Comments

of the

NATIONAL CONSUMER LAW CENTER
On behalf of its
Low Income Clients
and
CONSUMERS UNION
CONSUMER FEDERATION OF AMERICA
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

On
Electronic Delivery of Disclosures
Pursuant to

12 CFR Part 202 -- Regulation B; Docket No. R-1281 -- **Equal Credit Opportunity**
12 CFR Part 205 -- Regulation E; Docket No. RB1282 -- **Electronic Fund Transfer**
12 CFR Part 213 -- Regulation M; Docket No. RB1283 -- **Consumer Leasing**
12 CFR Part 226 -- Regulation Z; Docket No. RB1284 -- **Truth in Lending**
12 CFR Part 230 -- Regulation DD; Docket No. RB1285 -- **Truth in Savings**

I. Introduction.

On behalf of our low-income clients, the **National Consumer Law Center**,[1] as well as **Consumers Union**,[2] the **Consumer Federation of America**,[3] and the **National Association of**

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[1]**The National Consumer Law Center,** Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of seventeen practice treatises and annual supplements on consumer laws, including Consumer Banking and Payments Law (3rd ed. 2005), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal with predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments are written by Margot Saunders of the National Consumer Law Center and Gail Hillebrand of Consumers Union.
[2]**Consumers Union** publisher of Consumer Reports, is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived form the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports, ConsumerReports.org* and *Consumer Reports on Health,* with a combined paid circulation of approximately 5.5 million, regularly carry articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer

Consumer Advocates,[4] provide the following comments regarding *all* of the Federal Reserve Board's proposed rules relating to electronic disclosures under the Equal Credit Opportunity Act, the Electronic Funds Transfer Act, the Consumer Leasing Act, the Truth in Lending Act, and the Truth in Savings Act. Generally our comments relate to all of the proposed regulations, although we do highlight some specifics.

We appreciate the complexity of the issues the Board is dealing with in drafting these proposed regulations, but we believe the proposed regulations are based on several significant mistakes in the conceptual framework applied to electronic disclosures. As currently proposed, these changes to the regulations would result in important reductions in the basic disclosure requirements of all five of these federal consumer protection statutes. We believe that it is entirely possible to facilitate electronic commerce and electronic communications without loss of critical consumer protections, but that these proposed regulations do not accomplish that result.

Many of the concerns raised here were raised by us in written comments on the Interim Final Rules. Unfortunately, many of the problems we previously addressed continue to be a concern in the current proposal. It is also unfortunate that the Board is proposing further reduction of the protections afforded consumers in electronic commerce.

There are four overarching principles that must be applied whenever electronic disclosures are permitted to replace paper records:

I. The electronic records must be provided in a format which can be printed and retained.

II. The electronic records must be *delivered* to the consumer, which means *emailing them* to the consumer's designated email address, rather than requiring the consumer to go find them.

III. The power of the Internet should *increase* the reliability and timeliness of the information contained in the disclosures as well as the delivery of this information.

IV. Electronic records should only be permitted when the transaction is entirely electronic, and should be prohibited as a replacement for the required disclosures when the parties are transacting business in person. This is an essential provision to prevent a deceptive combination of an oral sales pitch and an electronic disclosure of different terms than those promised.

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welfare. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[3]**Consumer Federation of America**, is a nonprofit association of over 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy and education.

[4]The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

I. The electronic records must be provided in a format which can be printed and retained.

When disclosures are required by federal statutes to be provided in a writing, in a form that the consumer may keep,[5] that same requirement must be specifically articulated and applied to electronic disclosures that are permitted to replace the writings. The requirement that the consumer be able to keep the disclosures is a requirement of the underlying federal consumer protection rules -- Reg Z, Reg E, etc. The Board needs to reassert the application of this requirement in electronic transactions.

For example, Reg Z requires of disclosures for closed end credit that --

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, *in a form that the consumer may keep.* (Emphasis added.)[6]

The disclosure requirements in Reg E, applicable to electronic transfers are similar --

> Disclosures required under this part shall be clear and readily understandable, in writing, *and in a form the consumer may keep.*[7]

The proposed final rules omit this longstanding principle on the delivery of consumer disclosures. The proposed rules do not require that the electronic disclosures be actually delivered to the consumer (see the discussion of this point in the next section), and they also fail to require the electronic records be *in a form that the consumer may keep.* Electronic records can be on a website in a form that is neither downloadable nor printable.

Moreover, the Board proposes to delete even the current minimalist requirement in the Interim Regulations that electronic disclosures remain on the provider's website for 90 days. This means that under these proposed rules, a provider of critical disclosures could satisfy the requirement to deliver cost of credit and payment information, including the right to rescind, by posting this information on the Internet for just 30, 10, or even one day! If the consumer is unable to download the information, or to print it, during the short posting window, the consumer is out of luck?

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[5]For example, both open and closed end credit disclosures under Truth in Lending are required to be provided in a form that consumers may keep, *see, e.g.* Reg Z, Section 226.5 for open end disclosures, and 226. 17 for closed end disclosure, Reg E, Section 205.4 for electronic fund transfers, Reg M, Section 213.3(a) for consumer leases.

[6] 12 CFR § 226.17(a)(1).

[7]12 CFR § 205.4(a)(1). The Reg M, applicable to consumer leases and Reg B, applicable to equal credit protections, have similar requirements. 12 CFR § 213.3(a) (Reg M) and CFR § 202.4(d) (Reg B) respectively.

While E-Sign, 15 USC Section 7001(e), does include some requirements about the ability to retain information that is provided electronically in place of a writing, the protection is more of a defensive measure than an affirmative obligation:

> (e) **Accuracy and ability to retain contracts and other records.** Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction . . . 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.[8]

This measure does not clearly and unequivocally require that electronic records be provided in a way that the consumer can keep them. Instead, it simply sets up a defense for the consumer relating to the terms of the record if the consumer can prove that the record was not provided in a manner which assured its "accurate reproduction." While E-Sign's requirement is important and valuable, it is not the same as a direct obligation on the part of the person required to provide the disclosure to ensure that retention is possible. The omission of such an obligation from the proposed regulations thus is a substantial diminution in protection from the current interim rules.

The Board recognizes that E-Sign is a "self effectuating statute." However, E-Sign's requirements for electronic disclosures only apply if the electronic disclosures are *in place of* a writing. As the Board proposes to permit disclosures to be provided electronically, E-Sign's technical requirements may be deemed to no longer be required in each instance. The Board's job is to implement the provisions of Truth in Lending and the Electronic Funds Transfer Act, as well as the other three seminal federal consumer protection acts. In this implementation, the Board's requirements must clearly articulate that when the disclosures required by these laws are delivered by electronic records, the underlying requirements of the consumer protection laws are clearly applicable – which requires that the electronic records of these disclosures be retainable by the consumer.

An example of the potential issues which might arise if the Board does not clarify this requirement might be helpful here.

> ***Example.*** *Consumer John Smith goes on line and electronically applies for a mortgage from Home Bank. John Smith goes through E-Sign's consumer consent process (affirmatively demonstrating that he can access information in the electronic form that Home Bank will use to provide the disclosures required by Truth in Lending and other applicable federal and state laws). The entire*

[8] 15 USC § 7001(e).

transaction is conducted on-line, and the disclosures required to be provided relating to the cost of credit and the repayment terms of a closed end loan secured by the consumer's home under 15 USC § 1638 are simply displayed on the computer screen when Mr. Smith accesses them during the electronic closing process.

Mr. Smith tries to save to his hard drive the information displayed on his screen during the process, but the website does not permit this. He also tries to print out the disclosures, but this is not possible either. As a result, Mr. Smith is unable to retain the disclosures, either electronically or by printing them out.

This problem can be entirely addressed by adding a few words everywhere electronic disclosures are expressly permitted. Whenever "electronic form" appears in the regulation, the words "which can be electronically retained and printed" should be added. As we stated in our comments on the Interim rules, we recommend that the disclosures be capable of both retention and printing. A home loan, and even a car loan, is likely to have a longer duration than the lifespan of a home computer, and restricting consumers to downloading without an option to print only increases the likelihood that at some later time when the consumer needs to review the disclosures they will no longer be available for that purpose.

The E-Sign retention protection may not accomplish the same goal. Instead it would only be called into play if there were a subsequent dispute between Mr. Smith and Home Bank regarding the terms of the disclosure. In that instance, once Mr. Smith shows that the disclosure had not been provided in a manner which could be retained and accurately reproduced, the court would be required to find that the disclosure was *not* provided. This invites litigation; it is a negative way of ensuring that essential consumer protection disclosures be provided in the proper format;[9] and it provides no value to consumers who attempt to, or need to, resolve their disputes short of a court proceeding.

The language in each of the regulations permitting written disclosures to be replaced with electronic disclosures must be amended to clarify that electronic disclosures must be delivered in a format which is both printable and downloadable.

II. The electronic records must be *delivered* to the consumer, which means *emailing them* to the consumer's designated email address.

The Board properly de-links provision of electronic information by paper mail. It is definitely a step forward for the Board to prohibit delivery by snail-mail of a website address

[9]The E-Sign protection in § 7001(e) also goes to the *format* of the disclosure itself. E-Sign's language simply denies the validity of the electronic record if it is not originally provided in a form which can be "accurately reproduced for later reference by all parties. If the disclosure were provided in an electronic medium which allowed easy modification -- a word processing format, rather than a PDF or picture format -- the provider could not later challenge the terms in the electronic record, because it had not satisfied this original requirement to provide the record in a manner which itself required the production to be accurate.

from which a consumer is to recover disclosures. However, the Board *must* also require that every required disclosure provided electronically must also be provided by email.

It is hard to fathom why electronic disclosures which replace written disclosures should not always be emailed to the consumer, unless there is a problem of failure of address. Emailing information, receipts, and notices of delivery to consumers is the common method of doing business in today's web-based marketplace. Airline tickets, computers, food, clothes, books, bills for cell phone usage, banking notices, and more are all routinely emailed to consumers at their designated email addresses. Once emailed, those records are accessible and retainable by the consumer, for a long period of time. *Providing electronic records by email is the only truly reliable way to ensure that consumers actually access, receive and are able to keep those critical consumer protection disclosures required by these federal laws.*

The Board indicates that a fear of "phishing" is the reason why email delivery will not be required. But phishing requires the *consumer* to provide information by email or a website to a merchant or financial institution. We do not disagree with the implicit recommendation by the Board that information gathered *from* the consumer be provided on a website. We only disagree with the explicit exclusion of email as the method of providing information *to* the consumer. Disclosures that do not contain specific sensitive information such as a PIN or password simply do not pose a phishing risk.

To ensure that electronic records actually are received by consumers, and to assist in consumers' ability to retain these important records, the Board should require that all electronic records which replace written documents be emailed to the consumer (assuming compliance with E-Sign's consumer consent provisions) at the address provided for that purpose by the consumer.

III. The power of the Internet should *increase* the reliability and timeliness of the information contained in the disclosures as well as the delivery of this information.

One of the primary advantages of electronic communication is that it is instantaneous and allows for completely up to date information to be shared between all parties. The availability and price of airline tickets, the cost of funds at financial institutions, the amount of money we have in our bank accounts, is information that is currently instantaneously available on the internet. The disclosures required by the Truth in Lending Act should be similarly up to date when provided electronically.

The Board proposes to continue to allow disclosures about the accuracy of a variable annual percentage rate disclosed on the card issuer's web site to be considered accurate so long as it was in effect 30 days before it was viewed by the public.[10] This proposal is outdated, ignores the power and pace of the web, and cannot be justified. The card issuer has the information about the APR. The card issuer tells its employees and contractors the real -- currently applicable

[10] 12 CFR § 226.5a(c)(2)(i).

-- APR at any particular time. The card issuer should also be telling consumers the APR for which they are considering applying, or else a primary reason for shopping on line -- timeliness of information -- is lost.

The Board should require electronic provision of disclosures to carry the most obvious of benefits to consumers -- timeliness of information. If there is a concern that a timeliness requirement would require every day or intra-day updating, the requirement could be structured to require update within 24, or even 72, hours of when the offered rate is changed.

IV. Electronic records should only be permitted when the transaction is entirely electronic, and should be prohibited as a replacement for the required disclosures when the parties are transacting business in person.

The Board implicitly recognizes that electronic communications are intended to take place only when the parties are communicating electronically -- and should not be in place of paper writings. This recognition is illustrated by the Board's deletion of a mailed website address as a method of providing the consumer with information on how to obtain disclosures.

However, the Board needs to go further and explicitly state that electronic disclosures should only be permitted to be provided to consumers when they are *not* transacting business in person. We are concerned that unless this is made explicit, consumers who are standing in a merchant's place of business may be sent to an electronic kiosk to obtain federal disclosure information. The merchant might argue that the consumer could successfully satisfy E-Sign's consent requirements standing in a store. However, there would be no guarantee that the consumer actually has access to these disclosures at a later time, or the ability to retain the documents at that time.

Consider the following example of how this problem might develop in a predatory home loan situation:

> ***Example:*** *Imagine 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 uses his laptop computer and the woman's telephone line to connect to the salesman's website and then puts the laptop in front of her. He guides her through the process of electronically consenting to receive all notices and disclosures electronically on the salesman'=s website. 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 his website. 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.*
>
> *When the salesman leaves the elderly woman's house she has signed a high cost mortgage on her house, but she has no paper documents to explain the details of*

the transaction. All of her disclosures -- including her right to rescind -- have been visually displayed to her on the salesman's laptop. Under the proposed rule they are considered delivered to her even if they are purged from the lender's website immediately. Even if she were able to make her way to a public access computer, and access the Internet, she would have no way of finding the particular website address at which her disclosures were posted, because the creditor is not required to even leave her with a piece of paper with the website address (not that providing such a paper would be sufficient to address all the problems here).

To avoid these problems, the Board should clearly state in these Final Rules that ***electronic disclosures are only appropriate when the parties are transacting business electronically, and are not permitted when the parties are dealing in person.***

Conclusion

While we respect the desire of the Board to consider in which instances the Board's regulations need not address specific electronic disclosure issues due to the general application of E-Sign, these proposed regulations do not simply change the source of the governing law, they also reduce the available protections. The proposed regulations also freeze into place out of date concepts such as 30 day old advertising of outdated rates, even on a web page that is updated as a matter of course on a daily or other frequent basis. We urge the Board to withdraw this proposal and rethink how to mesh its electronic disclosure rules with E-Sign so that U.S. consumers are not exposed to new risks and new burdens. Those new risks and burdens include the risk of bait and switch with in-person sales combined with electronic disclosures; the risk that disclosures could be posted briefly and removed before the consumer even sees a link sent to a home email that is not checked every day; and the risk that non-printable, non-retainable disclosures will not be available when needed.

In the context of the current problems for consumers, neighborhoods, and even the U.S. economy from the spread of subprime loans that consumers clearly did not understand, this is a particularly inopportune time to change the rules of electronic disclosure for fundamental consumer disclosure statutes in ways that could reduce consumer understanding of the terms and conditions of increasingly complex financial products.