentication. No two of these state laws were the same. In layman's terms, the laws came in one of two forms: "thick" or "thin." The model for the "thick" approach is the Utah Digital Signature Act of 1996, Utah Code Section 46-3-101 et seq., which addresses use of electronic authentication by the general public, is Public Key Infrastructure ("PKI") — specific and regulates certificate authorities ("CAs") through various systems of registration, licensing and payment of fees. (PKI establishes electronic authentication through issuance of a certificate, which is a computer-based record that identifies the CA issuing it, identifies its subscriber, contains the subscriber's public key and is digitally signed by the CA). On the other hand, a law adopting the "thin" approach might merely give some legal recognition and effect to electronic authentication or regulate only transactions with the state government.

   Beyond these two basic formats, state laws vary widely regarding such matters as registration of CAs and the minimal content and technological attributes of certificates. Other areas of divergence include the treatment of licensed and unlicensed CAs; whether to impose fees on CAs (and how much); the suspension of certificates; the extent of a CA's liability for erroneous certification; whether a person who receives a message sent with a certificate must actively agree to use the electronic form; and the definitions of such basic terms as "certificate," "digital signature," "message" and "accept a certificate."

   In addition to variations in state statutory treatment of electronic authentication, state courts have also been a source of uncertainty. Some courts have upheld electronic contracts, provided they evidence true mutual assent. *See*, e.g., CompuServe Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Groff v. America Online, Inc., 1998 WL 307001 (R.I. Super. 1998). However, other courts have taken a different view. For example, in Roos v. Aloi, 127 Misc. 2d 864, 487 N.Y.S. 2d 637 (1985), a New York court held a tape-recorded contract unenforceable for failure to comply with the Statute of Frauds. Also see Department of Transportation v. Norris, 222 Ga. App. 361, 474 S.E. 2d 216 (1996) (rv'd. on other grounds), popularly known as the "beeps and chirps" case, in which the Court of Appeals of Georgia held that a facsimile transmission of a plaintiff's notice of a legal claim did not satisfy the requirement of written notice because a fax is only a series of "beeps" and "chirps."

5. For additional information on the Ad Hoc Committee's position see white paper entitled, *Framework for National Electronic Commerce Legislation*, Ad Hoc Committee, April, 1997.

6. 12 U.S.C. § 1881. The Bank Protection Act of 1968 requires federal banking agencies to implement standards designed to ensure that financial institutions take appropriate steps to guard against theft.

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7. Technology neutrality is important because public key cryptography is not the only technology capable of playing a role in electronic contracting. Biometrics, including signature dynamics, retinal scans, voice recognition and other electronic techniques, are under development. The biometrics industry wants to ensure that the marketplace, rather than Congress, decides which technology wins acceptance.

8. Statement of P. Michael Nugent, General Counsel for Technology and Intellectual Property, Citibank, before the Committee on Banking and Financial Services, Subcommittee on Domestic and International Monetary Policy, United States House of Representatives, July 9, 1997.

9. Testimony of Dick Mossberg, Associate Counsel, Government Affairs, Ford Motor Credit Company, on behalf of the Electronic Commerce Forum before the Committee on Banking, Housing and Urban Affairs, Subcommittee on Financial Services and Technology, United States Senate, October 28, 1997.

10. Quoted in *Reuters News Media*, "Clinton Administration Wants No Digital Signature Bill Yet," October 29, 1997. *See* also "Testimony of Andrew J. Pincus, General Counsel of the Department of Commerce before the House Committee on Science, Subcommittee on Technology," United States House of Representatives, October 18, 1997.

11. An identical measure was introduced March 17 by Rep. Merrill Cook (R-UT) in the House of Representatives as H.R. 3472 and referred to the House Committee on Banking and Financial Services. That bill also died in that committee.

12. For a recent example of these reports, *see* Statement of U.S. Commerce Secretary Norman Y. Mineta on Commerce Department Release of E-Retail Sales Data, August 31, 2000 at *http://www.census.gov/mrts/www/current.html*.

13. Title XVII of Public Law 105-277.

14. *See* S. Rep. No. 106-131, *Millenium Digital Commerce Act*, Report of the Committee on Commerce, Science, and Transportation on S. 761, at 2 (July 30, 1999).

15. S. 761 incorporated several important principles contained in the Bennett bill from the prior Congress, including a minimalist approach that did not seek to allocate liabilities or establish new regulatory schemes but which established broad recognition and effect for electronic authentication and provided for technology neutrality. However, it differed from the Bennett bill in that it was not "bank-centric," applied more broadly to electronic records and contracts as well as authentication, contained definitions consistent with those in UETA and incorporated deference to UETA within the preemption provisions of the legislation.

16. S. 921 was referred to the Senate Banking Committee because that committee has exclusive jurisdiction over securities issues. Indeed, the companion bill in the Senate was necessitated because the Senate Commerce Committee (unlike its analogue in the House) has no jurisdiction over securities issues.

17. S. Rep. No. 106-131, *supra*.

18. An "electronic agent" is a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response. *See* definition at section 106(2) of the E-Sign Act, S. 761, 106th Cong. § 106(2) (2000).

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19. *See*, S. Rep. No. 106-131, *supra*.

20. Under Senate procedure, a "hold" is an informal practice by which a Senator informs his or her floor leader that he or she does not wish a particular bill or other measure to reach the floor for consideration. The Majority Leader need not follow the Senator's wishes, but it serves as a notice that the opposing Senator may filibuster any motion to proceed to consider the measure. A filibuster is the informal term for any attempt to block or delay Senate action on a bill or other matter by debating it at length, by offering numerous procedural motions or by any other delaying or obstructive actions. A cloture vote, however, can override a filibuster. *See* Senate website at *www.senate.gov/learning/index.cfm*.

21. *See, e.g.*, Robert MacMillan, "Digital Signatures Bill Clears the Senate," *Post-Newsweek Business Information, Inc. Newsbytes*, November 19, 1999 and "Abraham To Drop Records Language from 'E-Sign' Bill, *National Journal's CongressDaily*, October 13, 1999.

22. *See* 146 CONG. REC. H11749-H11754 (daily ed. Nov. 9, 1999).

23. The Leahy language (section 5(a)) only extended legal validity to "contracts" and not to "records." Advocates of electronic commerce considered the inclusion of records — not just contracts containing records — in this legislation to be critical because of the number of documents, not deemed to be "contracts" for purposes of the law, which are integral to expanding electronic commerce and which need to be provided in electronic form. Moreover, the Leahy substitute specifically "denied" any "legal effect or enforceability" to contracts containing electronic records when "a law" exists which "requires that a contract be in writing," unless such records take a form which "can be retained" and which "can be used to prove the terms" of the contract (section 5(c)). The Leahy substitute also contained none of the specific language relating to the principles of uniformity and consistency found in H.R. 1714. On the contrary, sections 3(8) and 5(g) sunset the statute when "any State" adopts the UETA in a form "substantially similar" to the version presented to the states by NCCUSL. H.R. 1714, on the other hand, did not contain the "substantially similar" language, and Section 102(b)(4) of that bill made expressly clear that no state statute may be "otherwise inconsistent" with federal law in this arena.

24. Letter from Andrew J. Pincus, General Counsel, Department of Commerce to the Honorable Tom Bliley, Chairman, Committee on Commerce, House of Representatives, August 4, 1999.

25. H. Rep. No. 106-341, Part 1, House Committee on Commerce Report to Accompany H.R. 1714, "Electronic Signatures in Global and National Commerce Act" (September 27, 1999).

26. *See* the dissenting views of Congressman Coble in H. Rep. No. 106-341, Part 2, Report of the Committee on the Judiciary to Accompany H.R. 1714, "Electronic Signatures in Global and National Commerce Act," (October 15, 1999) at 17-19.

27. *Id.*

28. *Id.* In addition, Republican Reps. Jim Sensenbrenner (R-WI) and Bill McCollum (R-FL) were absent and did not vote.

29. "E-Sign Bill Due Up Today on Suspension Calendar," *National Journal's CongressDaily*, October 26, 1999.

30. *See* Comments to the Subcommittee on Courts and Intellectual Property, House Judiciary Committee, Regarding H.R. 1714 (the "Electronic Signatures in Global and National Commerce Act"), September 30, 1999 by Margot Saunders, Managing Attorney, National Consumer Law Center, Inc.

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31. A conference committee is a temporary, ad hoc panel composed of House and Senate conferees which is formed for the purpose of reconciling differences in legislation that has passed both chambers. Conference committees are usually convened to resolve bicameral differences on major and controversial legislation. *See* Senate website, *supra*.

32. *See* Wyden Draft Modifications to H.R. 1714 (undated).

33. *See, e.g.*, "E-Signature Bill Conferees Expected To Finally Meet Today," *National Journal's CongressDaily*, May 18, 2000, and "Summers, Daly Outline Goals on E-Sign Bill," *National Journal's CongressDaily*, April 28, 2000.

34. Letter from Andrew J. Pincus, General Counsel, Department of Commerce, to the Honorable Henry J. Hyde, October 12, 1999.

35. The Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338, was signed into law by the President on November 12, 1999.

36. Key New Democrats involved in this effort included Rep. Jay Inslee (D-WA), Jim Moran (D-VA), Cal Dooley (D-CA) and Anna Eshoo (D-CA).

37. *See* 146 CONG. REC. H11749-H11754, *supra*.

38. 146 CONG. REC. H11749-H11754, *supra*.

39. *See* "House Moves To Conference With Senate on E-Sign Bills," *National Journal's CongressDaily*, February 17, 2000. The House conferees were Chairman Bliley, and Reps. Tauzin and Oxley (on the Republican side), and Reps. Dingell and Markey (on the Democratic side).

40. *See* "Senate Taps E-Sign Conferees," *National Journal's CongressDaily*, March 29, 2000. Senate representatives were, from the Commerce Committee: Chairman John McCain, Ted Stevens (R-AL), Conrad Burns, Slade Gorton (R-WA), Kay Bailey Hutchinson (R-TX), Spencer Abraham, Ranking Democrat Ernest F. "Fritz" Hollings (D-SC), Daniel K. Inouye (D-HI), John D. "Jay" Rockefeller (D-WV), John F. Kerry (D-MA), and Ron Wyden (D-OR).

    Representing the Senate Banking Committee were Chairman Phil Gramm, Robert F. Bennett, and Ranking Democrat Paul Sarbanes; Senate Judiciary Committee members were Chairman Orrin Hatch (R-UT), Strom Thurmond (R-SC), and Ranking Democrat Patrick Leahy.

41. H. Rep. No. 106-661, *Electronic Signatures in Global and National Commerce Act*, June 8, 2000.

42. A "statement of managers" is a section of a conference report (the final version of a bill proposed by House and Senate conferees) which provides a section-by-section explanation of the agreement. Normally included as part of the conference report, the statement of managers is an important element of the legislative history of an act.

43. The weight accorded floor statements will depend on the court interpreting them. *See* e.g., concurring opinion of Justice Scalia in Thompson v. Thompson, 484 U.S. 174 (1988), in which he stated: "Committee reports, floor speeches, and even colloquies between Congressmen . . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." [484 U.S. 174, 192].

44. Section 7 of UETA states "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because it is in electronic form. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law."

45. *See* S. 761, 106th Cong. §106(13) (2000) (defining "transaction"). Consistent with plain language of the statute, the conferees specifically rejected including "governmental" affairs in the definition of "transaction." 146 CONG. REC. S5165, 5221 (2000) (statement of Sen. Leahy). "Even though some aspects of such governmental transactions . . . are commercial in nature, they are not covered by this because they are part of a uniquely governmental operation. 146 CONG. REC. S5165, 5229 (2000) (statement inserted into the Congressional Record by Sen. Sarbanes (D-Md.)), *Statement of Senators Hollings, Wyden and Sarbanes Regarding the Electronic Signatures in Global and National Commerce Act*) (hereinafter, the "Hollings, Wyden and Sarbanes Statement"). Rep. Dingell also inserted a statement which is virtually a verbatim repetition of the Hollings, Wyden and Sarbanes Statement and included the language, *supra*, on government transactions. 146 CONG. REC. H4341, 4357 (2000) (statement of Rep. Dingell.) The Hollings, Wyden and Sarbanes Statement was offered in an effort to clarify and rebut, from the Democratic perspective, certain interpretations of the E-Sign Act advanced by Republican conferees in colloquies on the floor. 146 CONG. REC. S5165, 5229 (2000) (statement of Sen. Sarbanes). Senator Wyden, who himself offered explanations, commented that "I believe it is important to the legislative history to say a brief word about the process. This is necessary because, unfortunately, statements are being made or inserted in the RECORD and colloquies are being offered that seek to weaken, undermine and even directly contradict the actual words of the text of the Conference Agreement. This appears to come from some quarters that do not share the majority view of those who signed the Conference documents. As one of the principal sponsors of the Senate measure, S. 761, I am compelled to point out that the actual text of the legislation can and should stand on its own." 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Wyden.) As noted above, there was no statement of managers that would have provided interpretive guidance on the E-Sign Act.

46. "The Conferees added the word "solely" in both sections 101(a)(1) and (2) to ensure that electronic contracts and signatures are not inadvertently immunized by this Act from challenge on grounds other than the absence of a physical writing or signature." 146 CONG. REC. S5165, 5229 (2000) (the Hollings, Wyden and Sarbanes Statement). "[S]olely truly means 'solely or in part.'" 146 CONG. REC. S5281, 5283 (2000) (statement inserted into the Congressional Record by Senator Abraham, *Explanatory Statement of S. 761, The "Electronic Signature in Global and National Commerce Act"*) (hereinafter, "Abraham Explanatory Statement"). Chairman Bliley inserted a statement which is almost a verbatim repetition of the Abraham Explanatory Statement and was offered for the same purpose: "The following statement is intended to serve as a guide to the provisions of the conference report accompanying S. 761, the Electronic Signatures in Global and National Commerce Act." 146 CONG. REC. H4341, 4352 (2000) (statement of Chairman Bliley) (hereinafter, the Bliley Explanatory Statement). However, Senator Leahy sought to place the Bliley Explanatory Statements in perspective: "I note that I saw in the CONGRESSIONAL RECORD of the House proceedings a statement by Chairman BLILEY that is formatted like a managers' statement of a conference report. I feel I must clarify that those are Mr. BLILEY'S views, not a statement of the managers." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

47. S. 761, 106th Cong. §101(a)(1) (2000).

48. S. 761, 106th Cong. §101(a)(2) (2000).

49. Although not spelled out in the text of the Act, it should cover unilateral actions by one of the parties to a transaction or by any other person with an interest in the transaction. Thus, it should cover, for example, activities relating to the establishment or operation of an employee benefit plan, such as an Individual Retirement Account ("IRA"), section 403(b) annuity or an education savings program, some of which activities might be unilateral in nature, such as establishment of trusts.

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50. S. 761, 106th Cong. §101(b)(1) (2000). *See* 146 CONG. REC. S5165, 5221 (2000) (statement of Sen. Leahy).

51. S. 761, 106th Cong. §101(b)(2) (2000).

52. S. 761, 106th Cong. §101(c)(1) (2000). "But the bottom line is that nothing requires an American to use the service of the Internet or to use this bill to sign electronically for purchases and sales. This is purely voluntary. It is an opt-in system. We have to consent to it." 146 CONG. REC. H4341, 4348 (2000) (statement of Rep. Tauzin). "[E]ngaging in electronic transactions is purely voluntary. No one will be forced into using or accepting an electronic signature or record. Consumers that do not want to participate in electronic commerce will not be forced or duped into doing so." 146 CONG. REC. H4341, 4348 (2000) (statement of Chairman Bliley).

53. Although section 101(b) implicitly incorporates certain "party autonomy" principles by stating the voluntary nature of using and accepting electronic signatures and records, it falls short of an express party autonomy provision. UETA includes, and earlier versions of the E-Sign Act included, broader and non-explicit language preserving the principle of party autonomy, specifically allowing parties to a contract to establish acceptable procedures or requirements regarding the use and acceptance of electronic records and electronic signatures. However this language was not included in the final E-Sign Act.

    Like technology neutrality, the principle of party autonomy is enshrined in UETA and enjoys wide acceptance as a necessary attribute in the e-commerce community. It is a market-oriented approach that reflects the state common law disposition to allow private parties the maximum flexibility in contracting and ordering their own affairs without government interference. Moreover, the principle of party autonomy, like that of technology neutrality, is expressly endorsed in the Administration's July 1, 1997 "Framework for Global Electronic Commerce," which is the charter document on U.S. policy on electronic commerce. The Framework states that "parties should be free to order the contractual relationship between themselves as they see fit." Consistent with this policy and as noted in the 1999 Second Annual Report of the U.S. Working Group on Electronic Commerce, "Towards Digital Equality," the United States has pressed other countries to develop commercial law frameworks that "reaffirm the rights of parties to a transaction to determine the appropriate technological means of authenticating their agreements." The principle of party autonomy also was embodied in the Declaration on Authentication adopted by the 1998 OECD Conference on Electronic Commerce in Ottawa and in Joint Statements by the United States with the United Kingdom, Korea, Australia, Japan and France.

54. "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." S. 761, 106th Cong. §106(1) (2000). "It is well worth noting that the term "consumer" does not include business-to-business transactions, which will allow businesses to take full advantage of the efficiency opportunities presented by this legislation." 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Abraham). "Section 101(c)(1) refers to writings that are required to be delivered to consumers by some other law, such as the Truth-in-Lending Act. The reference to consumers is intentional: subsection (c) only applies to laws that are specifically intended for the protection of consumers. When a statute applies to consumers as well as to non-consumers, subsection (c)(1) should not apply. In this way, the subsection preserves those special consumer protection statutes enacted throughout this Nation without creating artificial constructs that do not exist under current law. At no time in the future should these 'consent' provisions of 101(c), which are intended to protect consumers (as defined in this legislation), be permitted to migrate through interpretation so as to apply to business-to-business

transactions." 146 CONG. REC. S5165, 5284 (2000) (Abraham Explanatory Statement). However, the Democratic conferees took a different view. "It is the Congress' intent that the broadest possible interpretation should be applied to the concept of "consumer." The definition in Section 106(1) is intended to include persons obtaining credit and insurance, even salaries and pensions — because all of these are 'products or services which are used primarily for personal, family, or household purposes' as the word is defined in the Act." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement).

55. S. 761, 106th Cong. §101(c)(1) (2000). "[T]he Act does not create new requirements for electronic commerce but simply allows disclosures or other items to be delivered electronically instead of on paper. This means that if a consumer protection statute requires delivery of a paper copy of a disclosure or item to a consumer, then the consent and disclosure requirements of subsection (c)(1)(A-D) must be satisfied. Otherwise, subsection (c) does not disturb existing law." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement).

56. S. 761, 106th Cong. §101(c)(1)(A) (2000).

57. S. 761, 106th Cong. §101(c)(1)(B) (2000). There is no guidance in the E-Sign Act on how specific the statement must be with respect to the four items listed *infra* or what format or wording it must use. Presumably it could be provided either electronically or by paper. Or must it be provided or made available in the same manner that the electronic records will be? In what way must it be "clear and conspicuous?"

58. S. 761, 106th Cong. §101(c)(1)(B)(i) (2000). The use of the term "any right" suggests that there may be no right to receive paper records, which is in fact reflective of existing law. Prior drafts of this language had included such a right, but the conferees modified it to the current formulation.

59. S. 761, 106th Cong. §101(c)(1)(B)(ii) (2000). The E-Sign Act does not define "particular transaction" or "entire course of the parties" relationship.

60. S. 761, 106th Cong. §101(c)(1)(B)(iii) (2000). Consistent with Footnote 58, *supra*, the use of the word "may" should not imply that there is a right to obtain a paper record, only that this is how the consumer would go about doing it if the paper record were made available.

61. S. 761, 106th Cong. §101(c)(1)(B)(iv) (2000).

62. S. 761, 106th Cong. §101(c)(1)(C)(i) (2000).

63. S. 761, 106th Cong. §101(c)(1)(C)(ii) (2000). "Section 101(c) . . . requires the use of a technological check, while leaving companies with ample flexibility to develop their own procedures. . . . Senator Gramm has criticized the conference report on the grounds that its technological check on consumer consent unfairly discriminates against electronic commerce. But those most familiar with electronic commerce have never seriously disputed the need for a technological check. In fact, many high tech firms have acknowledged that it is good business practice to verify that their customers can open their electronic records, and many already have implemented some sort of technological check procedure. I am confident that the benefits of a one-time technological check far outweigh any possible burden on e-commerce, and it will greatly increase consumer confidence in the electronic marketplace." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy). By means of section 101(c)(1)(C)(ii) "the conferees sought to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them." 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). However, the conferees claimed that they did not intend for the "reasonable demonstration" standard to burden the consumer

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or the person providing the record. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). An e-mail response from a consumer that confirmed that the consumer can access electronic records in the specified formats would satisfy the 'reasonable demonstration' requirement." 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). An affirmative response to an electronic query asking if the consumer can access the electronic information or if the affirmative consent language includes the consumer's acknowledgement that the consumer can access the electronic information in the designated format satisfies the 'reasonable demonstration' requirement. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy). The requirement can also be satisfied if it is shown that the consumer actually accesses electronic records in the relevant format. 146 CONG. REC. S5281, 5282 (2000) (McCain/Abraham colloquy). *See also* 146 CONG. REC. H4341, 4360 (2000) (Markey/Bliley colloquy) and 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). The process of obtaining consumer consent has been described as a "two-way consent" referring to the prior to consent clear and conspicuous disclosure going one way, and the "reasonable demonstration" going the other way. 146 CONG. REC. S5165, 5216 (2000) (statement of Sen. Wyden). "'Reasonably demonstrates' means just that. It means the consumer can prove his or her ability to access the electronic information that will be provided. It means the consumer, in response to an electronic vendor enquiry, actually opens an attached document sent electronically by the vendor and confirms that ability in an e-mail response. It means there is a two-way street. It is not sufficient for the vendor to tell the consumer what type of computer or software he or she needs. It is not sufficient for the consumer merely to tell the vendor in an e-mail that he or she can access the information in the specified formats. There must be meaningful two-way communication electronically between the vendor and consumer." "[I]t must be possible to 'reasonably demonstrate' that a consumer will be able to access the various forms of electronic records that the consumer has consented to receive. This is a requirement that has no parallel in the paper world. To ensure that consumers can get the full benefits of these electronic records provisions, consumers should only need to consent once either on paper or electronically, with the ability to withdraw their consent if changes create a problem for them. There is concern that S. 761 may actually create a new basis for denying legal effect to electronic records if they are not in a form that could be retained and accurately reproduced for later reference by any parties who are entitled to retain them. It is my hope, Mr. Speaker, that Congress will be able to respond effectively to these and other challenges that would be brought on by the rapidly changing nature of the Internet economy." 146 CONG. REC. H4341, 4349 (2000) (statement of Rep. Dreier).

64. The verification requirements inherent in this provision are analogous to requiring that the first letter mailed to a consumer must meet the standards of certified mail, thereby setting up a more exigent standard for e-commerce than the paper world.

65. *See* document released by Senate Democrats entitled "Comments on Conference Draft, May 17, 2000."

66. *Id.*

67. 146 CONG. REC. S5281, 5282 (2000) (colloquy between Chairman McCain and Sen. Abraham).

68. S. 761, 106th Cong. §101(c)(1)(D)(i) (2000).

69. S. 761, 106th Cong. §101(c)(1)(D)(i) (2000).

70. S. 761, 106th Cong. §101(c)(1)(D)(ii) (2000).

71. S. 761, 106th Cong. §101(c)(2)(A) (2000). "State and federal law requirements on delivering documents have not been addressed in this Act. The underlying rules on these issues still prevail. It is our view that records provided electronically to consumers must be provided in a manner that has the same expectation for the consumer's actual receipt as was contemplated when the state law requirement for "provided" was passed. So, for example, if a statute requires that a disclosure be provided within 24 hours of a certain event and that the disclosure include specific language set forth clearly and conspicuously. That requirement could be met by an electronic disclosure if provided within 24 hours of that event, which disclosure included the specific language, set forth clearly and conspicuously. However, simply providing a notice electronically does not obviate the need to satisfy the underlying statute's requirements for timing and content." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). Senator Leahy voiced a concern that the conference report "fails to provide a clear Federal rule — or, indeed, any rule at all — concerning how it is intended to affect requirements that information be sent, provided, or otherwise delivered. . . . The conference report touches upon the issue of delivery in section 101(c)(2)(B), but only with respect to specified methods that require verification or acknowledgement of receipt, such as registered or certified mail. What happens to State law requirements that a notice be sent by first-class mail or personal delivery? How about a law that requires information to be provided, sent, or delivered in writing ,but does not specify a particular method of delivery? I raised these questions during the conference, but the conference report provides few answers." 146 CONG. REC. S5165, 5222 (2000) (Sen. Leahy).

72. S. 761, 106th Cong. §101(c)(2)(B) (2000).

73. Section 102(c) of the E-Sign Act suggests that Congress may have intended to preempt at least certain of these types of state delivery requirements. Section 102(c) provides that section 102(a) "does not permit a State to circumvent this title or title II through the imposition of nonelectronic delivery methods under section 8(b)(2)" of UETA.

74. S. 761, 106th Cong. §101(c)(3) (2000). "Section 101(c)(3) is a narrow savings clause to preserve the integrity of electronic contracts: just because the consumer's consent to electronic notices and records was not obtained properly does not mean that the underlying contract itself is invalid. This provision only affects electronic records, it simply means that an electronic consent which fails to meet the requirements of section 101(c) does not create a new basis for invalidating the electronic contract itself." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). "Section 101(c)(3) makes clear that an electronic contract or electronic signature cannot be deemed ineffective, invalid, or unenforceable merely because the party contracting with a consumer failed to meet the requirements of the consent to electronic records provision. Compliance with the consent provisions of section 101(c) is intended to address the effectiveness of the provision of information in electronic form, not the validity or enforceability of the underlying contractual relationship or agreement between the parties. In other words, a technical violation of the consent provisions cannot in and of itself invalidate an electronic contract or prevent it from being legally enforced. Rather, the validity and enforceability of the electronic contract is evaluated under existing substantive contract law, that is, by determining whether the violation of the consent provisions resulted in a consumer failing to receive information necessary to the enforcement of the contract or some provision thereof. For example, if it turns out that the manner in which a consumer consented did not 'reasonably demonstrate' that she could access the electronic form of the information at a later date, but at the time of executing the contract she was able to view its terms and conditions before signing, the contract could still be valid and enforceable despite the technical violation of the electronic consent provision." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "Let me make special note of section 101(c)(3), a late addition to the conference report.

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Without this provision, industry representatives were concerned that consumers would be able to back out of otherwise enforceable contracts by refusing to consent, or to confirm their consent, to the provision of information in an electronic form. At the same time, however, companies wanted to preserve their autonomy as contracting parties to condition their own performance on the consumer's consent. For example companies anticipated that they might offer special deals for consumers who agreed not to exercise their right to paper notices. Section 101(c)(3) makes clear that failure to satisfy the consent requirements of section 101(c)(1) does not automatically vitiate the underlying contract. Rather, the continued validity of the contract would turn on the terms of the contract itself, and the intent of the contracting parties, as determined under applicable principles of State contract law. Failure to obtain electronic consent or confirmation of consent would, however, prevent a company from relying on section 101(a) to validate an electronic record that was required to be provided or made available to the consumer in writing." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

75. S. 761, 106th Cong. §101(c)(4) (2000).

76. *Id.*

77. *Id.*

78. S. 761, 106th Cong. §101(c)(5) (2000).

79. S. 761, 106th Cong. §101(c)(6) (2000). The floor statements on this provision are contradictory. "It should be noted that Section 101(c)(6) does not preclude the consumer from using her voice to sign or approve that record. Proper voice signatures can be very effective in confirming a person's informed intent to be legally obligated. Therefore, the consumer could conceivably use an oral or voice signature to sign a text record that was required to be given to her 'in writing.' Moreover, the person who originated the text record could authenticate it with a voice signature as well. The spoken words of the signature might be something like 'I Jane Consumer hereby sign and agree to this loan document and notice of interest charges.' By way of clarification, the intent of this clause is to disqualify only oral communications that are not authorized under applicable law and are not created or stored in a digital format. This paragraph is not intended to create an impediment to voice-based technologies, which are certain to be an important component of the emerging mobile-commerce market. Today, a system that creates a digital file by means of the use of voice, as opposed to a keyboard, mouse or similar device, is capable of creating an electronic record, despite the fact that it began its existence as an oral communication." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "I should also explain the significance of section 101(c)(6), which was added at the request of the Democratic conferees. This provision makes clear that a telephone conversation cannot be substituted for a written notice to a consumer. For decades, consumer laws have required that notices be in writing, because that form is one that the consumer can preserve, to which the consumer can refer, and which is capable of demonstrating after the fact what information was provided. Under appropriate conditions, electronic communications can mimic those characteristics; but oral notice over the telephone will never be sufficient to protect consumer interests." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

80. S. 761, 106th Cong. §101(d) (2000).

81. S. 761, 106th Cong. §101(d)(1) (2000). "There is concern that S. 761 may actually create a new basis for denying legal effect to electronic records if they are not in a form that could be retained and accurately reproduced for later reference by any parties who are entitled to retain them. It is my hope, Mr. Speaker, that Congress will be able to respond effectively to these and other challenges that would be brought on by the rapidly changing nature of

the Internet economy." 146 CONG. REC. H4341, 4359 (2000) (statement of Rep. Dreier). "Section 101(d) recognizes the importance of accuracy and accessibility in electronic records, which is of utmost importance for investor protection and prevention of fraud." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).

82. S. 761, 106th Cong. §101(d)(1)(A) (2000).

83. S. 761, 106th Cong. §101(d)(1)(B) (2000).

84. 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement).

85. S. 761, 106th Cong. §101(d)(2) (2000).

86. S. 761, 106th Cong. §101(d)(3) (2000).

87. S. 761, 106th Cong. §101(d)(4) (2000).

88. S. 761, 106th Cong. §101(e) (2000). "The Conferees added new language in section (e) of 101 to establish that a contract or record which is required under other law to be in writing loses its legal validity unless it is provided electronically to each party in a manner which allows each party to retain and use it at a later time to prove the terms of the record." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). "Section 101(e) addresses statutory and regulatory requirements that certain records, including contracts, be in writing. The statute of frauds writing requirement exemplifies one such legal requirement. . . . This provision is intended to reach two qualities of 'a writing' in the non-electronic world. The first such quality of 'a writing' is that it can be retained, e.g., a contract can be filed. The second such quality of 'a writing' is that it can be reproduced, e.g., a contract can be copied. With respect to Section 101(e), the actual inability of a party to reproduce a record at a particular point in time does not invoke this subsection. The subsection merely requires that if a statute requires a contract to be in writing, then the contract should be capable of being retained and accurately reproduced for later reference by those entitled to retain it. Thus if a customer enters into an electronic contract which was capable of being retained or reproduced, but the customer chooses to use a device such as a Palm Pilot or cellular phone that does not have a printer or a disk drive allowing the customer to make a copy of the contract at that particular time, this section is not invoked. The record was in a form that was capable of being retained and reproduced by the customer had it chosen to use a device allowing retention and reproduction." 146 CONG. REC. S5281, 5284 (2000) (Abraham Explanatory Statement). "Under section 101(e) of the conference report, the legal effect of an electronic contract or record may be denied if it is not in a form that can be retained and accurately reproduced for later reference and settlement of disputes. This means that the parties to a contract may not satisfy a statute of frauds requirement that the contract be in writing simply by flashing an electronic version of the contract on a computer screen. Similarly, product warranties must be provided to purchasers in a form that they can retain and use to enforce their rights in the event that the product fails." 146 CONG. REC. S5165, 5220 (2000) (statement of Sen. Leahy).

89. S. 761, 106th Cong. §101(f) (2000).

90. S. 761, 106th Cong. §101(g) (2000). "This subsection permits notaries public and other authorized officers to perform their functions electronically, provided that all other requirements of applicable law are satisfied. This subsection removes any requirement of a stamp, seal, or similar embossing device as it may apply to the performance of these functions by electronic means. It is my intent that no requirement for the use of a stamp, seal, or similar device shall preclude the use of an electronic signature for these purposes." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

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91. S. 761, 106th Cong. §101(h) (2000).

92. 15 U.S.C. § 1011 et seq.

93. S. 761, 106th Cong. §101(i) (2000).

94. S. 761, 106th Cong. §101(j) (2000). However, the Senate Democrats were not happy with this provision. "Another troubling provision in the conference report appears at the end of section 101, and concerns the liability of insurance agents and insurance brokers. This provision appeared for the first time in a conference draft produced by the Republican conferees on May 15th. In its original incarnation, this provision gave insurance agents and brokers absolute immunity from liability if something went wrong as a result of the use of electronic procedures. This was not just a shield from vicarious liability, or even from negligence; rather, it was an absolute shield, which would protect insurance agents and brokers from their own reckless or even wilful conduct. No matter that insurance agents and brokers are perfectly capable of protecting themselves through their contracts with insurance companies and their customers. Senator Hollings and I opposed the provision as unnecessary and indefensible as a matter of policy, and we succeeded in transforming it into a clarification that insurance agents and brokers cannot be held vicariously liable for deficiencies in electronic procedures over which they had no control. In this form, the provision remains in the bill as a stark reminder of the power of special interests." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy).

95. "Section 102 of the conference report provides a conditioned process for States to enact their own statutes, regulations or other rules of law dealing with the use and acceptance of electronic signatures and records and thus opt-out of the federal regime. The preemptive effects of this Act apply to both existing and future statutes, regulations, or other rules of law enacted or adopted by a State. Thus, a State could not argue that section 101 does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement). "I believe that the eventual adoption of UETA by all 50 states in a manner consistent with the version reported by NCCUSL will provide the same national uniformity which is established in the Federal legislation. For that reason, and at my insistence, when a state adopts the 'Uniform Electronic Transactions Act' (UETA) as reported by NCCUSL, the federal preemption provided in this bill is superceded. In the meantime, the preemption contained in the Federal Act will ensure a uniform standard of legal certainty for both electronic signatures and electronic records." 146 CONG. REC. S5165, 5224 (2000) (statement of Sen. Abraham).

96. S. 761, 106th Cong. §102(a)(1) (2000). "Subsection (a)(1) places a limitation on a State that attempts to avoid Federal preemption by enacting or adopting a clean UETA. Section 3(b)(4) of UETA, as reported and recommended for enactment by NCCUSL, allows a State to exclude the application of that State's enactment or adoption of UETA for any 'other laws, if any, identified by State.' This provision offers a potential loophole for a State to prevent the use or acceptance of electronic signatures or electronic records in that State. To remedy this problem, subsection (a)(1) requires that any exception utilized by a State under section 3(b)(4) of UETA shall be preempted if it is inconsistent with Title I or II, or would not be permitted under subsection (a)(2)(ii) (technology neutrality). Requirements for certified mail or return receipt would not be inconsistent with Title I or II, however, note that an electronic equivalent would be permitted." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement). "States that enact UETA in the manner specified in (a)(1) may supercede the provisions of section 101 with respect to State law. Thus, regulatory agencies within a state which comply with (a)(1) would interpret UETA, not section 101 of the federal act. Further, some States are enacting or adopting a strict, unamended version of

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UETA as well as enacting or adopting a companion or separate law that contains further provisions relating to the use or acceptance of electronic signatures or electronic records. Under this Act, such action by the State would prompt both subsection (a)(1) (for the strict enactment or adoption of UETA) and subsection (a)(2) (for the other companion or separate legislation)." *Id.*

97. Section 3(b)(4) of UETA states: "This [Act] does not apply to a transaction to the extent that it is governed by: . . . [other laws, if any, identified by State]."

98. However, *see* Statement of Chairman Bliley that: "Any variation or deviation from the exact UETA document reported and recommended for enactment by NCCUSL shall not qualify under subsection (a)(1). Instead, such efforts and any other effort may or may not be eligible under subsection (a)(2)." 146 CONG. REC. H4353 (2000).

99. S. 761, 106th Cong. §102(a)(2)(A) (2000).

100. S. 761, 106th Cong. §102(a)(2)(A)(i) (2000).

101. S. 761, 106th Cong. §102(a)(2)(A)(ii) (2000). "It is not intended that the singular use of technology or technological specification in subsection (a)(2)(A)(ii) allows a State to set more than one technology at the expense of other technologies in order to meet this standard, unless only one form of the technology exists, in which case this act is not intended to preclude a technological solution. Further, inclusion of the 'or accord greater legal status or effect to' is intended to prevent a state from giving a leg-up or impose an additional burden on one technology or technical specification that is not applicable to all others, and is not intended to prevent a state or its subdivisions from developing, establishing, using or certifying a certificate authority system. In addition, subsection (a)(2)(B) requires that a State that utilizes subsection (a)(2) to escape federal preemption must make a specific reference to this Act in any statute, regulation, or other rule of law enacted or adopted after the date of enactment of this Act. This provision is intended, in part, to make it easier to track action by the various States under this subsection for purposes of research." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

102. S. 761, 106th Cong. §102(a)(2)(B) (2000).

103. Senate Democrats took a particularly expansive view of the scope of the preemption provisions as to consumer consent: "Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transaction Acts or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points. A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supercede or displace the requirements of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in section 101(c) [emphasis added]." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). This interpretation appears to be at odds with the plain language of the statute.

For a thorough comparison of the E-Sign Act and UETA, as well as analysis of their mutual impact on one another, *see* Robert A. Wittie and Jane K. Winn, "E-Sign of the Times," [published in the August 2000 issue of *E-Commerce Law Report* and available at *www.kd.com/*

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Practice Areas/Technology/pubs/page 20.stm]. *Also see* Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws* (July 21, 2000) *<http://www.nccusl.org/whatsnew-article1.htm>*.

104. An additional array of uncertainty surrounds the question of whether the E-Sign Act preempts conflicting state law in whole or in part. Presumably, if a state were to enact a clean version of UETA but for mere formatting changes there should be no preemption by the E-Sign Act. If, however, the state enactment of UETA contains changes that are inconsistent with the E-Sign Act, does the E-Sign Act preempt that state enactment to the extent that it is inconsistent with the E-Sign Act as provided in the section 3(b)(4) provision at subsection (a)(1) or does it preempt the entire state statute as arguably might be the case under subsection (a)(2) because of that subsection's omission of the phrase "to the extent?" Thus, does it matter if the changes are section 3(b)(4) changes or other changes or additions? Arguments can be made either way based on the legislative history. *See* Wittie and Winn, *supra*, and Fry, *supra*.

105. 146 CONG. REC. H4353 (statement of Chairman Bliley) (emphasis added).

106. *See* S. 761, 106th Cong. §102(b) (2000). "Subsection [102](a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof." *Id.*

107. S. 761, 106th Cong. §102(c) (2000). "Section 8(b)(2) of UETA allows States to impose delivery requirements for electronic records. Section 102(c) has the limited purpose of ensuring that the state does not circumvent Titles I or II of this Act by imposing nonelectronic delivery methods. Thus, provided that the delivery methods required are electronic and do not require that notices and records be delivered in paper form, States retain their authority under Section 8(b)(2) of UETA to establish delivery requirements." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement). "Section 102(c) makes clear that subsection (a) cannot be used by a State to circumvent this title or Title II through the imposition of nonelectronic delivery methods under section 8(b)(2) of UETA. Any attempt by a State to use 8(b)(2) to violate the spirit of this Act should be treated as effort to circumvent and thus be void." 146 CONG. REC. S5281, 5285 (2000) (Abraham Explanatory Statement).

108. "We specifically intend that a state may not use its authority under section 102, to authorize solely electronic records of those notices listed in section 103." 146 CONG. REC. S5165, 5230 (2000) (Hollings, Wyden and Sarbanes Statement).

109. S. 761, 106th Cong. §103(a)(1) (2000).

110. S. 761, 106th Cong. §103(a)(2) (2000).

111. U.C.C. § 1-107 (1992). "§1-107. Waiver or Renunciation of Claim or Right After Breach. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." *Id.*

112. U.C.C. § 1-206 (1992). "Statute of Frauds for Kinds of Personal Property Not Otherwise Covered. (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforce-

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ment is sought or by his authorized agent. (2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 2-201) nor of securities (Section 8-319) nor to security agreement (Section 9-203)." *Id.*

113. U.C.C. Article 2 (1992). Article 2 applies to transactions in goods. *Id.*

114. S. 761, 106th Cong. §103(a)(3) (2000). Article 2A applies to any transaction, regardless of form, that creates a lease. U.C.C. Article 2A (1992).

115. "To clarify further, with respect to Section 103(b), the statement that 'the provisions of section 101 shall not apply to' the listed items means only that Section 101 may not be relied upon to allow an electronic record or electronic signature to suffice. Section 103(b) does not prohibit use of electronic records or signatures, however. Whether such can be used is left to other law." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

116. S. 761, 106th Cong. §103(b)(1) (2000).

117. S. 761, 106th Cong. §103(b)(2)(A) (2000). "The exclusion pertaining to utility services applies to essential consumer services including water, heat and power. This provision does not apply to notices for other broadly used important consumer services, such as telephone, cable television, and Internet access services, etc. Electronic cancellation or termination notices may be used in association with those other services, assuming all of the other elements of Section 101 are met." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

118. S. 761, 106th Cong. §103(b)(2)(B) (2000).

119. S. 761, 106th Cong. §103(b)(2)(C) (2000). However, a number of questions arise. What is a "notice of cancellation or termination"? Does it include notices preceding cancellation or termination such as renewal notices that warn of imminent cancellation if premiums are not paid by a specified date? What are "health insurance or benefits" and "life insurance benefits?" Do they include only traditional health (i.e., medical) insurance, or do they include income replacement policies benefits under which may be triggered by health problems, such as disability insurance and certain forms of long-term care insurance? What impact do state law definitions of those terms have? Are worker's compensation benefits to be regarded as "health insurance or benefits" notwithstanding state law classification of such insurance as a form of casualty insurance?

120. S. 761, 106th Cong. §103(b)(2)(D) (2000).

121. S. 761, 106th Cong. §103(b)(3) (2000).

122. S. 761, 106th Cong. §103(c)(1) (2000).

123. S. 761, 106th Cong. §103(c)(1) (2000).

124. S. 761, 106th Cong. §103(c)(3) (2000).

125. "The conference report is designed to prevent Federal and State Regulators from undermining the broad purpose of this Act, to facilitate electronic commerce and electronic record keeping. To ensure that the purposes of this Act are upheld, Federal and State regulatory authority is strictly circumscribed. It is expected that Courts reviewing administrative actions will be rigorous in seeing that the purpose of this Act, to ensure the widest use and dissemination of electronic commerce and records are not undermined." 146 CONG. REC.

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S5281, 5286 (2000) (Abraham Explanatory Statement). "We have provided both federal and state agencies with the authority to interpret and issue guidance on the proposed law. Providing this interpretive authority will provide businesses with a cost-effective way of getting guidance in how to implement the new law. Without this authority, these questions would have to have been answered by the courts, after extensive and expensive litigation. We have avoided that problem. The conference report gives law enforcement agencies of federal and state governments the authority they need to detect and combat fraud, including the ability to require the retention of written records in paper form if there is a compelling governmental interest in law enforcement. Let me raise one specific example, among many, of where this provision ought to be exercised. The Securities and Exchange Commission should use this provision to require brokers to keep written records of agreements required to be obtained by the SEC's penny stock rules. Investors in the securities markets have been the victims of penny stock abuse for more than a decade. The SEC must exercise every tool at its disposal to fight this kind of fraud." CONG. REC. S5165, 5229 (2000) (statement of Sen. Sarbanes). "Section 104 of the Conference Report specifically permits federal regulatory agencies, such as the SEC, to interpret the law to require retention of written records in paper form if there is a compelling governmental interest in law enforcement for imposing such requirement, and if, imposing such requirement is essential to attaining such interest. For example, we specifically expect the SEC would be able to use this provision to require brokers to keep written records of all disclosures and agreements required to be obtained by the SEC's penny stock rules." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).

126. 104(c)(2) allows a federal or state regulatory agency to interpret Section 101 of Title I if such agency finds in connection with issuance of such interpretation that the methods selected to carry out the purpose are substantially equivalent to the requirements imposed on records that are not electronic records and will not impose unreasonable costs on the acceptance and use of electronic records. S. 761, 106th Cong. §104(c)(2) (2000).

127. S. 761, 106th Cong. §104(a) (2000). ". . . Section 104(a) of the Conference Report protects standards and formats developed by the SEC for electronic filing systems such as EDGAR and the IARD, as well as for systems are developed by securities industry self-regulatory organization filing systems such as the CRD, which the NASD and the states use for registering securities firms and their personnel." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey). ". . . [S]ection 104(a) of the conference report expressly preserves governmental filing requirements. Federal agencies are already working toward full acceptance of electronic filings, pursuant to the schedule established by the Government Paperwork Elimination Act. I am confident that State agencies will follow our lead. Until they are technologically equipped to do so, however, they have an unqualified right under section 104(a) to continue to require records to be filed in a tangible printed or paper form." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy).

128. "This provision provides important protection to both affected industry and consumers. It is impossible to envision all of the ways in which this Act will affect existing statutory requirements. This interpretative authority will allow regulatory agencies to provide legal certainty about interpretations to affected parties. Moreover, this authority will allow regulatory agencies to take steps to address abusive electronic practices that might arise that are inconsistent with the goals of their underlying statutes . . . I would also like to clarify the nature of the responsibility of government agencies in interpreting this bill. As the bill makes clear, each agency will be proceeding under its preexisting rulemaking authority, so that regulations or guidance interpreting section 101 will be entitled to the same deference that the agency's interpretations would usually receive. This is underlined by the bill's requirements that regulations be consistent with section 101, and not add to the requirements of that section, which restate the usual *Chevron* test that applies to and limits an agency's interpretation of a law it administers. Giving each agency authority to apply sec-

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tion 101 to the laws it administers will ensure that this bill will be read flexibly, in accordance with the needs of each separate statute to which it applies. Any reading under which courts would apply an unusual test in reviewing an agency's regulations would generate a great deal of litigation, creating instability and needlessly burdening the courts with technical determinations. Likewise, because these regulations will be issued under preexisting legal authority, and challenges to those regulations will proceed through the methods prescribed under that preexisting authority, whether pursuant to the Administrative Procedure Act or some other statute. Again, this will ensure that any challenges to such regulations are resolved promptly and minimize any resulting instability and burden. Of course, such regulations must satisfy the requirements of the Act." 146 CONG. REC. S5165, 5231 (2000) (Hollings, Wyden and Sarbanes Statement)

129. S. 761, 106th Cong. §104(b)(1) (2000). "While the conference report preserves such authority to such agencies or organizations, it is intended that use of such authority is rarely exercised." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

130. S. 761, 106th Cong. §104(b)(2) (2000).

131. S. 761, 106th Cong. §104(b)(3) (2000).

132. S. 761, 106th Cong. §104(b)(4) (2000).

133. S. 761, 106th Cong. §104(b)(1)(A)-(B) (2000).

134. S. 761, 106th Cong. §104(b)(2)(A)-(B) (2000).

135. S. 761, 106th Cong. §104(b)(2)(C)(i)-(iii) (2000).

136. "Section 101(d) recognizes the importance of accuracy and accessibility in electronic records, which is of utmost importance for investor protection and prevention of fraud. Section 104(b)(3) recognizes the need for agencies, such as the SEC, to provide performance standards relating to accuracy, document integrity, and accessibility in their electronic recordkeeping and retention rules. This is intended to preserve requirements such as the SEC's existing electronic recordkeeping rule, Rule 17a-4(f), which specifies that electronic recordkeeping systems must preserve records in a non-rewriteable and non-erasable manner. The Conferees also expect the SEC to work with the securities SROs to the extent necessary to ensure that accuracy, accessibility, and integrity standards also cover SRO recordkeeping requirements in an electronic environment." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey).

137. S. 761, 106th Cong. §104(b)(3)(A) (2000). Therefore, 104(b)(3) extends the federal and state regulatory interpretive authority to override the technology neutrality provision, 104(b)(2)(C)(iii), but only if doing so (1) serves and important governmental objective; and (2) is substantially related to the achievement of that objective. 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

138. S. 761, 106th Cong. §104(b)(3)(A) (2000).

139. S. 761, 106th Cong. §104(b)(3)(B) (2000). "It is important to note that the test in subsection (b)(3)(B) is higher and more stringent than in subsection (b)(3)(A). This is intentional as it is an effort to impose an extremely high barrier before a Federal or State regulatory agency will revert back to requiring paper records. However, this does not diminish the test contained subsection (b)(3)(A). It, too, is intended to be an extremely high barrier for a Federal or State regulatory agency to meet before the technology neutrality provision is violated. It is intended that use of either of these tests will be necessary in only a very, very few in-

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stances. It is expected that Federal and State agencies take all action and exhaust all other avenues before exercising authority granted in paragraph (3)." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement).

140. S. 761, 106th Cong. §104(b)(4) (2000).

141. S. 761, 106th Cong. §104(c)(1) (2000).

142. S. 761, 106th Cong. §104(c)(2) (2000). The Government Paperwork Elimination Act was promulgated to minimize the burden of Federal paperwork demands upon small businesses, educational and nonprofit institutions, Federal contractors, State and local governments, and other persons through the sponsorship and use of alternative information technologies. 44 U.S.C. 3501, 3504(h).

143. S. 761, 106th Cong. §104(d)(1) (2000). "Finally, the Conference Report's consent provisions are similar to much of the SEC's guidance in the electronic delivery area. Section 104(d)(1) permits agencies such as the SEC to continue to provide flexibility in interpreting consent provisions anticipated by the Conference Report. In addition, a specific provision contained in section 104(d)(2) anticipates that the SEC will act to clarify that documents, such as sales literature, that appear on the same website as, or which are hyperlinked to, the final prospectus required to be delivered under the federal securities laws, can continue to be accessed on a website as they are today under SEC guidance for electronic delivery." 146 CONG. REC. H4341, 4350 (2000) (statement of Rep. Markey). As usual, Senator Leahy took a critical view. "Section 104(d)(1) is another political compromise that blemishes this conference report, although I believe its actual impact will be negligible. It provides that Federal agencies may exempt a specified category or type of record from the consumer consent requirements of section 101(c), but only if such exemption is 'necessary' to eliminate a 'substantial' burden on electronic commerce, and it will not increase the material risk of harm to consumers. While Chairman Bliley indicated in his floor statement yesterday that this test should not be read as too limiting, the opposite is true. The test is, and was intended to be, demanding. The exemption must be 'necessary,' and not merely 'appropriate,' as Chairman Bliley suggested. It should also be noted that the conferees considered and specifically rejected language that would have authorized State agencies to exempt records from the consent requirements." 146 CONG. REC. S5165, 5222 (2000) (statement of Sen. Leahy). "It is intended that the test under subsection (d)(1) not be read too limiting. There are vast numbers of instances when section 101(c) may not be appropriate or necessary and should be exempted by the appropriate regulator." 146 CONG. REC. S5281, 5286 (2000) (Abraham Explanatory Statement) and 146 CONG. REC. H4341, 4355 (Bliley Explanatory Statement).

144. S. 761, 106th Cong. §104(d)(2) (2000).

145. Release No. 33-7877, IC-24582 (July 27, 2000), 65 *Fed. Reg.* 47281 (August 2, 2000).

146. S. 761, 106th Cong. §104(e) (2000).

147. S. 761, 106th Cong. §104(e) (2000). 146 CONG. REC. S5281, 5287 (2000) (Abraham Explanatory Statement).

148. S. 761, 106th Cong. §105(a) (2000).

149. S. 761, 106th Cong. §105(b) (2000).

150. Four out of the 13 terms are substantially identical to their analogues in UETA. *See* UETA at note, Section 2. There are, however, eight defined terms in UETA that do not appear in

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the E-Sign Act: "agreement," "automated transaction," "computer program," "contract," "governmental agency," "information processing system," and "security procedure." *Id.* There are three defined terms in the E-Sign Act that are not in UETA: "consumer," "requirement," and "self-regulatory organization."

151. S. 761, 106th Cong. §106(2) (2000). This definition is identical to the UETA definition for the same term. *See* UETA, section 2(5).

152. S. 761, 106th Cong. §106(3) (2000). This definition is also identical to the UETA definition for the same term, except for the additional phrase "at the time of the action or response." *See* UETA, section 2(6).

153. S. 761, 106th Cong. §106(4) (2000). This definition is identical to the UETA definition for the same term, except for the phrase "a contract or other record." As above, UETA specified only "a record." *See* UETA, section 2(7).

154. S. 761, 106th Cong. §106(5) (2000). This definition is identical to the UETA definition for the same term, except for the phrase "a contract or other record." UETA only specified "a record." *See* UETA, section 2(8).

155. S. 761, 106th Cong. §106(1) (2000). This term is not defined in UETA. *See* UETA, Section 2.

156. S. 761, 106th Cong. §106(8) (2000). This definition is the same as the UETA definition. *See* UETA, section 2(12).

157. S. 761, 106th Cong. §106(6) (2000) and 5 U.S.C. 552(f) (1996). UETA offers a similarly inclusive definition of "governmental agency" which "means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a State or of a county, municipality, or other political subdivision of a State." See UETA, section 2(9).

158. S. 761, 106th Cong. §106(11) (2000). This term is not defined in UETA. *See* UETA, Section 2.

159. S. 761, 106th Cong. §106(12) (2000). This term was defined at once more broadly and more concisely in UETA: "'State' means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a State." UETA, section 2(15).

160. S. 761, 106th Cong. §106(7) (2000). This definition is identical the UETA definition for the same term. *See* UETA, section 2(10).

161. S. 761, 106th Cong. §106(9) (2000). This definition is also identical to the UETA definition. *See* UETA, section 2(13).

162. S. 761, 106th Cong. §106(10) (2000). This term was not defined in UETA. *See* UETA, Section 2.

163. S. 761, 106th Cong. §106(13) (2000). This term was defined differently in UETA: "'Transaction' means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." UETA, section 2(16).

164. S. 761, 106th Cong. §107(a) (2000).

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165. S. 761, 106th Cong. §107(b)(1)(A) (2000).

166. S. 761, 106th Cong. §107(b)(1)(B) (2000). Section 104(b)(3)(A) allows federal and state regulatory agencies to violate the technology neutrality provision, section 104(b)(2)(C)(iii), when interpreting 101(d) to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. S. 761, 106th Cong. §104(b)(3)(A) (2000).

167. S. 761, 106th Cong. §107(b)(2) (2000). "The one year delay was granted to permit the federal government time to institute safeguards necessary to protect taxpayers from risk of default on loans guaranteed by the federal government." 146 CONG. REC. S5281, 5287 (2000) (Abraham Explanatory Statement).

168. S. 761, 106th Cong. §107(b)(3) (2000).

169. "The conference report adopts a new provision in recognition of the need to establish a uniform national standard for the creation, recognition, and enforcement of electronic negotiable instruments. The development of a fully-electronic system of negotiable instruments such as promissory notes is one that will produce significant reductions in transaction costs. This provision, which is based in part on Section 16 of the Uniform Electronic Transactions Act, sets forth a criteria-based approach to the recognition of electronic negotiable instruments, referred to as 'transferable records' in this section and in UETA. It is intended that this approach create a legal framework within which companies can develop new technologies that fulfill all of the essential requirements of negotiability in an electronic environment, and in a manner that protects the interests of consumers." 146 CONG. REC. S5281, 5283 (2000). "The conference report notes that the official Comments to section 16 of UETA, as adopted by the National Conference of Commissioners on Uniform State Laws, provide a valuable explanation of the origins and purposes of this section, as well as the meaning of particular provisions." *Id.*

170. S. 761, 106th Cong. §201(a)(1) (2000). "The conference report further notes that the reference in section 201(a)(1)(C) to loans secured by real property' includes all forms of real property, including single-family and multi-family housing." 146 CONG. REC. S5281, 5287-5288 (2000) (Abraham Explanatory Statement).

171. *Id.* "The conference report notes that, pursuant to sections 3(c) and 7(d) of the UETA, an electronic signature satisfies any signature requirement under Section 16 of the UETA. It is intended that an electronic signature shall satisfy any signature requirement under this provision, as well." 146 CONG. REC. S5281, 5287 (2000) (Abraham Explanatory Statement).

172. "Title III directs the Secretary of Commerce to take an active role in bilateral and multilateral talks to promote the use and acceptance of electronic signatures and electronic records worldwide. It is intended that the Secretary promote the principles contained in this Act internationally. However, it is possible that some foreign nations may choose to adopt their own approach to the use and acceptance of electronic signatures and electronic records. In such cases, the Secretary should encourage those nations to provide legal recognition to contracts and transactions that may fall outside of the scope of the national law and encourage those nations to recognize the rights of parties to establish their own terms and conditions for the use and acceptance of electronic signatures and electronic records." 146 CONG. REC. S5281, 5288 (2000) (Abraham Explanatory Statement).

173. S. 761, 106th Cong. §301(a)(1) (2000).

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174. "There is particular concern about international developments that seek to favor specific technologies of processes for generating electronic signatures and electronic records. Failure to recognize multiple technologies may create potential barriers to trade and stunt the development of new and innovative technologies." 146 CONG. REC. S5281, 5288 (2000) (Abraham Explanatory Statement). The Abraham Explanatory Statement singles out two foreign approaches, the German Digital Signature Law of July 1997 and the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for electronic signatures. *Id.* "Parties to a commercial transaction should be able to chose the appropriate authentication technologies and implementation models for their transactions. Unnecessary regulation of commercial transactions distorts the development and efficient operation of markets, including electronic markets. Moreover, the rapid development of the electronic marketplace is resulting in new business models and technological innovations. This is an evolving process. Therefore, government attempts to regulate may impede the development of newer alternative technologies." *Id.*

175. S. 761, 106th Cong. §301(a)(2) (2000).

176. S. 761, 106th Cong. §401 (2000).

177. *Id.* ■

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STATEMENT

OF

JEREMIAH S. BUCKLEY

ON BEHALF OF THE

ELECTRONIC FINANCIAL SERVICES COUNCIL

BEFORE THE

HOUSE FINANCIAL SERVICES SUBCOMMITTEE ON DOMESTIC MONETARY POLICY, TECHNOLOGY AND ECONOMIC GROWTH

UNITED STATES HOUSE OF REPRESENTATIVES

June 28, 2001

Good morning, Mr. Chairman and members of the Subcommittee. My name is Jerry Buckley. I am a partner in the law firm of Goodwin Procter and I serve as General Counsel for the Electronic Financial Services Council. The Council established in 1998, is a national trade association made up of both technology companies and traditional financial services firms dedicated to promoting legal and regulatory changes needed to facilitate electronic delivery of financial services. The Council welcomes the opportunity to comment on the operation and impact of the ESIGN Act and its consumer consent provisions on the financial services industry.

Members of the Council believe that the rules regarding electronic signatures and records set forth in the ESIGN Act have tremendous potential to promote the growth of electronic commerce, particularly in the financial services sector.

Under the ESIGN Act, consumers and businesses will be better able to access products and services 24 hours a day 7 days a week. Transaction times will be reduced. Consumers in currently under-served communities, be they urban or rural, will now have access to a competitive menu of services from a variety of financial services providers. These online consumers will receive financial disclosures in real-time, not a packet of papers mailed and received days after they commit to a financial product, as is now the case.

Imagine the luxury of exploring a financial product and related disclosures at leisure on your computer whenever you want. Pop-up boxes or hyperlinks will be available to answer frequently asked questions or explain financial jargon which you don't understand. By having a real-time, online conversation with the consumer, a financial services provider will be able to assure that the consumer is informed and committed to the product, thus avoiding costly fall-out as the transaction approaches consummation.

Beyond empowering consumers, it is hard to overestimate the savings and increased productivity which ESIGN will facilitate with respect to the management and retention of records. ESIGN will allow businesses to eliminate billions of dollars in records management costs, which savings will ultimately be competed through to consumers in the form of reduced costs for financial services.

Congress is to be congratulated for its foresight in enacting the ESIGN Act and providing the legislative infrastructure to facilitate a dramatic expansion of electronic transactions. Mr. Chairman, we are pleased that with the first

anniversary of enactment of the ESIGN Act coming up in two days, you have seen fit to hold this oversight hearing on implementation of the ESIGN Act and its impact on the financial services industry.

Some have observed that financial services industry has been slower than expected in adopting the use of the electronic medium that ESIGN empowers. We believe that several factors are responsible for this phenomenon.

- First, the Act is self-effectuating, that is, it does not require a federal agency to spell out "rules of the road" and standard, mandated forms as is often the case with federal legislation, rather leaving these decisions to private parties. This flexibility, which will be very important to facilitating market innovation over the long run, has the short run disadvantage of not providing specific governmental guidance regarding appropriate electronic business procedures.

  Thus, private sector parties are having to devise their own standards and specifications for conducting business electronically. Particularly in the financial services business, where financial instruments must often be capable of being traded or pledged, it is not sufficient for the financial instrument to be enforceable as between the originating parties. These instruments must be originated to the satisfaction of secondary market purchasers of mortgage or chattel paper and others who trade in or finance such instruments. In order for this to happen, each financial services industry will have to develop a series of conventions regarding what electronic practices and procedures will be acceptable to companies doing business in a particular industry.

  We at the Electronic Financial Services Council are participating in promoting the development of these conventions. Over the last seven months, Freddie Mac has developed specifications for purchase of electronically originated loans in the secondary market. Freddie Mac and Fannie Mae are currently negotiating with lenders to arrange forward commitments for the purchase of electronically originated mortgages. As a result, we expect a gradual, but steady growth in paperless mortgage transactions.

  Similarly, drawing on the seminal thinking by Freddie Mac in developing its specifications, the Department of Education has promulgated guidelines for the electronic origination of student loans. These loans will be available online next month for students seeking financing for the upcoming academic year.

Our conversations with financial services providers in other industries lead us to believe that similar conventions will develop in these industries as well.

- In addition to the need for time to develop industry guidelines and conventions, another factor slowing the introduction of electronic financial services is the fact that, just as the ESIGN Act became effective, the U.S. economy began to slow and businesses, in an effort to maintain profitability, have reduced capital expenditures, including expenditures on development of electronic channels of communication. Pressures on "dot com" companies and the closure of the "IPO market" have also been factors in slowing adoption of ESIGN technology.

- As an attorney advising clients on the implementation of ESIGN, I deal with clients who are wrestling with choices of vendors, decisions regarding authentication, evidence of intent, and authority to sign. Again, ESIGN having become law these companies are now coming to grips with the legal decisions involved in setting up an online contracting process. In absence of court decisions affirming the evidentiary validity of electronic records, those seeking to do business electronically are proceeding with caution.

You have asked whether the consumer consent provisions of the ESIGN Act are hampering the speedy adoption of electronic records. While we recognize that some aspects of the consumer consent provisions may place an unnecessary burden on the use of electronic signatures and records, the Council is firmly committed to the proposition that consumers are entitled to timely and meaningful information concerning their options and all the methods available to them for receiving required notices and disclosures. Electronic commerce cannot reach its full potential without the consumer's complete comfort with, and confidence in, both the process and the medium. Effective delivery of the ESIGN consent disclosures will materially contribute to that comfort and confidence.

The Council strongly supported the original package of consumer protection provisions added to ESIGN in the House of Representatives, the so-called "Inslee-Roukema Amendments." The Council supports the requirement that consumers give affirmative consent to receive electronically information otherwise required to be in writing including disclosure of their rights and responsibilities as participants in electronic transactions.

Certain elements of ESIGN's rules concerning effective consumer consent were not part of the original Inslee-Roukema Amendments. Instead, they were added at the very end of the legislative process and so were, perhaps unavoidably, subjected to

a less rigorous level of analysis than the rest of the statute. In particular, the requirements that a consent be in electronic form and that there be a "reasonable demonstration" of the consumer's ability to access the intended information. However, so far these requirements have proven to be hurdles, not barriers, to the use of ESIGN powers.

More specifically, the requirement of electronic consent impairs the use of electronic contracting and disclosure in business models where the relationship begins with a face-to-face meeting in a commercial setting or via telephone (or some combination of the two), but both parties wish to communicate and exchange required information electronically on a going forward basis. Having made the decision to do business electronically, the need to go back and reconfirm the consumer's intent through an electronic channel is burdensome and has led some consumers to abandon the process. The testimony of Fidelity Investments at the April FTC Workshop on ESIGN relating its experience with consumer decisions to do business electronically, pre- and post- ESIGN, is instructive.

Further, the reasonable demonstration test requires interruption of the contracting process to establish, based on a subjective standard, the consumer's ability to access documents. The test also provides an incentive to favor certain file formats over others in order to streamline the testing process. In addition, it should be noted that a technical failure to comply with the ESIGN consent provisions may result in ineffective delivery of required information even if the violation was not intentional and did not prevent receipt and review of the required information. We believe this technical failure may result in disproportionate penalties. These issues are treated in more detail in the attached copy of the Council's submission to the Federal Trade Commission in connection with its April workshop regarding the benefits and burdens of the consumer consent provisions.

With respect to your question of whether the ESIGN Act and the UETA are operating harmoniously, we have seen no evidence to date that they are not. In this regard, we note that most consumer financial transactions have the federal nexus, and the disclosures mandated by federal law in most cases can only be delivered electronically under the authority granted by the ESIGN Act. Thus, for financial services firms, compliance with the requirements of the ESIGN Act, including consumer consent provisions, is a necessity if they are to provide consumers with electronic financial services.

We do have some concerns, however, regarding implementation of the regulatory requirements contained in Section 104 of the ESIGN Act. We believe that federal

and state agencies should adhere to the standards set out in the ESIGN Act when interpreting ESIGN or exempting transactions from its coverage, and we have noticed an early tendency to stray from these standards. Our views on this issue are spelled in more detail in the attached comment letter submitted to the Board of Governors of the Federal Reserve System on the Board's interim final rule on electronic communications.

To sum up, the fact that large-scale implementation of ESIGN has not yet occurred should not be read as a lack of enthusiasm for the statute or a waning of industry interest in electronic commerce. Rather, the deliberate pace reflects the determination of many responsible members of the financial services industry to act thoughtfully and to roll out e-commerce applications that are well designed and well implemented. While some may urge that Congress revisit or amend the ESIGN Act at this point, we believe the best course is to allow the financial service industry and other firms time to acclimate themselves to this new environment and to implement the powers already conferred by the ESIGN Act.

The long term importance of the ESIGN Act for the industries which are under the jurisdiction of your Committee is hard to overstate. Traditional charter and licensing restrictions have limited financial services providers to the products they are entitled to offer at their retail outlets under their respective charters as banks, insurance companies, securities brokers, and so forth. Until now each industry has tended to operate in its separate silo. In the future, it will be possible to mix and match elements of different types of financial products from different providers, perhaps using a web-based advisor or software package. As Marshall MacLuhan observed, "The medium is the message," and for financial services consumers the electronic medium will deliver a message of new financial empowerment, which will in turn, reshape not only the types and varieties of financial products offered to consumers, but may ultimately re-configure the financial services providers themselves.

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March 17, 2001

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Sallianne Fortunato
National Telecommunications and Information Administration
Room 4716
14th Street and Constitution Avenue, N.W.
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Re: ***ESIGN Study - Comment P004102***

To the Federal Trade Commission ("FTC"):

These comments are provided in response to your Request for Comment and Notice of Public Workshop on the Electronic Signatures in Global and National Commerce Act ("ESIGN"). The Electronic Financial Services Council ("EFSC") is a national trade association promoting legislation and regulation designed to ensure that electronic commerce continues to revolutionize the availability and delivery of financial services.

The EFSC welcomes the opportunity to comment on the benefits and burdens of requiring consumer consent to receive information electronically pursuant to Section 101(c)(1)(C)(ii). The EFSC believes that as a general matter the rules set forth in ESIGN have tremendous potential for assisting the growth of electronic commerce. Furthermore, the EFSC is firmly committed to the proposition that consumers are entitled to timely and meaningful information concerning their options and all the methods available to them for receiving required notices and disclosures. Electronic commerce cannot reach its full potential without the consumer's complete comfort with, and confidence in, both the process and the medium. Effective delivery of the ESIGN consent disclosures as set forth in Section 101(c)(1) ("ESIGN consent disclosures") will materially contribute to that comfort and confidence.

The EFSC strongly supported the original package of consumer protection provisions added to ESIGN in the House of Representatives (sometimes called the "Inslee Amendments"). The EFSC supports both (i) the requirement under Section 101(c)(1)(A) that consumers give affirmative consent to electronically receive information otherwise required to be in writing, and (ii) disclosure of the information currently mandated by Section 101(c)(1)(B).

However, the EFSC also believes that the current rules regarding the *timing and methodology* for delivering the ESIGN disclosures and obtaining consumer consent could be substantially improved. Certain elements of ESIGN's rules concerning effective consumer consent in Section 101(c)(1)(C)(ii) were not part of the original Inslee Amendments. Instead, they were added at the very end of the legislative process and so were, perhaps, unavoidably subjected to a less rigorous level of analysis than the rest of the statute. In particular, the consent process described in Section 101(c)(1)(C)(ii) can create unanticipated, and unintended, obstacles to the effective use of electronic commerce by both consumers and businesses. This letter will respond to a number of the questions the FTC has addressed to the financial services industry concerning the ESIGN consent procedure.

The consumer consent provisions in ESIGN Section 101(c) lay out four principal procedural requirements:

> The consumer must be provided the "ESIGN consent disclosures";
>
> The disclosures must be conspicuously displayed prior to the consumer's first receipt of information which otherwise would be required to be delivered in writing ("required information");
>
> Having received the ESIGN consent disclosures, the consumer must consent electronically to receive the required information in electronic form; and
>
> There must be a "reasonable demonstration" of the consumer's ability to receive and access the file formats that will be used during the transaction.

EFSC's members are now in the process of designing and implementing a variety of products and services intended to benefit from and implement ESIGN. For the most part, these products and services are still in the planning and design stage, so that at this time the EFSC has little empirical data available concerning consumer acceptance and practical application of the ESIGN consent disclosure requirements "in the field." However, the EFSC's members do have experience in design and implementation of electronic commerce applications that are not dependent on ESIGN for validity (e.g. online lending applications, commercial data, aggregation and exchange, and agreements for provision of certain financial services), as well as significant experience with consumer reaction to those designs. Based on this experience, the EFSC's members believe that implementation of the consumer consent provisions, and in particular the electronic consent and "reasonable demonstration" requirements of Section 101(c)(1)(C)(ii), impose the following potential burdens (discussed in more detail below):

> The combination of the timing and ESIGN consent disclosure requirements may, in a number of instances, force presentation of the ESIGN consent disclosures before the customer has committed to the transaction in any form, and before the customer is prepared to choose either an electronic or written medium. An example would be the delivery of pre-application disclosures in connection with certain types of consumer credit products.
>
> The reasonable demonstration test requires interruption of the contracting process to establish, based on a subjective standard, the consumer's ability to access documents that are provided in formats in common use for which viewing software is freely

available. The test also provides an incentive to favor certain file formats over others in order to streamline the testing process.

The requirement of electronic consent, combined with the reasonable demonstration test, impairs the use of electronic contracting and disclosure in business models where the relationship begins with a face-to-face meeting in a commercial setting or via telephone (or some combination of the two), but both parties wish to communicate and exchange required information electronically.

Technical violations of the rules for ESIGN consent disclosures may result in disproportionate penalties.

As noted earlier, the members of EFSC have not, in general, had a chance yet to fully test consumer acceptance of, or reaction to, the systems and processes they are designing. It is conceivable that additional issues may arise as testing continues.

It is the view of the EFSC that the information communicated to consumers in the ESIGN consent disclosures is of significant benefit to both consumers and businesses; it empowers consumers to make educated decisions regarding the transaction of business and the receipt of legally required disclosures electronically. However, the benefits associated with some of the technical and procedural requirements outlined above for the delivery of the ESIGN consent disclosures and the process for obtaining consumer consent are significantly outweighed by the burdens they impose on electronic transactions involving financial services and products. The balance of this letter will explore each of these burdens in more detail and suggest statutory solutions that would retain the most meaningful benefits of the consent provisions, while reducing the burdens. The letter will also indicate the FTC questions that are addressed in the course of the discussion.

EVALUATING THE BURDENS

Timing (Responds to FTC Questions 1, 3, 5, 6, 12, 15)

As a general matter, both ESIGN and the Uniform Electronic Transactions Act ("UETA") require the parties to an electronic transaction to agree to replace any required writings or traditional signatures with electronic equivalents. The consent can be express or implied from the circumstances. Timing is left to the parties under the UETA for all transactions and for business-to-business transactions under ESIGN. Consent may be given before the electronic records and signatures are utilized, or the use of electronic methods may be ratified at any time during the transaction or even after the transaction is concluded.

In contrast, Section 101(c) requires the ESIGN consent disclosures to be given before the required information is provided. In some financial transactions (particularly certain types of consumer credit transactions) required information must be delivered before the consumer is committed to conclude the transaction. The presentation of the full ESIGN consent disclosures while the consumer is still evaluating the proposed transaction can be intrusive and confusing. Introducing the burden of reviewing and absorbing the ESIGN consent disclosures too early in the "shopping" process may cause consumers to reflexively opt out of efficient, cost effective electronic delivery and signature systems that could benefit them. This is particularly true in the context of an online transaction initiated by the consumer, who is actively and intentionally seeking out the required information electronically. The

forced display of the detailed ESIGN consent disclosures while the consumer is still shopping interrupts the consumer's evaluation of the proposal, and may lead to the erroneous belief that the consumer is being asked to commit to the transaction itself, when all that is being sought is consent to use electronic records to effect delivery of pre-transaction required information.

Past experience with consumer reactions to online contracting strongly suggests that under these circumstances many consumers will become either frustrated or confused and abandon the transaction entirely. As a consequence, some lenders designing online systems are actively seeking ways to delay the ESIGN consent disclosures until the consumer is at the point of committing to the transaction. One way this is being done is by invoking the rules relating to telephone loan applications, so that initial delivery of required information may occur shortly after the consumer has completed the application process. In this way, the ESIGN consent disclosures do not interrupt or interfere with the consumer's evaluation of the offered loan and completion of the application. The result is that the timing of information flow to the consumer is being determined, not by consumer preference, need or convenience, but by the strictures of the timing requirements for consumer consent.

Reasonable Demonstration Test (Responds to FTC Questions 1, 3, 7, 12, 15, 26, 27)

The requirement of a "reasonable demonstration" of the consumer's ability to receive file formats is already having an impact on electronic financial services, both by (i) discouraging the use of widely available, reliable file formats, such as Adobe Acrobat PDF ("PDF") in favor of HTML and other formats native to the software delivering the ESIGN consent disclosures, and (ii) discouraging some major lenders from utilizing ESIGN at all.

One of the principal goals of any electronic information delivery process is to keep the flow of information as streamlined as possible. Experience has shown that frequent extended interruptions and downloads increase the likelihood that the consumer will abandon the transaction. As a result, EFSC members and representatives have observed a growing pattern over the last few months: a number of system designers are selecting the native file format of the software delivering the ESIGN consent disclosures (such as HTML for a web browser) as the *exclusive* file format for delivering all required information. This choice is made because it simplifies completion of the reasonable demonstration test, without regard to whether it is the best format for handling the documents in the transaction. Financial service providers reason that in many cases consumers will initiate electronic contact over the Internet, using a web browser, or using proprietary software provided for the specific purpose (such as bill payment or money management software). If the ESIGN consent disclosures are delivered in the software's native format, and the consumer reviews the ESIGN consent disclosures and affirmatively consents, that should constitute a "reasonable demonstration" of the consumer's ability to receive records. The consumer and service provider have not had to deal with multiple formats, and the consumer has not had to endure a complex "download and response" test.

Essentially, the reasonable demonstration test provides a disincentive to use alternative file formats such as PDF and Microsoft Word, despite the fact that these formats are highly reliable, print and store accurately across a wide variety of platforms and printers, provide an excellent medium for delivering information with the formatting intact, and may be viewed using software that is distributed free of charge and is widely available. As a result, the file format of choice is being selected by some designers based on its unobtrusive "fit"

into the reasonable demonstration test, and not on an evaluation of the most appropriate and useful format for the transaction. This is ironic, given Congress' clear general intent that ESIGN be technologically neutral and not favor any one process or format for doing business electronically to the detriment of others.

In addition, uncertainty as to what constitutes a "reasonable demonstration" is persuading some businesses to avoid the use of electronic documentation entirely. The test is subjective and fact-based. This means that even if the required information is actually received and reviewed, consumers may at a later date challenge the effectiveness of the required information based on whether the *test* was reasonable. Furthermore, because the reasonableness of the test will usually be a question of fact, not law, there will be little opportunity for the industry to shape its testing process based on reported judicial decisions and prior case law. Representatives of the EFSC have been present at public forums where counsel to large, sophisticated lenders stated that they have advised their clients against using ESIGN because of these uncertainties.

Electronic vs. written consent (Responds to FTC Questions 1, 3, 12, 13)

The primary benefits of substituting electronic records and signatures for traditional paper-and-ink documents are the ability to better manage data, workflow, quality control, speed of delivery, and document management (storage, retrieval and transmission). These benefits accrue whether a transaction is initiated online, or initiated in person. In the financial services industry, many customers still prefer to establish a relationship with an in-person visit, but are fully prepared to accept electronic delivery of the required information that is part of the ongoing relationship. Because of the electronic consent and reasonable demonstration requirements, businesses cannot rely on a consumer's consent obtained during the initial in-person meeting. Instead, the business must provide instructions for giving consumer consent, which the consumer must keep and remember to follow at a later date. In some instances, the time for providing certain required information may be running while the business is waiting for the consumer to complete the consent process. As a result, the business must continue to send paper documents to a consumer who is slow to complete the consent procedure, even though the consumer may be ready, willing and able to receive electronic documents.

Disproportionate Penalties (Responds to FTC Questions 1, 3, 5, 11, 12, 14)

Under Section 101(c)(1)(A) and (B), a technical failure to comply with the ESIGN consent disclosure and timing requirements may result in ineffective delivery of the required information, even if the violation was not intentional and did not prevent receipt and review of the required information. If the required information is not considered effectively delivered, or consent is deemed ineffective, the provider of the required information may be exposed to significant statutory damages and other remedies associated with the substantive law underlying the transaction. For example, it might be argued that an unintentional misstatement of the fees for paper copies, or a technically incorrect statement of hardware or software requirements, invalidates both the consent and delivery of the required information, even though the inaccurate disclosure had no impact on the transaction and the required information was actually received and reviewed successfully. In the same vein, it may be argued that both consent and delivery of required information is invalidated if the presentation of the ESIGN consent disclosures is not correctly timed, even though the consumer wished to consent and actually received and reviewed the required information.

EVALUATING THE BENEFITS

Each of the consent timing and methodology requirements discussed above generates some benefit. However, upon examination it is clear that the benefits are not as significant, or as certain, as might be thought at first glance.

Timing (Responds to FTC Questions 3, 5, 17)

The object of the ESIGN consent disclosures timing rule is to prevent the use of ESIGN to force the consumer to accept electronic delivery of required information. It is also intended to prevent the use of ESIGN to render required information ineffective either because it is delivered in an obscure manner or in file formats the consumer is unable to view, download or print. In the context of required information delivered before the consumer is committed to the transaction, however, the need for such protection is attenuated, so long as the consumer has initiated the transaction online and has been notified that important information is about to be delivered electronically. If the information is delivered in an inaccessible format, or is garbled in transmission, or is otherwise unreadable, the consumer has the option of simply terminating the transaction. The past experience of EFSC members strongly indicates that consumers routinely terminate unconsummated transactions when they become frustrated or confused by the on-line process.

Reasonable Demonstration Test (Responds to FTC Questions 3, 17)

The "reasonable demonstration" test is intended to establish the ability of a consumer to receive and view the file formats being used to deliver required information. The significance of the test is diluted, however, because of other protections available to the consumer. Intentional use of obscure or unstable file formats will run afoul of state and federal laws governing deceptive trade practices and fraud. In addition, even in the case of unintentional delivery problems the consumer retains the right to rescind consent and either terminate the transaction or demand delivery of required information on paper.

In addition, the effectiveness of the test is, by definition, limited to the computer the consumer is using at the time the test is administered. Many consumers have Internet access both at home and at work, and may have multiple computers in their home. The various computers may use different operating systems, different versions of key software, or even competing software to perform the same functions. The relevancy of the test is diminished because it only establishes the ability to receive and view the files on one computer, which may not even be the computer on which the consumer principally relies. In cases where the proposed file formats are in common use, and software for viewing the file format is freely available, the test will often be no more than an unnecessary annoyance for all parties.

Electronic vs. written consent (Responds to FTC Questions 3, 17)

The primary purpose of the electronic consent requirement is to prevent consumers who do not have the ability to receive electronic records from unwittingly or unwillingly agreeing to their use for required information. This is perceived as a particular problem with respect to the homebound and the elderly. However, it is not clear what benefit this adds to a transaction initiated in a commercial establishment or by telephone, if the full ESIGN consent disclosures are provided at the time of the election. In most cases, if the transaction is occurring at a place of business it means that the consumer sought out the transaction. If

the consumer is unwilling or unable to accept electronic delivery of required information, or is feeling undue pressure to accept electronic delivery, then the consumer can simply terminate the exchange.

Disproportionate Penalties (Responds to FTC Questions 3, 5, 17)

The imposition of penalties for intentional and material non-compliance with ESIGN's consent and timing requirements is both necessary and appropriate; it provides an incentive for compliance and a remedy for injured consumers. However, penalties do not accomplish either of those goals in situations where a good faith attempt at compliance has occurred, the violation is inadvertent and non-material, and the required information was actually delivered. Penalties will not prevent unintentional technical violations, and offering remedies to consumers who were not harmed by the error results in a windfall, not relief from an injury. Furthermore, the cost of settlement of actions brought in connection with unintentional technical violations is borne by all consumers.

RECOMMENDATIONS

(responds to FTC questions 2, 4, 17)

In light of the foregoing evaluation, the EFSC recommends that the following four changes be made to the ESIGN Act:

a. In circumstances where a consumer is initiating a transaction electronically and required information must be given before the consumer is obligated on the transaction, it should not be necessary to display the full ESIGN consent disclosures before providing the required information. An alternative procedure should be available, permitting the display of a brief statement requesting consent to deliver the information electronically, advising that the full ESIGN consent disclosures are available for review, and providing the consumer voluntary access to the full disclosures before proceeding. Conspicuous display of the full ESIGN consent disclosures would still be required before the consumer becomes bound to complete the transaction.

b. It should be possible to give consent either electronically, or on paper if the transaction is being initiated at a commercial location, or over the telephone. Written or telephonic consent should be preceded by the full ESIGN consent disclosures, including a disclosure of the file formats and delivery methods that will be used to provide required information to consumers.

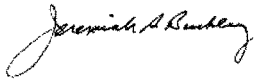
c. The "reasonable demonstration" test should not be required when information is being provided in file formats for which free viewing software is available (examples would include HTML, PDF, or Microsoft Word), if the consumer is given notice of the availability of the viewing software as part of the ESIGN consent disclosures (this would mirror the practice on a number of federal websites, including the FTC and Internal Revenue Service sites, where files are made available for downloading in PDF format and hyperlinks are provided to obtain free PDF viewing software).

d. The consumer's consent and effective delivery of required information should not be invalidated as a result of technical violations of the ESIGN consent disclosure or timing requirements, where the required information is actually received and

reviewed.

By its nature, a comment letter of this type can sometimes seem to focus on the negative. The members of the EFSC wish to emphasize that they are enthusiastic supporters of the ESIGN legislation and its potential contribution to efficiency, economic expansion, and consumer convenience. The fact that large-scale implementation of ESIGN has not yet occurred should not be read as a lack of enthusiasm for the statute or a waning of industry interest in electronic commerce. Rather, the deliberate pace reflects the determination of many responsible members of the financial services industry to act thoughtfully and to roll out ecommerce applications that are well designed and well implemented.

Sincerely,



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June 1, 2001

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Interim Final Rules on Regulation B; Docket No. R-1040
Interim Final Rules on Regulation E; Docket No. R-1041
Interim Final Rules on Regulation M; Docket No. R-1042
Interim Final Rules on Regulation Z; Docket No. R-1043
Interim Final Rules on Regulation DD; Docket No. R-1044

Dear Ms. Johnson:

The Electronic Financial Services Council ("EFSC") is a national trade association which seeks to promote legal and regulatory changes designed to facilitate electronic delivery of financial services. The EFSC appreciates the opportunity to submit its views regarding the interim rules (the "Interim Rule") of the Board of Governors of the Federal Reserve System (the "Board") concerning the use of electronic communications to provide required notices under five consumer protection regulations: B (Equal Credit Opportunity), E (Electronic Fund Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings). Although we recognize that there are differences among the interim rules, the EFSC is submitting its comments in this single letter in order to address certain concepts common to all of the proposals. This letter will direct specific comments to the interim rule under Regulation Z.

We strongly support the Board's efforts to facilitate electronic applications and believe that several of the provisions of the Interim Rule could be helpful to both consumers and industry. We are concerned, however, that in promulgating the Interim Rule, the Board has adopted certain interpretations of the meaning of the Electronic Signatures in Global and National Commerce Act (the "ESIGN" or "Act"), Pub. L. No. 106-229, 106th Cong., 2d Sess., 114 Stat. 464 without going through the procedures prescribed under ESIGN, exceeding its authority under the Act. The Board's interpretations, while providing sound practical solutions to

important problems, may have the unintended effect of creating future legal uncertainty for financial service providers seeking to make disclosures electronically.

Our most serious concerns are (1) that the Board's Interim Rule in interpreting the word "transaction" in Section 101(c) of ESIGN did not comply with the standards and limitations on rulemaking required by Section 104(b) of ESIGN and (2) that the Board interprets the consumer consent provisions without making the appropriate findings and otherwise complying with the requirements under Section 104 and (3) that the Board misinterprets the timing and delivery exclusion contained in Section 101(c)(2) to permit it to establish differing timing and content requirements for electronic communications than for those provided on paper. If other state or federal agencies adopt similar interpretations of their authority under ESIGN, the Act's effectiveness could be seriously compromised.

The EFSC recognizes that the Board has broad power under TILA to interpret Regulation Z in a way that furthers the goals of the statute. Based on the analysis used to support the Board's 1998 revisions to Regulation E permitting electronic disclosures, it is possible that the Board can support the Interim Rule without reference to ESIGN. However, the EFSC strongly believes that before promulgating a final version of the Rule, the Board should follow the procedures set forth in Section 104 of ESIGN, for three reasons:

- The history and provisions of ESIGN make it clear that Congress intended to provide baseline rules, and regulatory procedures, for replacing writing and signature requirements across the whole range of federal laws and regulations affecting consumer disclosures and notices.
- The use of parallel or alternative authority by the Board will result in a regulatory "double standard", in which federal regulators without the broad interpretive authority of the Board are required to live within ESIGN, while the Board and other regulators with arguably broader authority may avoid its procedures and limitations.
- Since the use of parallel or alternative authority will not supplant ESIGN, institutions wishing to avail themselves of electronic notices and disclosures will be forced to select between two potentially different schemes, creating the potential for both competitive inequalities and confusion for consumers as they encounter widely differing practices.

DISCUSSION

I. The Board Would Interpret Section 101 of ESIGN without Making the Findings Required by Section 104(b).

Our first concern is that the Interim Rule in interpreting the word "transaction" in Section 101(c) of ESIGN does not comply with the standards and limitations on rulemaking required by Section 104(b) of ESIGN.

A. ESIGN's General Rules

E-Sign applies to the use of electronic records and signatures relating to a "transaction in or affecting interstate or foreign commerce."[1] A transaction is defined as any "action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons."[2] E-Sign is a statutory "overlay." It sets up uniform rules revising traditional writing and signature requirements in the law, permitting the use of electronic records and electronic authentication methods instead. Section 101(c) of ESIGN applies a modified rule to any "statute, regulation, or other rule of law [that] [1] *requires* that information relating to a *transaction or transactions* . . . [2] be provided or made available to *a consumer* [3] *in writing*" (emphasis added).

B. Required Findings

As a condition of issuing any regulation, order, or guidance that interprets Section 101 of ESIGN, an agency must satisfy the standards set forth in Section 104(b) of ESIGN, including that:

> (A) such regulation, order, or guidance is consistent with section 101;
> (B) such regulation, order, or guidance does not add to the requirements of such section; and
> (C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that—
>
> > (i) there is a substantial justification for the regulation, order, or guidance;
> > (ii) the methods selected to carry out that purpose—

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[1] ESIGN § 101(a).

[2] ESIGN § 106.

(I) are substantially equivalent to the requirements imposed on records that are not electronic records; and

(II) will not impose unreasonable costs on the acceptance and use of electronic records; and

(iii) the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

We also note that the Board can exempt certain types of disclosures under Section 104(d)(1) of ESIGN, which provides that the Board may:

> . . . with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category of record or type of record from the requirements relating to consent in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

C. The Board Used its Interpretive Authority Inappropriately

The Interim Rule authorizes certain disclosures to be provided electronically without first obtaining consumer consent under ESIGN.[3] The disclosures exempted from consent are sometimes referred to collectively as the "shopping disclosures," and include advertisements (§ 226.16 and § 226.24), Home Equity Line of Credit ("HELOC") and Adjustable Rate Mortgage ("ARM") loan application disclosures (§ 226.5b and § 226.19(b)), and disclosures under §§ 226.17(g)(1)-(5) ("Shopping Disclosures"). The exemption is based on a finding by the Board that these disclosures are "deemed not related to a transaction."[4] This is presumably a reference to the provision in Section 101(c) of ESIGN that requires consumer consent to be obtained before presenting "information relating to a transaction" that is otherwise required to be presented in writing.

The result under the Interim Rule makes perfect sense. The consumer has consciously sought out the information in an electronic environment. If the Shopping Disclosures, which are

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[3] Interim Rule §226.36(c).

[4] Interim Rule §226.36(c).

provided before the consumer has entered into any binding obligation, are not delivered in a satisfactory form, the consumer may simply abandon the transaction. Furthermore, interrupting the delivery of these disclosures with ESIGN consent process may create confusion and frustration for the consumer. The consent process may create the impression that a binding commitment to proceed with the transaction is being forced before the Shopping Disclosures are provided, causing the consumer to abandon the process. Ironically, such a result would inhibit, rather than promote, the effective dissemination of the shopping disclosures to potential borrowers.

Unfortunately, however, the approach taken by the Board in implementing the exemption does not appear to conform with either (i) a reasonable interpretation of the term "transaction" as it appears in ESIGN, or (ii) the requirements of Section 104(d) of the Act for exempting disclosures from the consent requirement.

As noted above, the definition of "transaction" in the Act is extremely broad. It covers "any ...set of actions relating to the conduct of...consumer...affairs between two or more persons."[5] Note that the definition does not require that an exchange of value occur, nor that the actions result in a binding agreement.[6] The fact that the borrower has not yet become bound to complete

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[5] ESIGN § 106(13).

[6] Although the language of the statute is clear, it is also supported by the legislative history of the E-Sign Act. As shown in the following colloquy from the Senate floor debate on the bill, in enacting the E-Sign Act, Congress intended to establish broad application of the Act:

> "MR. GRAMM. As to its coverage, does the Senator agree that *this act is intended to operate very broadly to permit the use of electronic signatures and electronic records in all business, consumer and commercial contexts? This breadth is accomplished through the use of the term 'transaction,' which is defined broadly* to include any action or set of actions by one of the parties to the underlying transaction, or by any other person with any interest in the underlying transaction, or a response by one party to the other's action, all are covered by the act. In this regard, it is the nature of the activity, rather than the number of persons or the identity or status of the person or entity involved in the activity, that determines the applicability of the act. Have I stated the matter correctly?
>
> "MR. ABRAHAM. Yes, this act applies to all actions or set of actions related to the underlying business, consumer, or commercial relationship which is based on the nature of the activity and not the number of persons involved in the activity. The act is also intended to cover the related activities of those persons or entities who are counterparties to, or otherwise involved in or related to, the covered activity."

the transaction does not mean that a transaction has not been initiated. By making contact with the lender and seeking out the shopping disclosures, a consumer has begun a process that is related to any loan ultimately made. Even if no loan is made as a result of the disclosures, there has still been a transaction within the meaning of ESIGN; the choice to proceed or not proceed, based on the information provided, is a significant consumer choice that affects both the consumer and the lender. It directly impacts the conduct of the consumer's affairs.

This view of the relevance of pre-obligation communications is consistent with commercial law generally. For example, the express warranties covered by Article 2 of the Uniform Commercial Code include affirmations of fact made by the seller during the advertising and negotiation cycle, well before any commitment is made to purchase or sell. Terms of sale may also include communications made prior to any commitment. All of these communications are viewed as related to the final transaction, because they form part of the foundation for the mutual understanding of the parties. The shopping disclosures fulfill the same function.

Even though the result reached by the Board is both reasonable and desirable, the reasoning used to support it is of grave concern. A narrowing of the term "transaction" as defined in ESIGN constitutes an invitation to other regulators to conclude that various consumer disclosures within their jurisdiction are not "related to a transaction," and so are not covered by ESIGN at all, permitting the reintroduction of paper requirements that otherwise would be prohibited under ESIGN.

As an alternative to attempting to narrow the statutory definition of "transaction" the Board has the option of making an explicit decision to exempt the shopping disclosures from ESIGN's consent requirement. Applying the consent process to the Shopping Disclosures, which were deliberately sought out by the consumer in an electronic environment, is both burdensome and largely pointless. Because the consumer has no obligation to proceed, if the disclosures are not effectively delivered or cannot be read, the consumer may simply abandon the transaction, so that no material harm will result from the lack of consent.

By narrowing the scope of the definition of transaction in reaching its conclusion, the Board interprets Section 101(c) of ESIGN as not applying to certain disclosures. In such cases, the Board must satisfy the requirements of Section 104(b) of ESIGN before reaching a conclusion about the applicability of Section 101 of ESIGN to these disclosures. On the other hand, the Board could have exempted such categories of disclosures from Section 101(c) of ESIGN by following the procedures set forth in Section 104(d)(1). Given the burdens that the consumer consent provisions impose on shopping disclosures, the Board could have used either its interpretive or exceptive authority under the Act to eliminate such burdens without taking the extraordinary step of excluding shopping activities from the definition of a transaction under Section 101(c).

The Board fails to reconcile its conclusion that shopping is not related to a transaction for purposes of Section 101(c) with its apparent intent to include such activities within the scope of the definition of transaction in Section 106. Our concern with this line of reasoning is that it opens the door to excluding certain commercial activities such as shopping from the definition of transaction under both Sections 101(c) and 106, thus denying such activities both the burdens and the benefits of ESIGN. Such a line of reasoning in the hands of a regulator not favorably disposed to electronic commerce might consign shopping disclosures to a paper environment only. Clearly Congress did not intend such a result when it established detailed procedures for exercise by a regulator of its interpretive and exemptive authority under ESIGN.

II. Any Regulation Must be Consistent with the Broad Purposes of ESIGN.

A. Interpretation of the Consumer Consent Provisions

The Board interprets the consumer consent provisions without making the appropriate findings and otherwise complying with the requirements under Section 104. As noted above, in order to interpret the consumer consent provisions, the Board must find among other things, that there is a substantial justification for the Board's action, the resulting requirements for electronic disclosures will be substantially similar to the requirements for paper disclosures, and the requirements for electronic disclosures will not impose unreasonable cost.

We believe that the Interim Rule imposes delivery-related requirements on electronic disclosures that (i) add to the requirements of Section 101, and (ii) are not substantially equivalent to the requirements for equivalent writings. In addition, to the extent these requirements do not otherwise violate ESIGN, the Board has still failed make specific findings that (i) the regulation is substantially justified, (ii) the methods used to implement it are substantially equivalent to those for non-electronic records and will not impose unreasonable costs, and (iii) the methods are technology-neutral.[7]

E-mail notice for disclosures displayed in real time

The Interim Rule provides that, for disclosures other than the Shopping Disclosures, if a disclosure is posted on a website the consumer must be sent an e-mail (or postal mail) informing the consumer of the location at which the disclosure is available for review. The disclosure must remain available for at least ninety days from the delivery date. The requirement to deliver an e-mail (or postal) notification appears to apply even if the disclosure is being displayed and viewed at the website as part of an interactive real time session with the consumer. Under ESIGN, an electronic disclosure is the operative disclosure. In the case where a disclosure or notice is being reviewed on a website in real time, that disclosure is effective when it is displayed, just as it

[7] *See* ESIGN § 104(b).

would be effective when handed across a desk or delivered in the mail. If the consumer is offered the opportunity to retain a copy by printing or download at the time of display, then the record retention rules of ESIGN have been satisfied.[8] Requiring additional notification constitutes a burden that is not equivalent to any imposed for paper documents. The Interim Rule should be revised to clarify that the e-mail notice is not required when the disclosure or notice is being displayed to the consumer electronically in real time as part of an interactive session.[9]

Redelivery

The Interim Rule requires a creditor to take "reasonable steps" to attempt redelivery of an electronic communication if the disclosure is returned undelivered. The Commentary indicates that such steps must include sending the disclosure to a different e-mail or postal address that the creditor has "on file." No such requirement is imposed when disclosures are initially made through postal mail.

The redelivery issue is an example of an area in which the Board might be permitted to issue regulatory interpretations under ESIGN if it could make the required findings, including a determination that the methods chosen in the regulation are "substantially equivalent" to those that apply to non-electronic records and that they "will not impose unreasonable costs." Due to the limitations of current technology, it may be more likely that e-mail will be returned as undeliverable than that a postal letter will be, which could provide a basis for regulatory action. But the method that the Board has chosen—requiring the creditor to send a second notice to another address that the creditor has "on file"—has the potential to be burdensome, because the creditor may have other addresses for the applicant "on file" but have no way to connect those addresses with the applicant.

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[8] See ESIGN § 101(e).

[9] For disclosures that are not made in real time (other than Shopping Disclosures), the Interim Rule requires that those disclosures either be (i) delivered to an e-mail address or (ii) made available at another location (such as an Internet website) with an accompanying notification of availability delivered to an e-mail address or a postal address. It is the experience of the EFSC's members that a certain small percentage of those consumers moving past the "shopping" phase of a transaction do not have, or are not willing to provide, an electronic address. The use of a postal address as a substitute for notification effectively eliminates any efficiencies derived from electronic disclosures. If those consumers unable or unwilling to provide an electronic address have agreed to receive electronic disclosures and have not withdrawn their consent, then it seems reasonable that other alternatives should be available for delivering disclosures. For example, the approximate timetable for delivery of specified disclosures, and the location at which they will be posted, could be provided to the consumer at the time of application if an e-mail address is not available. The Board may wish to consider offering such consumers the opportunity to participate in e-commerce by authorizing alternatives to e-mail notice, including the provision of a timetable and location for disclosures as an alternative for consenting consumers who have not provided an e-mail address.

B. Interpretation of the Timing and Content Exclusion

The Board misinterprets the timing exclusion contained in Section 101(c)(2) to permit it to establish different timing requirements for electronic communications than for those provided on paper.

Section 101(c)(2) of ESIGN states that—

> Nothing in this title affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

Although the Board's rulemaking authority gives it power to issue regulations effecting content and timing, ESIGN overrides *any* other statute, regulation, or rule of law that may be inconsistent with ESIGN. As the Board acknowledges in the Preamble, regulatory agencies have limited authority to interpret ESIGN. The Act gives the Board no power to undermine the safe harbor that the Act creates.[10] Thus, any regulations issued by the Board must be consistent with the broad purpose of ESIGN.[11] Regulation effecting electronic disclosures that exceed those for written ones should not be issued until the Section 104(b) findings are made to ensure that the intent of Congress and the purpose of ESIGN are upheld.

By purporting to impose requirements beyond those in ESIGN, the Board's Interim Rule undermines ESIGN's fundamental purpose. If the Board's Interim Rule is allowed to stand, then

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[10] This notion is clearly documented in the legislative history of ESIGN:

> The conference report is designed to prevent Federal and State Regulators from undermining the broad purpose of this Act, to facilitate electronic commerce and electronic record keeping. *To ensure that the purposes of the Act are upheld, Federal and State regulatory authority is strictly circumscribed.* It is expected that Courts reviewing administrative actions will be rigorous in seeing that the purpose of this Act, to ensure the widest use and dissemination of electronic commerce and records are not undermined. [Cite to Congressional Record – House H4355 (emphasis added).]

[11] The legislative history of the ESIGN is again helpful:

> As the bill makes clear, each agency will be proceeding under its preexisting rulemaking authority, so that the regulations or guidance interpreting section 101 will be entitled to the same deference that the agency's interpretations would usually receive. *This is underlined by the bill's requirements that regulations be consistent with section 101*, and not add requirements of that section, which restate the usual Chevron test that applies to and limits an agency's interpretation of a law it administers. [Cite to Congressional Record—House H4358-9 (emphasis added)].

the intent of Congress—"to facilitate e-commerce and to provide legal certainty for electronic signatures, contracts and records where such certainty [did] not exist"[12]—will be defeated.

C. Delivery of Forced Disclosures using "Multiple Screens"

The Board's interpretation of §226.36(b) includes the following analysis of methods for forcing the review of certain disclosures:

> When a creditor permits the consumer to consummate a closed-end transaction on-line, the consumer must be required to access the disclosures required under § 226.18 before becoming obligated. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before becoming obligated. Or the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure.

The methods for forcing disclosure described in the Staff Interpretation are instructive. However, it is not clear from the Staff's comments whether the methods described are intended to be examples, or to constitute the exclusive methods for deploying a forced disclosure. In particular, the reference to "multiple screens" could be read as a rejection of the use of scroll boxes to deliver disclosures that require more than a single screen for full display. Prohibiting the use of scroll boxes for the delivery of important information would be contrary to both current practice and would set a different standard than the guidelines for conspicuous disclosure provided by the FTC in connection with the delivery of online privacy notices, which permit the use of scroll boxes for delivering disclosures.[13] The Board should consider revising the Staff Interpretation to reflect that there are a broader range of delivery solutions available, beyond the examples provided in the Interpretation.

CONCLUSION

The EFSC strongly supports the Board's actions in formulating and promulgating the Interim Rule. The Interim Rule provides valuable guidance on the delivery of electronic disclosures and notices. It is at least arguable that the Board has the authority to issue the Interim Rule without regard to the requirements of ESIGN. However, the law of electronic records and signatures is in its infancy. ESIGN creates a new environment for delivering notices and disclosures. It is intended to foster both efficiency and innovation. Congress clearly intended ESIGN to provide an across-the-board set of guidelines for federal regulation of electronic notices and disclosures

[12] 146 Cong. Rec. S5282 (June 16, 2000) (emphasis added).

[13] *See* 16 CFR Part 313.

used in place of required writings. The Board is a highly influential and well-regarded regulator, and the Interim Rule represents the first comprehensive attempt to interpret ESIGN as it applies to specific federal disclosure requirements. The EFSC believes it is essential that the Board's final Rule complies with the procedural requirements and limitations of ESIGN, in order to promote a uniform environment for electronic transactions and clear early guidance to other regulators addressing the same issues. The EFSC looks forward to working the Board Staff to achieve these goals.

The EFSC appreciates the opportunity to comment on the Interim Rule.

Very truly yours,

[SIGNED]

Jeremiah S. Buckley

STATEMENT

OF

LOUIS F. ROSENTHAL
ABN AMRO North America, Inc.

FOR

THE FINANCIAL SERVICES ROUNDTABLE
&
BITS

BEFORE THE

House Financial Services Subcommittee on Domestic Monetary Policy, Technology and Economic Growth

UNITED STATES CONGRESS

June 28, 2001

TESTIMONY OF LOUIS F. ROSENTHAL, ABN AMRO North America Inc.

Good morning, Mr. Chairman and Members of the Subcommittee. I am Louis F. Rosenthal, Executive Vice President at ABN AMRO North America Inc. I am pleased to appear before you today on behalf of The Financial Services Roundtable (The Roundtable) and BITS.

The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. BITS was established in 1996 as a not-for-profit industry consortium and a sister organization to The Roundtable -- we share many of the same members. BITS is not a lobbying organization; instead, it serves as a business and technology strategy group for CEOs in the financial services industry.

I want to begin by commending the Members of this Subcommittee, and indeed all Members of the 106th Congress, for passing the E-SIGN Act. E-SIGN represents the kind of supportive, yet minimalist, legislation that is needed to encourage and facilitate the continued growth of electronic commerce in the United States. It levels the playing field between electronic and paper-based methods of doing business by granting legal recognition to electronic signatures, contracts and records, and creates a consistent and uniform legal environment for electronic commerce by preempting state laws. As a result, it provides businesses with the necessary confidence and legal certainty to offer their customers cost-effective and innovative electronic services and products.

Perhaps the most important principles embodied in E-SIGN are those of party autonomy, technology neutrality, and uniformity. For the most part, E-SIGN allows the parties to electronic commercial transactions to decide for themselves how they wish to do business and to structure their business relationships in the manner most appropriate to their needs. By not prescribing standards or mandating the use of any particular technology, E-SIGN permits parties to select from a broad array of electronic methods for doing business, thus helping to ensure that technological innovation will continue to flourish. Finally, by

preempting inconsistent state laws, E-SIGN enables businesses to offer electronic services and products to their customers on a nationwide basis without having to worry whether their contracts and relationships will be legally recognized and enforced.

Until very recently, the financial services industry has been implementing the comprehensive provisions of the Gramm-Leach-Bliley Act. Nevertheless, BITS and Roundtable member companies have also been working to implement E-SIGN and to expand the types of on-line services and products we offer our customers. Examples of some of the opportunities our members now offer or are exploring include: opening and maintaining retirement and brokerage accounts online; offering, selling and servicing insurance products (except for the termination or cancellation of benefits) over the Internet; online mortgage and other consumer loans; account aggregation services; credit facility services; contract closing and archival services; secure document storage and retrieval, such as in electronic vaults; and a variety of business to business (B-to-B) and business to consumer (B-to-C) transactions.

Shortly after E-SIGN was passed, BITS created an E-SIGN Working Group to assist our members in addressing these issues on a cross-industry basis. I am especially pleased to be here as the Chairman of this Working Group, which consists of approximately 50 member BITS and Roundtable companies. We also formed an E-SIGN Industry Guidelines Subgroup, which has developed a matrix of top-priority industry applications for B-to-B, B-to-C, and internal products that could be used in conjunction with E-SIGN. Some of the issues being addressed by the Subgroup include levels of risk, process controls, legal and regulatory issues, and document archival requirements.

Since its inception, the E-SIGN Working Group has served as a valuable discussion forum and information clearinghouse regarding the approaches and steps being taken by financial services companies, government entities, and technology providers to implement E-SIGN. Through these meetings, we have identified a number of challenges to the successful implementation of E-SIGN. These include complying with E-SIGN's consumer consent requirements, the interaction between E-SIGN and state enactments of

the Uniform Electronic Transactions Act ("UETA"), and the manner in which federal regulatory agencies have interpreted and applied Section 104 of E-SIGN, which outlines the boundaries of their interpretive authority.

Our members do not necessarily see these challenges as roadblocks preventing them from going forward, but rather as hurdles to address so that they do not threaten their ability to provide the kind of streamlined and cost-effective services their customers want and expect. To a large degree, whether these hurdles prove to be major problems or simply minor irritants depends on how E-SIGN is interpreted and applied. If it is broadly interpreted, with common sense and in line with its underlying purpose of facilitating electronic commerce, we believe these hurdles can be overcome without undue burden. If, however, it is interpreted narrowly and restrictively, they could well interfere with our members' ability to take full advantage of E-SIGN's promise.

Consumer Consent Requirements

As the Subcommittee is no doubt aware, E-SIGN contains fairly complex consumer consent requirements for the electronic delivery of required written disclosures. Consumers must be provided with a clear and conspicuous statement containing a number of mandatory disclosures, after which they must affirmatively consent to receiving information in electronic form. In addition, consumers must either consent or confirm their consent electronically in a manner that "reasonably demonstrates" that they can receive the information in the form in which it will be provided, for example, by e-mail or in HTML format on a web site.

Our members fully support the concept of informed consumer consent to electronic delivery of information, and all would build meaningful consent processes into their electronic offerings regardless of whether it were required by E-SIGN. Unfortunately, the E-SIGN consent requirements go beyond ensuring that consumers are afforded the same level of protection in the electronic world as in the paper world, and instead impose requirements that have no equivalent in the paper world. This is particularly true with

respect to the "reasonable demonstration" requirement, which has emerged as posing the most significant practical challenge to fully implementing E-SIGN.

E-SIGN does not define what is meant by a "reasonable demonstration," and firms have been working diligently to come up with real-world solutions that meet both E-SIGN's consumer protection goals and its underlying purpose of facilitating electronic commerce. In our view, if this requirement is interpreted broadly and with common sense to permit consumers to demonstrate their ability to receive electronic documents in a variety of ways, the burden it imposes will likely be manageable. If narrowly construed, the burden could well impede the use of electronic delivery in the future.

Even if construed broadly, however, the reasonable demonstration requirement poses particularly difficult challenges when firms interact with consumers both through electronic and non-electronic means (which most of members do). For example, if a consumer wishes to open an account at a firm's offices or by telephone, and at the same time consents to receive subsequent disclosures through electronic communications, both the consumer and the business must go through the added step of confirming electronically that the consumer can receive the disclosures. This is true even if the disclosures are to be made through e-mail and the consumer gives the business an e-mail address as part of the paper-based consent process. It is also true even if the disclosures are to be made in HTML format on the firm's web site, and the consumer assures the firm that she or he has Internet access, has previously visited the firm's web site, and is fully capable of viewing HTML documents.

Prior to E-SIGN, some federal agencies allowed electronic delivery if firms obtained their customers' informed consent. These agencies provided general guidance as to what might constitute informed consent, but did not impose requirements such as "reasonable demonstration." As a result, consumers were adequately protected, while firms had the necessary flexibility to design their electronic offerings to meet practical realities. Congress may wish to reconsider whether these types of consent regimes are better suited to fulfilling E-SIGN's goals and to enabling firms to provide their customers with the

type of efficient and convenient online services they demand. This may be particularly appropriate in the case of firms, such as our members, that do business in highly regulated industries.

Preemption

By preempting inconsistent state law, E-SIGN creates a uniform national framework for the use of electronic signatures, contracts and other records. E-SIGN does, however, authorize states to legislate in this area if they meet certain requirements in Section 102(a). Although the precise scope of Section 102(a) has been the subject of debate, it clearly allows states to adopt the Uniform Electronic Transactions Act (UETA) in the form that was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (NCCUSL). As a result, over 20 states have enacted uniform versions of UETA that are consistent with E-SIGN. For example, Illinois is amending its electronic commerce law with language taken verbatim from E-SIGN, and Michigan has used virtually identical language in its adoption of UETA.

Other states, however, have adopted non-conforming versions of UETA. In addition, some commentators have suggested that the preemptive scope of E-SIGN is extremely narrow and that the states continue to have significant leeway to pass laws that discriminate against and impose restrictions on electronic contracts and signatures. At this point, these issues are somewhat theoretical, and they may well end up being resolved in the courts. Nevertheless, we urge Congress to pay close attention to how states are reacting to E-SIGN, and to take appropriate action if states pass laws that threaten to undermine it.

Our members are also greatly concerned by the need for uniformity in the international marketplace. We have spent some time reviewing the laws of our trading partners, and there are inconsistencies in the laws of sovereign countries that could impede implementation globally. However, as is the case in areas mentioned previously, it is too early to tell what, if any, disruption these inconsistencies may cause, and what, if any,

recommendations we would have for lawmakers. In the interim, we urge Congress to ensure that the government takes all necessary steps to implement the provisions of Title III of E-SIGN, which outlines the principles to guide the use of electronic signatures in international commerce.

Regulatory Interpretations

Finally, our members are concerned that some federal regulatory agencies are interpreting E-SIGN in an overly restrictive manner. We urge Congress to continue to review agency interpretations, along with the OMB Guidance on which many of them are based, to ensure regulations implementing E-SIGN are consistent with the goals of the Act.

Conclusion

Once again Mr. Chairman, the Roundtable and BITS congratulate Congress on passing E-SIGN. As technology evolves, we will continue to rely on this landmark legislation to develop new and improved ways to better serve their customers.

While the Act has some provisions that make its implementation cumbersome, we are not proposing that Congress re-open E-SIGN. Once our members and our customers have a chance to operate under the Act for a while, The Roundtable may have proposals to bring to the Committee.

At the present time, however, The Roundtable believes that the marketplace should be allowed to come up with practical methods for implementing the Act. We also would urge Congress to remain watchful that its provisions are not being restrictively interpreted and applied to frustrate its underlying purpose of removing barriers to electronic commerce.

On behalf of both BITS and The Roundtable, Mr. Chairman, thank you for the opportunity to testify before you today.

Testimony before the

COMMITTEE ON FINANCIAL SERVICES

Subcommittee on Domestic Monetary Policy, Technology and Economic Growth

regarding the

Consumer Consent Provisions

in the

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

Public Law No. 106-229

June 26, 2001

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Testimony before the
Subcommittee on Domestic Monetary Policy, Technology and Economic Growth
regarding the
Consumer Consent Provisions
in the
Electronic Signatures in Global and National Commerce Act (E-Sign)
June 26, 2001

Mr. Chairman and Members of the Committee, the **National Consumer Law Center**[1] thanks you for inviting us to testify today regarding the consumer consent provisions in the Electronic Signatures in Global and National Commerce Act (E-Sign).[2] We offer our testimony here today on behalf of our low income clients, as well as the **Consumer Federation of America, Consumers Union,** and the **U.S. Public Interest Research Group.**[3] Our testimony is offered in strong support of the need for retaining the consumer consent provisions in E-Sign.

E-Sign required the FTC and the Department of Commerce to evaluate whether the benefits to consumers from the requirement for electronic consent in E-Sign[4] *outweigh* the burdens. On behalf of the millions of low and moderate income consumers that we represent, we can categorically state that there are substantial benefits to consumers, and minimal burdens to industry. The electronic consent protects consumers in both the off-line world, as well as the on-line world. The provisions protect consumers from mistakenly agreeing to electronic records, or as part of a form contract. They protect consumers from mistakenly agreeing to receive electronic records in a form

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[1]The **National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of predatory practices against low-income people in almost every state in the union. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. We have led the effort to ensure that electronic transactions subject to both federal and state laws provide an appropriate level of consumer protections. We publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions.

[2] Federal Electronic Signatures in Global and National Commerce Act, Pub. L No. 106-229, 114 Stat. 464 (2000) (codified as 15 U.S.C. §§ 7001-7006, 7021, 7031) (enacted S. 761).

[3]The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

Consumers Union is the publisher of Consumer Reports.

The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

[4] E-Sign requires that for consumers before

> (c)(1) . . . the use of an electronic record to provide . . . information such information satisfies the requirement that such information be in writing if –
>
> (C) the consumer – . . .
>
> (ii) consents electronically, or confirms his or her consent electronically, 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.

(15 U.S.C. § 7001(c)(1)(C)(ii))

that they are not able to access and retain. And these provisions protect consumers from fraudulent practices which might otherwise be facilitated by the laws like E-Sign, which are designed only to expedite the transition to an electronic marketplace.

We believe that once access to the Internet is more widely available to all Americans, especially the nation's poor and elderly, there may be many new and beneficial opportunities made available. However, policies to facilitate electronic commerce must assure that consumers who are looking for credit, goods and services both through the Internet *and in the physical world* will not be victimized by overreaching merchants of goods and services.

Encouraging electronic commerce and protecting consumers need not be competing goals. The key to facilitating electronic commerce while protecting consumers' interests is to ensure that all of the assumed elements to a transaction in the physical world are in existence in electronic commerce, and that e-commerce not be the excuse for reducing consumer protections in real world transactions.

In these comments we address:

I. The three distinct benefits of the electronic consent requirement.

II. The current and future effect of the consumer consent provisions of E-Sign.

III. The need to protect consumers, and the benefits of the consumer consent provisions, with particular focus on special issues facing consumers in the new world of electronic commerce:

   a. The necessity to protect consumers *who are conducting real world transactions* from unfair or fraudulent practices which may be facilitated by E-Sign or other laws designed to expedite e-commerce.
   b. The importance of protecting consumers who are conducting business on line *using a public access computer.*
   c. The risks that consumers face when relying on electronic transmission of important notices.

IV. Discussion of the confusing status of E-Sign's provisions in the states.

V. The effect of the differences between *electronic* delivery and *paper* delivery on electronic records.

VI. Recommendations to improve protection of consumers from risks imposed by electronic exchanges.

I. The three distinct benefits of the *electronic* consent requirement.

The electronic consent requirement was included in the E-Sign legislation to protect consumers in a number of ways. Clearly, one reason was to protect consumers from the use of electronic commerce to facilitate fraud on consumers. However, it is clear from the Congressional record that the electronic consent is also to create a type of electronic handshake between the parties – a means to ensure that the electronic communication will in fact be successful. It is also apparent that the electronic consent is meant to emphasize to the parties to significance of the agreement to receive records electronically.

The three, distinct, but related protections afforded by the requirement for a consumer to *electronically* consent are:

- To ensure that the consumer has reasonable access to a computer and the Internet to be able to access information provided electronically.

- To ensure that the consumer's means of access to electronically provided information includes the software to read the electronic records provided.
- To underscore to the consumer the fact that by electronically consenting, the consumer is agreeing to receive the described information electronically in the future.

Senator Leahy emphasized these differences when he said on the floor of the Senate, regarding the passage of E-Sign:

> [This bill] avoids facilitating predatory or unlawful practices. . . . {It] will ensure informed and effective consumer consent to replacement of paper notices and disclosures with electronic notices and disclosures, so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher.
>
> . . . I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. *Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for access the information.* (Emphasis added)[5]

II. The Current and Future Effect of the Consumer Consent Provisions of E-sign

The internet has considerably broadened the power of consumers to access information and to comparison shop for goods and services. In many instances, purchases made over the internet are less expensive than would be available to consumers shopping in the real world. There are clear, undeniable benefits to consumers from engaging in e-commerce. However, it should be kept in mind that consumers' confidence in their own privacy and in their financial security is also essential for an active consumer marketplace to thrive.

Indeed, laws pre-dating E-Sign provide consumer protections which have allowed e-commerce to thrive. *But for the substantial consumer protections provided by the Truth in Lending Act for credit card purchases, e-commerce would not have flourished as it has [6] in the past decade.* When purchases are made over the Internet, they are generally paid for with a credit card. Payment by credit card provides a wide array of consumer protections mandated by the Truth in Lending Act,[7] ensuring – among other things – that the consumer is not billed for items not ordered, or not received, or not as warranted. In the less typical situation of a consumer using a debit card to make a purchase, the protections against unauthorized use provided by the Electronic Fund Transfers Act[8] apply.

To date, we do not believe that the provisions of the consumer consent provisions of E-Sign have been used for many contractual arrangements over the net. To the extent that the consumer consent provisions of E-Sign have been implicated since its passage, it has generally been in the areas of electronic banking and provision of

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[5] 146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. Leahy).

[6] Compare the explosive use of electronic commerce for the purchasing of goods in the U.S. to the paltry amount in Europe. Undeniably the difference is in the protections afforded the American consumer when they use credit cards to pay for their purchases on-line.

[7] 15 U.S.C. §1601 *et seq.*; *see* §§ 1642, 1643, 1644, 1666.

[8] 15 U.S.C. § 1693 see § 1693g.

information relating to securities. In other words, most transactions which are required to be in writing are *still being conducted on paper* rather than electronically. Industry may say that this is because the consumer consent provisions of E-Sign are too onerous. Actually, the news reports indicate that there are other, more technical problems that must be ironed out before business is conducted entirely electronically.[9] The passage of E-Sign, as well as the passage by many states of the Uniform Electronic Transactions Act, has *established the legal authority for electronic records and signatures.* But these laws have not provided the participants in e-commerce with necessary assurances. The big questions of 1) how to authenticate the players on-line, and 2) how to ensure that the electronic records have reasonable integrity against alteration, remain unanswered.

Before the next big step is made in e-commerce, both business and consumers must be assured that they will be reasonably protected from losses. The issue for the regulators is to ensure that the protections afforded consumers will be meaningful and enforceable. While we believe that, due to unrelated technological shortcomings, few transactions have been undertaken with the consumer consent provisions of E-sign in the few months since the statute's enactment, those protections will be highly important as a predicate for the future growth of e-commerce.

III. The Benefits of the Consumer Consent Provisions Far Outweigh the Minimal Burden

Significance of Using Electronic Records to Replace Paper. An important complexity in the analysis of the need for the consumer electronic consent provisions of E-Sign is the fact that the law applies to situations and transactions which are entirely *non-electronic.* If this were not the case, our concerns would be considerably different. But, E-Sign does not limit its application to transactions conducted between parties who are both on-line. This means that consumers who are standing in a place of business may be asked to agree to receive important documents electronically. They may be asked to agree to receive electronic records immediately – relating to the transaction taking place in the store, or they may be asked to receive electronic records in the future – relating to an ongoing relationship between themselves and the business.

E-Sign allows an electronic record to satisfy a legal requirement for a writing. Generally when the law requires that a notice or a contract be provided in writing to a consumer there has been a recognition that the consumer needs to receive the information in the record in a form the consumer can *access* and can *keep.* State and federal requirements that certain information be given to consumers in writing have been adopted only after a finding of a pattern of harm to consumers when that information is *not* delivered in writing. Required paper notices and documents are critically important to ensure that consumers are informed of their rights and obligations, and have the proof of the terms of their contracts to enforce these rights in court.

E-Sign allows electronic records to replace paper. But the differences between the physical world and the electronic world must be recognized. For example, when a law requires a document to be in writing there are a number of inherent assumptions that automatically apply to that writing that are not necessarily applicable to an electronic record:

- A piece of paper handed to or mailed to a person can be read without any special equipment.

  A computer is required to access or read an electronic record.

- A written record can be received by the consumer at no cost to the consumer. The consumer pays nothing to maintain and open the mailbox to which the U.S. Post delivers the mail daily.

  The electronic record can only be accessed through a computer connected to a third party for whom payment is generally required on an ongoing basis – the Internet Service Provider, or ISP.

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[9] *See, e.g.* Tom Fernandez, The American Banker, *E-Signature Law Proves Tough to Put into Practice,* March 13, 2001.

- If the consumer moves, U.S. Postal mail can be easily forwarded, at no cost to the consumer and with minimal difficulty – one notice to the Post Office suffices to forward all incoming mail for a year.

  ISPs generally do not forward electronic mail. Occasionally electronic mail will bounce back as undeliverable to the sender, but this is not automatic and not universal.

- A paper writing does not require special equipment to hold on to, or to retain. A consumer need only put it in the drawer, or in a file, where it will remain until the consumer removes it.

  An electronic record can only be retained electronically. The consumer must have access to a computer with a hard disc to retain the record,[10] or access to a computer with a printer to retain a printed copy of the electronic record (although the printed copy may not useful to prove the terms of the electronic record in court unless the paper representation of the electronic record includes some means of verifying that it is a true reflection of the actual electronic record received by the consumer.)

- A paper writing is by its nature tangible. Once handed to, or mailed, to a person it will stay on the table or in the drawer, wherever the consumer put it, until it is thrown out by the consumer.

  An electronic record can be provided in a form which will disappear after a period of time determined by the provider of the record. For example, E-Sign contemplates that a consumer could be provided notice of important information by providing a web-link to an internet posting. If the consumer does not access the internet web-link in time, the electronic record may no longer be there.

- The printed matter on the paper writing will not change every time someone looks at it, and the paper writing can be used at a later date to prove its contents in a court.

  The electronic record could be provided in a format which is not retainable by the consumer. And, even if the consumer is able to access and retain the electronic record, the record may not be printable in the same format in which it was viewed. To provide the same level of integrity to an electronic record that exists naturally with a paper writing, a special effort must be made: the electronic record must be deliberately preserved in a particular *locked* format (Adobe, XML, etc.) to prevent alterations by mistake or deliberately every time the document is read.

These are a lot of differences between paper writings and electronic records. One significant difference is that it *takes money to access and retain electronic records in a useable format.* It does not take money to access and keep and use the same information in a paper format. As the Department of Commerce's excellent report on the Digital Divide indicates, the majority of households are still not connected electronically.[11]

- The majority of Americans have no access to the Internet in their homes or *elsewhere* – over 55%.

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[10] It is conceivable that the consumer without regular access to a computer with a hard disc could use a floppy disc or a CD to retain important electronic records. But this requires access to a computer on which to download the records on to the floppy when are received, and access to a computer with similar capabilities to access the electronic records at a later time when they are needed.

[11] U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools,"* October, 2000. Figure II-13.

Only 41.5% of all households can access the Internet from their home.[12]
Over 8% of Americans rely on public access, their employer's, or another person's computer.[13]
The percentages of elderly and the poor who do not have access to computers are much higher.[14]

While we want to encourage and facilitate electronic commerce, we must remember that a majority of Americans are still not connected to the Internet, at home, at work, or in a public place. Only access at home can be considered a reliable method of receiving personal information. Use of a computer at work is frowned upon or considered grounds for disciplinary action by many employers. Public access computers have extensive waiting times and limitations on use.

Moreover, even as Internet access continues to expand, people continue dropping their Internet service as well. The latest report on the Digital Divide indicates that each year over 4 million households have dropped their electronic access.[15] This is a significant figure, especially when measured against the total number of households that are on line -- 43.6 million,[16] and only a portion of these use the Internet from their homes. This is a **drop off rate of over 10% a year.**[17] The message here, unfortunately, is that even as more households rush to obtain Internet access, a significant number are dropping off that access.

While e-commerce has great potential, the differences between paper documents and electronic documents, and the gap in Internet access, invite exploitation by fraudulent marketers. There are numerous scenarios which describe the dangers presented to consumers by E-Sign. Below, we set out a few to illustrate the reasons why the electronic consumer consent provision in E-Sign is so important to protect consumers:

1. **Danger – Use of electronic records as a method of avoiding providing information to a consumer who lacks access to the Internet.** An elderly woman is visited at home by a home improvement salesman who talks her into taking out a home equity loan to pay for an overpriced home improvement. The salesman has the woman sign various papers that include a statement that she agrees **to receive all notices and disclosures on line.** She also signs an acknowledgment that various disclosures required by state and federal law have been provided to her electronically, and indeed the salesman has posted these documents on a website or sent them to an email address he has set up for her. However, the woman has no home computer and no knowledge of how or where she can access a computer. She might even be home bound or disabled.

Federal and state consumer laws require that the documents relating to the transaction be provided to the woman in writing. This writing requirement is some assurance the consumer will be apprized of the following important information:

- the terms of the sales and financing contract (Retail Installment Sales Contract)
- the cost and the monthly payments for the mortgage taken out on her house (Truth in Lending Disclosures)

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[12] *Id.* in Executive Summary.

[13] *Id.* in Figure II-13.

[14] *Id.* in Executive Summary.

[15] *Id.* in text accompanying Figure I-18.

[16] *Id.* in Part One -- Overall Household Findings.

[17] Actually, if one compares the drop off rate in the year 2000 to the number of households which were on line during the previous year, which may be the better comparison, this ratio will be higher. However, we do not have the number of households which had Internet access the previous year, only the percentage.

- the consumer's right to cancel the transaction within three days (FTC Door to Door Sales Rule).

The requirement that this important information be provided in writing also ensures that the home improvement salesman cannot alter the terms of the contract after she has signed it. The writing requirement also provides this consumer with a chance to review the documents, or get help to review them, and cancel the loan within a certain period of time.

E-Sign's requirement for consumer electronic consent provision addresses these issues, albeit imperfectly. A comparison with what can happen under the provisions of the Uniform Electronic Transactions Act (UETA)[18] is relevant, because UETA does not require electronic consent. Under UETA, a consumer who does not own a computer *could sign a piece of paper* in a person-to-person transaction and later find that all notices, disclosures, and records relating to that transaction are to be sent electronically to an email address set up for the consumer by the salesperson.

E-Sign does not permit paper form agreements to be used as the sole method for consumers without computer skills or equipment to agree to electronic disclosures or notices. E-Sign prohibits this by requiring that the consumer's consent must be either given or confirmed electronically. Mere paper consent to receive future electronic notices is not sufficient to permit an electronic notice to replace a legally required paper notice.[19]

In the absence of the consumer electronic consent provision of E-Sign, crucial notices which now are required to be physically handed to these consumers would be emailed instead. UETA permits this dangerous scenario to occur.

b. **Danger – Using Product Price *Unfairly* To Persuade Consumer to Accept Electronic Records Instead of Paper.** A consumer walks into a car dealership to buy a car. The salesman says the price for the car is $10,000, so long as the consumer agrees to accept all records relating to the transaction electronically. The consumer points out he does not have a computer at home or work, and he certainly does not have an email address. The salesman assures the consumer that he can establish a "hotmail" account for the consumer at no cost, and he can access his documents at any public library. He says that as the dealership printer is broken, if the consumer insists on paper, the car will be $500 more, increasing the monthly payments. The high pressure sales tactics work, and the consumer *electronically* signs the contract and financing agreement as UETA would allow. The consumer drives away in his new car without a copy of the signed contract.

There could be two detrimental consequences from this scenario. The first is simply burdensome on the consumer. The second facilitates fraud.

Should it be burdensome to a consumer to access records legally required to be provided? At the least, the consumer will have the significant burden of finding a public access computer with the type of programs necessary to access the internet, access his email account, and open the electronically provided documents sent by the car dealer. The public access computer must also have a working printer. The consumer will then have the burden of figuring out how to access his new email account, opening the documents, and printing them. This is considerably easier to articulate than it is to do. In many public libraries in populous areas, there is a often a long wait to use computers with Internet access, and an even longer wait for computers attached to a working printer. This required

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[18] By the end of this season, it is likely that a majority of states will have passed some form of UETA. The issue of whether the consumer consent provisions of E-Sign apply in those states is a very complicated one, which will not be finally resolved for some time. *See,* Gail Hillebrand and Margot Saunders, *E-Sign and UETA: What Should States Do Now?* (October, 2000), http://www.consumerlaw.org .

[19] E-Sign also has a provision which explicitly states that it does not require anyone to use electronic records. E-Sign § 15 U.S.C. § 7001(b).

sequence of efforts is so burdensome that it is likely that many consumers simply will not procure the electronic copy of their paperwork. If and when there is a dispute with the car dealer, or the finance company, -- months or years later – then the consumer will try to get a copy of the records. But if the consumer never uses the "hotmail" account, it is likely it will have expired, and the records will no longer be accessible.

Some may ask what is the incentive of the car dealer in this scenario to avoid providing paper to the consumer. The answer is that the laws which require writings to be provided to the consumer generally set out civil penalties for failing to comply with the substantive consumer protections or failing to disclose properly information relating to the transaction. Consumers who do not have the records of these writings cannot file suit in court claiming that the dealer has violated these consumer protection laws.

Should laws facilitating electronic commerce also expedite fraud? The more serious consequence to the consumer is the extent to which the potential for electronic provision of documents eases – even encourages fraud while leaving a consumer without any reasonable means to prove it. In the car dealer scenario described above, when the consumer "signs" the documents electronically at the computer on the car dealer's desk, the consumer has not necessarily "locked" the document. In a paper transaction, the consumer would pen his name to a piece of paper, either several times, or once with carbon copies being automatically created. The dealer then signs, tears off the consumer's copy and hands the consumer his copy. The consumer takes that copy away with him when he drives off. But when the consumer electronically signs the contract *at the dealership*, and then the records are sent to his email address by the dealer, the dealer has the opportunity to *change* the electronic record, after the signature was affixed. (There is nothing in E-Sign which requires that the process of electronically signing a record would prevent alteration of that record.)

After the consumer leaves, the salesman could easily change the terms of the electronic contract, for example, by increasing the interest rate or not giving the consumer credit for the trade-in. If the consumer later objects, he has absolutely no basis on which to contest the electronic contract, because the electronic record was not locked when he signed, and he walked away with no paper copies of the agreement that he agreed to. Even if the documents are not altered, providing them electronically makes it much easier to slip onerous terms past the consumer, who may not see the entire document on the screen at the dealership and will not have a paper copy to review.

E-Sign's consumer electronic consent provisions would prevent both of these scenarios from taking place. E-Sign effectively prohibits this (although this prohibition could be more specific) by requiring electronic consent "in a manner which reasonably demonstrates that the consumer can access information in an electronic form. A consumer who is in a face-to-face transaction should not be able to consent electronically by using the computer equipment belonging to the seller. That consent does not meet E-Sign's requirements that the electronic consent demonstrates "that the consumer can access information in the electronic form." As Senator McCain said, "[t]his should mean that the consumer must initiate or respond to an email to consent or confirm consent."[20] Congressional statements by the sponsors of this legislation indicate that the only rational reading of E-Sign's strict requirements for consent would prohibit this activity.[21]

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[20] 146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. McCain).

[21] Subsection (c)(1)(C)(ii) requires that the consumer's consent be electronic or that it be confirmed electronically, in a manner that reasonably demonstrates that consumer will be able to access the various forms of electronic records to which the consent applies. The requirement of a reasonable demonstration is not intended to be burdensome on consumers or the person providing the electronic record, and could be accomplished in many ways. For example, the "reasonable demonstration" requirement is satisfied if the provider of the electronic records sent the consumer an email with attachments in the formats to be used in

c. **Danger – Inability of the Consumer to Access or Retain Important Electronic Records.** Under UETA a consumer could agree to receive important documents electronically *mistakenly* believing that the computer the consumer intends to use has a certain program or a certain capacity, only to discover *after* the agreement is made that the consumer is not able to open, read or retain the records. Is there any individual who is not a computer expert who has not received emails with attachments that could not be opened? What if the consumer had agreed to receive his monthly credit card bills in a Word Perfect format, only to discover when the first bill came that his computer could not open these records. When the consumer contacts the provider, he is told that this is the only format that is available, and that if the consumer can't read the statements at home, he will simply have to go to a public access computer each month. This provider may require the use of electronic records, so that the card would be cancelled, and all payments immediately due if the consumer refused to accept electronic records.[22]

E-Sign's requirement for electronic consent "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information" unequivocally protects against this danger. To assure that the consumer actually has access to the necessary hardware and software to access these documents, the consumer consent process should test and assure capacity to receive electronic notices. E-Sign's electronic consent requirement addresses this issue by requiring that the initial consent both be electronic and that it "reasonably demonstrate" the ability to receive notices using the consumer's existing technology. *Until there is a universal electronic language that every computer can read this protection is necessary.*

IV. Discussion of the confusing status of E-Sign's provisions in the states.

In an unusual move, Congress permits the federal E-Sign law to be displaced by state action.[23] It is not clear that the displacement of E-Sign works also to displace the consumer protections in E-Sign, because the only legislative history on this issue dictates otherwise.[24] But, there is a risk when states take some actions which could

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> providing the records, asked the consumer to pen the attachments in order to confirm that he could access the documents, and request the consumer to indicate in an emailed response to the provider of the electronic records that he or she can access information in the attachments. . . . The purpose of the reasonable demonstration provision is to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them.

106th Congress, 146 Cong. Rec. H4352-4353 (daily ed., June 14, 2000) (statement of Cong. Bliley).

[22] The ability to insist on electronic records is clearly approved by E-Sign. The consumer must be informed of

> the right of the consumer to withdraw consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relations), ...

15 U.S.C. § 7001(c)(1)(C)(i)(II).

[23] 15 U.S.C. § 7002 (a).

[24] "Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points."146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes). It is important to note the close involvement of these three Senators in the passage of E-Sign. Senator Wyden was an original co-sponsor of S. 761, the bill that became E-Sign. Senator Hollings is the ranking member

work to displace the consumer protections in E-Sign.

E-Sign contemplates two kinds of state legislation on electronic notices and electronic signatures which can displace the federal law. These two kinds of state statutes are: 1) UETA, and 2) other provisions which "specif[y] the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures."[25] Nothing prohibits a state from enacting both UETA and companion consumer protection provisions, and indeed the legislative history suggests that this was contemplated.[26] The companion provisions must:

- Be consistent with E-Sign
- Specify alternative procedures or requirements for the use or acceptance of electronics records and signatures
- Not favor one technology over another, and
- Make reference to the Federal Act if it is adopted after E-Sign.

To date[27] thirty eight states have enacted some version of the Uniform Electronic Transactions Act ("UETA"). This is a Uniform Law on the same subject matter as E-Sign that is recommended by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). A few states have enacted the uniform version,[28] while other states have added consumer protections not found in the uniform version.[29]

E-Sign and UETA are similar in many respects, but they are not at all similar in the way they treat consumers.

- In consumer transactions, E-Sign requires a specific and *electronic* consent process before an electronic notice may replace a legally required written notice[30]. UETA merely requires that the

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on the Senate Commerce Committee, through which the E-Sign bill passed before it went to the Senate floor. Senator Sarbanes, the ranking member of the Senate Banking Committee, was responsible for holding up the bill before it could be considered by the full Senate because consumers were not adequately protected.

[25] 15 U.S. C. § 7002(a)

[26] *See* 146 Cong. Rec. S 5229 –5230 (daily ed., June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes) ("These choices for states are not mutually exclusive.") *See also* 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) ("[S]ome states are enacting or adopting a strict, unamended version of UETA as well as enacting of adopting a companion or separate law that contains further provisions relating to the use or acceptance of electronic signatures or electronic records. Under this Act, such action by the State would prompt both subsection (a)(1) . . . and (a)(2).")

[27] May 8, 2001.

[28] For information on the status of UETA's passage in the states, see http://www.uetaonline.com. This site, however, does not list or describe the nonuniform amendments. For the uniform text and comments, see http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm. For a discussion of the nonuniform variation by state, see http://www.bmck.com/ecommerce/uetacomp.htm.

[29] Some states also have other laws affecting electronic signatures or electronic records. These laws are preempted to the extent they violate E-Sign's prohibitions against "procedures or requirements that require or accord greater legal status or effect to . . . a specific technology . . ..: E-Sign15 U.S.C. § 7002(a)(2)(A)(ii).

[30] 15 U.S.C. § 7001(c).

parties agree to conduct transactions by electronic means, but does not specify how that agreement is to be proven. Instead, UETA states that agreement is determined from the context and circumstances.[31] This could allow, for example, a paper contract with the agreement to transmit notices and documents electronic *included in the fine print.*

- E-Sign exempts certain important consumer notices from the possibility of electronic delivery.[32] UETA does not exempt any categories of consumer notices.
- E-Sign prohibits oral records to be used for consumer records.[33] UETA does not.
- E-Sign has clearer and more protective language for record retention and the integrity of electronic records replacing written records (note these provisions are not limited to consumers).[34]

UETA alone is worse for consumers than E-Sign on all major aspects except perhaps UETA's recognition that state agencies can impose added requirements on retained records subject to the agency's jurisdiction. The passage of E-Sign removes the key reason for states to enact UETA—to facilitate nationwide acceptance of electronic notices and electronic signatures. Thus, a state might wisely choose not to enact UETA in light of E-Sign. However, the National Conference of Commissioners on Uniform State Laws, UETA's author, has representatives in every state who are expected to continue to seek to enact UETA. If UETA is enacted at all, it should be enacted in a way that does not "modify, limit, or supersede" the consumer protections of E-Sign. Ideally, in the same bill as UETA, it should be accompanied by a companion consumer protection act.[35]

a. Status in States which Enacted UETA Prior to E-Sign's Effective Date

The following states enacted some version of UETA prior to the enactment date of E-Sign – June 30, 2000

Arizona	California	Florida	Hawaii	Idaho
Indiana	Iowa	Kansas	Kentucky	Maine
Maryland	Minnesota	Nebraska	Ohio	Oklahoma
Pennsylvania	Rhode Island	South Dakota	Utah	Virginia

E-Sign should apply in all states that had previously passed UETA – both uniform and non-uniform – as well as any other law legalizing electronic records and electronic signatures. This means that – at the least – **on all issues that are addressed in E-Sign, E-Sign is the prevailing law.** For the purposes of consumer protection, the provisions of E-Sign's sections 7001(c), (d) and (e), should apply in all those states. The question of whether any part of the pre-E-Sign state law is still in effect after E-Sign needs to be addressed separately;[36] but will essentially turn on the extent to which the pre-E-Sign law was a completely uniform version of UETA, or otherwise consistent

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[31] UETA §5.

[32] 15 U.S.C. § 7003(b).

[33] 15 U.S.C. § 7001(c)(6).

[34] 15 U.S.C. § 7001(d) and (e).

[35] For example, North Carolina passed extensive consumer protections in its UETA, N.C.G.S. § 66-308.16; as did West Virginia, *see* 2001 West Virginia Senate Bill 204. Connecticut has a bill on UETA pending with extensive consumer protections included in it, *see* 2001 Connecticut House Bill No. 5925, as does Massachusetts, 2001 Massachusetts Senate 1803.

[36] For an extensive discussion on the preemption and displacement issues relative to E-Sign and UETA, *see* Gail Hillebrand and Margot Saunders, *E-Sign and UETA: What Should States Do Now?* September, 2000. http://www.consumerlaw.org/e_sign.html.

with E-Sign.[37]

E-Sign's legislative history establishes that state statutes passed prior to E-Sign do not displace it. Statements by the bill sponsors and other members closely involved with the passage of E-Sign bill indicate it was Congress' intent that E-Sign could be displaced (in part) only by a *post-E-Sign* state statute:

> A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of section 101.[38]

Congressman Bliley, the original sponsor of the E-Sign bill in the House,[39] and the Chair of the Conference Committee on E-Sign, emphasized that prior passage of a state law does not eliminate the application of E-Sign in a state:

> [A] State could not argue that section 101 does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act. . . .[40]

Logic also supports the conclusion that prior statutes do not displace E-Sign. E-Sign and prior state UETAs can coexist without either being displaced. A merchant dealing with a consumer can comply with both the general rules of UETA and the more specific E-Sign consumer protections. In addition, it would be extremely odd for a UETA enacted before E-Sign to displace the subsequent federal statute. If Congress had wanted prior uniform UETAs to displace E-Sign, it could have made E-Sign applicable only in states lacking a uniform UETA. It did not do so. Thus, a state may only displace E-Sign with legislation enacted after E-Sign that meets either of the two tests set forth in E-Sign.[41]

b. Post E-Sign Passage

Since E-Sign was passed, at least six states have passed UETA specifically preserving the consumer protections in E-Sign:

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[37]UETA's proponents suggest that even if all or many of the nonuniform parts of an enacted UETA are preempted, the uniform parts survive, transforming a nonuniform UETA into a uniform one. This argument turns the insistence of state legislatures on non-uniform UETAs on its head. Nonuniform UETAs were enacted in states that were originally offered the uniform UETA. Those state legislatures deliberately refused to pass UETA without changes, generally to protect consumers. If those state legislatures had found UETA adequate without the nonuniform consumer protection additions, then they could have simply enacted the uniform version. The fact that state legislators made nonuniform changes to UETA is strong evidence that those legislators did not intend the uniform version of UETA to become law in their states. *See,* Patricia Brumfield Fry, "*A Preliminary Analysis of Federal and State Electronic Commerce Laws UETA Online.*" http://www.uetaonline.com/docs/pfry700.html. Yet, it is hard to see how a state enactment of UETA which occurred prior to E-Sign could displace E-Sign.

[38]146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

[39]H.R. 1714, 106th Cong., 1st Sess (1999).

[40]*See* 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

[41] E-Sign 15 U.S.C. § 7002(a)(1) or (2).

New Jersey	Nevada	North Carolina
West Virginia[42]	Tennessee	Texas

The following states have passed UETA after E-Sign without specifically addressing the federal consumer protections:

Alabama	Arkansas	Delaware	Louisiana	Michigan
Mississippi	Missouri	Montana	New Mexico	North Dakota
Wyoming				

UETA has been introduced in the state legislatures of the following states (the states with the asterisk are revisiting some issues):

California*	Colorado	Connecticut	District of Columbia	
Massachusetts	Illinois	Missouri	Nevada	
New Hampshire	North Carolina*	Oregon	Vermont	Wisconsin

So far as we know, to date UETA is not on the table in the following five states:

Alaska	Georgia	New York	South Carolina	Washington

The bottom line here is that there will be substantial confusion in many states regarding the question of whether the E-Sign consumer consent provisions. That is unnecessary and should be resolved.

V. The effect of the differences between *electronic* delivery and *paper* delivery on electronic records.

The use of electronic delivery mechanisms has certainly changed the way many people communicate and exchange information. Electronic mail is an extraordinarily useful means of transferring ideas, conducting transactions, and conveying facts and proposals to large numbers of people easily and instantaneously. Electronic communication is undoubtedly changed the way commerce -- business as well as personal -- is conducted.

Electronic communication is faster, cheaper, more adaptable and more secure in many instances that physical world delivery. The benefits of electronic communication are extensive, and are still being discovered. It does not diminish the extensive benefits of electronic communication, however, to articulate the differences between electronic delivery and physical world delivery. Nor should it diminish the benefits to illustrate the dangers of assuming both methods of communications are equally reliable in all contexts.

The differences between electronic and physical world communications must be recognized, both to enhance the future improvement of electronic communication, and to ensure that individuals who do not have the same degree of access to electronic communications are not penalized for this lack of access. We welcome the continued increase and reliance upon electronic communications. *We caution only against blind assumptions that the two forms of communications are equivalent.* Despite the extensive list of benefits of electronic delivery over physical world, there are incontrovertibly still some differences between the two which dictate that the law not treat them in identical fashions. (These differences are described in Part III above).

Without question, electronic communication provides wonderful opportunities, but it cannot be assumed to be as reliable a method to receive essential information as postal delivery for the general public. **A 10% drop off rate indicates that in any one year, 1 out 10 households which has Internet access the previous year will no**

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[42] North Carolina and West Virginia's versions add some additional consumer protections as well.

longer be able to receive electronic communications.[43]

As the Department of Commerce has noted in its report, the drop off rate was higher among households at lower incomes. This should come as no surprise. Also, we can assume that households at lower incomes will continue to have less stable access to electronic commerce in the future. It is very important that the U.S. Government continue to require that access to essential information not be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service does, the law should treat electronic delivery and physical world delivery of records differently.

VI. Recommendations to improve protection of consumers from risks imposed by electronic exchanges.

Consumer Consent Provisions Should be Nationwide. Given the confusion regarding the application of E-Sign's rules in various states, we recommend that Congress mandate the consumer consent provisions be provided on a nationwide basis. As E-Sign might be read to allow states to opt out of the consumer consent provisions, the possibility of non-uniformity is likely. This will require internet sellers to comply with different rules in different jurisdictions. It also potentially hampers the growth of e-commerce, by failing to provide the assurances of privacy and financial security that are the basis of consumer confidence. The consumer consent provisions should be made a uniform and nationwide standard, just as the Truth in Lending Act provides a uniform nationwide standard for consumer credit transactions.

Assurances of Receipt Should be Required for Electronic Delivery. Assume that a financially savvy consumer shops for the best health insurance on-line. The consumer finds that the most economical product requires that all communications between the insurance company, the consumer, and the medical providers be conducted entirely electronically. So, this consumer agrees to receive notices regarding his health insurance on-line. However, a year later, the consumer's computer breaks, and he is not in a financial position to purchase a new one.[44] He does not have access to the Internet at work, and his obligations at work and to his family make it difficult for him to take the time it requires to go to a public access computer and wait to use the computers connected to the Internet. He also relies on his understanding that any notice of cancellation of insurance will be mailed to him.[45] As a result, when the insurance company decides to change its coverage policies of dependents and notifies all policy holders this consumer never gets his notice and is unknowingly left without insurance.

Both the Federal Electronic Signature Act,[46] and the state laws on electronic records -- the Uniform Electronic Transaction Act -- fail to fully address the significant differences between the ease and lack of cost involved in receiving mail through the U.S. Postal Service, and the complexities, ongoing expense, and uncertainties involved with receiving email. The problems experienced with e-mail are not unique to individuals. Even corporate

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[43]U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools,"* October, 2000, Part One -- Overall Household Findings.

[44] The reason this consumer no longer has access to the Internet thus could fall into one of three categories in the Digital Divide's survey: "no longer owns computer" (17%); "computer requires repair" (9.7%); or "cost, too expensive" (12.3%).

[45] Notice of cancellation of health insurance is exempted from the electronic record provisions of Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7003(b)(2)(C). However, even this provision may not apply in a state that has superceded the provisions of E-Sign by passing a law which meets the requirements of 15 U.S.C. § 7002(a)(1) or (2).

[46]Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, *et. seq.* 2000.

email systems seem to break down fairly frequently. Until email reaches at least the degree of reliability of the U.S. Postal Service, care must be taken to assure that consumers actually receive important information that is sent electronically.

There are many technological advantages to creditors and consumers alike from electronic delivery of notices. One of these advantages is that there are numerous technological methodologies which enable the sender of an electronic record to determine if the recipient of the record actually accessed it.[47] The program built into the ubiquitous Microsoft Outlook which allows senders to ascertain that emails have appeared on the recipient's screen, is just one of a multitude of similar technologies.[48]

E-Sign's requirement for electronic consent provides only an imperfect protection against this danger. Requiring the consumer to go through the exercise to test his computer's capacity to access the information that will be provided henceforth electronically, at least alerts the consumer to the significance of the agreement to receive all records in the future via an electronic mechanism. A better protection against this particular danger would be statutory language as follows:

> Notices required to be provided, sent or delivered to a consumer shall be considered received only when the notice itself is opened, acknowledged, or automatically acknowledged by a flag that tells the sender it has been opened.[49]

The recommended language gives three ways to trigger effectiveness of a notice: 1) actual opening; 2) manual acknowledgment; or 3) a technological automatic acknowledgment received by the sender.[50]

If there is a fairly easy and inexpensive way to ensure that consumers actually receive this information,

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[47] Just a few examples of the available technology include:
http://www.readnotify.com/
http://www.electradoc.com/emailetes.html
http://www.drakken.com/email.htm
http://www.cs.bc.edu/~osbornk/reply/
http://www.greenbaycd.com/emailp.html
http://www.slipstick.com/addins/auto.htm
http://www.msbcd.com/cds4sale/23246.html

[48] *For example,* in just one of the dozens of websites which listed software that provided automatic acknowledgment of a recipient's opening of an email (http://www.sharewareplace.com/file_pc/int_mail.htm) the following was explained:

> Description: The G-Lock EasyMail was developed to help people run and manage mailing lists, newsletters, announcement lists and customer updates and other legal uses. G-Lock EasyMail is a powerful group mailer which sends your message directly from your outbox to the recipient's mail server (without using any ISP's SMTP server). This takes the load off of your mail server and speeds up message sending significantly. It gives instant confirmation of delivery by checking the address before it sends, which eliminates the dreaded "Mail undeliverable" messages you can get. It can also get confirmation that your message has been read.

[49] Because of the fear of the spread of a virus, many people are afraid to open attachments. Required notices should only be included in the body of the email.

[50] We recommend that, as an additional question to be addressed, the FTC and the Department of Commerce seek information about the cost, availability, and effectiveness of technological automatic acknowledgment systems.

especially when ongoing access to electronic notices remains an expensive and illusive proposition for the majority of households in the nation,[51] that methodology should be required.

VII. Conclusion

There are extensive benefits of electronic communication -- many of which provide more convenience, more flexibility, and less cost to all parties. However, these marvelous attributes do not mean that electronic communication provides the same degree of reliability and equal access that is provided by physical world delivery. We hope that the report written by the Department of Commerce recognizes the significant differences between real world communications and electronic commerce.

It is very important that U.S. Government continue to require that access to essential information *not* be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service does, the law should treat electronic delivery and physical world delivery of records differently.

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[51] Only 41.5% of all households can access the Internet from their home. U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"Falling Through the Net: Toward Digital Inclusion" A Report on Americans' Access to Technology Tools,"* October, 2000. Figure II-13.