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OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Electronic Consumer Disclosures
and Notices

TO: Chief Executive Officers of All National Banks, Federal Branches and Agencies, Service Providers, Software Vendors, Department and Division Heads, and All Examining Personnel.

PURPOSE

Increasingly, national banks are replacing their paper-based consumer notices or disclosures with electronic disclosures. However, the failure to provide such electronic disclosures in a proper manner can expose the bank to significant compliance, transaction, and reputation risk. This advisory provides some background, and highlights issues that should be considered by national banks that provide electronic consumer disclosures.

BACKGROUND

The Electronic Signatures in Global and National Commerce Act¹ (E-SIGN Act), enacted in June 2000, permits disclosures to be made or delivered electronically, notwithstanding any other law that might require a written disclosure, provided that the consumer consents to such disclosures in accordance with the requirements of the act.

The E-SIGN Act requires that before consumers can consent to electronic notices or disclosures they must receive certain clear and conspicuous disclosures. These pre-consent disclosures include information on any right or option to have the record provided in a non-electronic form, the effect of the withdrawal of consent for electronic disclosures, the scope of the consent, how consumers can obtain a paper copy of a record after consent is given (and any associated fees), and the hardware and software requirements for access and retention of the electronic disclosures. 15 USC 7001(c).

Further, the act requires that consumers must express their consent electronically, or confirm their consent electronically, in a manner that reasonably demonstrates that the consumer will be able to access required notices or disclosures electronically. Finally, the act requires that if, after consent is provided, a change is made in the hardware or software requirements needed to access or retain the electronic disclosures and the change creates a material risk that the consumer will not be able to access or retain an electronic disclosure that was the subject of the prior consent, the consumer must be provided with an appropriate notice of the change and must re-consent

¹ Pub. L No. 106-229, 114 Stat. 464 (June 30, 2000) (codified at 15 USC 7001 *et seq.*).

electronically in a manner that reasonably demonstrates the consumer's ability to access the electronic notice or disclosure.

The above-described special consumer consent requirements under the act apply only if a "statute, regulation, or other rule ... requires that information relating to a transaction ... be provided or made available to a consumer in writing...." 15 USC 7001(c)(1).

In 2001, the Federal Reserve Board (the Board) published interim rules on electronic disclosures for its major federal consumer protection regulations.² The interim rules required banks that electronically deliver disclosures mandated under those regulations and "related to a transaction" to obtain consumers' affirmative consent in accord with the E-SIGN Act. The interim rules also established uniform standards for the electronic delivery of disclosures required by the various consumer protection laws administered by the Board, including guidance on the timing and delivery of electronic disclosures.

Among the "timing and delivery" requirements for electronic disclosures, the Board required that disclosures provided by e-mail be sent to an electronic address designated by the consumer. The Board also required that institutions make a good-faith attempt to redeliver electronic disclosures that are returned undelivered. Disclosures made by posting on an Internet Web site were required to be accompanied by a notice to consumers alerting them to the availability of the disclosures and were to be made available for at least 90 days to allow consumers adequate time to access and retain information. Finally, the Board required that electronic disclosures be made in a manner that will assure compliance with the timing requirements in the underlying regulations; the Board noted that the act does not affect the timing or content of disclosures, including any requirement that the substantive disclosures be clear, conspicuous, and readily understandable.

Later in 2001, the Board announced that it would not mandate compliance with the delivery requirements of the interim regulations because it was considering adjustments to the rules to provide additional flexibility.³ However, the Board indicated that institutions could continue to provide electronic disclosures as long as the procedures comply with the requirements of section 101(c) of the E-SIGN Act (described above). Thus, until the Board issues permanent rules, national banks may provide electronic disclosures under federal consumer protection rules using either their own policies and practices or the Board's interim rules, so long as the disclosures are made in accord with the E-SIGN Act.

ELECTRONIC DISCLOSURES BY NATIONAL BANKS

National banks contemplating making disclosures to their retail customers by electronic means should determine whether the special consumer consent provisions of the E-SIGN Act apply to

² OCC Bulletin 2001-23 "Uniform Standards for the Electronic Delivery of Disclosures; Regulations M, Z, B, E, and DD", (April 27, 2001). These federal consumer protection regulations are Regulations M (Consumer Leasing), Z (Truth in Lending), B (Equal Credit Opportunity), E (Electronic Fund Transfers), and DD (Truth in Savings).

³ See OCC Bulletin 2001-45 ("Uniform Standards for the Electronic Delivery of Disclosure; Regulations M, Z, B, E, and DD", October 1, 2001).

those disclosures. As noted above, the consent provisions apply only when a law, rule, or regulation mandates that disclosures be provided “in writing.”⁴ In addition, where a federal disclosure mandate provides an option for disclosures to be made either “in writing” *or* in electronic form, the E-Sign special consent provisions do not apply. However, national banks should be alert to the possibility that some laws or regulations may contain implied writing requirements.⁵ In the future, the federal banking regulators may provide additional clarification on which federally mandated disclosures do not “relat[e] to a transaction” and, thus, are not covered by the E-SIGN special consent provisions even though a written disclosure is mandated.⁶

When obtaining effective consumer consent to electronic disclosures under the E-SIGN Act, the OCC encourages national banks to pay particular attention to the following issues:

- Clearly and properly identifying the scope of transactions to which the consent will apply;⁷
- Providing all the required pre-consent disclosures for effective consent under E-SIGN (15 USC 7001(c)(1)) before the federally mandated substantive disclosure or notice is provided electronically;
- Designing an appropriate method to obtain consumer consent or confirmation of consent in an electronic manner that reasonably demonstrates the ability of the consumer to receive the electronic notices and disclosures that are the subject of the consent;⁸ and
- Advising consumers of changes in hardware or software that create a material risk that the consumer will no longer be able to access or retain electronic disclosures.

Even where a national bank will be providing electronic disclosures that it believes are *not*

⁴ See, for example, the federal regulations listed in footnote 2 above. Some terms and phrases in OCC regulations and laws that require a “writing” include: “advise in writing,” “provide copies on paper,” “written advice,” and “written notice.”

⁵ Some OCC regulations and statutes administered by the OCC specify a particular mode of delivery for a notice or disclosure, *e.g.*, “by mail” (12CFR 7.2001, 12 USC 21a and 1831r-1(b)) or “by newspaper publication” (12 USC 214a, 15a, and 1828(c)(3)). The status of these “mode of delivery” requirements under the E-SIGN Act is uncertain. Until there is greater certainty, national banks may wish to continue to use the specified non-electronic modes to assure compliance with these requirements.

⁶ For example, the Board in its interim rules indicated that certain application, solicitation, and advertising disclosures might not be subject to the special consent requirements because they may not “relate to a transaction.” *See, e.g.*, 66 *Federal Register* 17329, 17335 (2001). The Board may provide further guidance on this issue in its permanent rules.

⁷ For example, consumers should be told whether their consent applies only to a particular transaction or to a broader group of transactions.

⁸ The E-SIGN Act is not clear on precisely when the “reasonable demonstration” must occur in time relative to the consumer’s expression of consent. Pending greater certainty on this issue, a national bank may wish to consider whether the consent method it adopts encourages demonstrations that are reasonably contemporaneous to the expression of consent and that are not unduly delayed. This advisory letter is not intended to interpret the E-SIGN Act.

subject to the special consumer consent provisions under the E-SIGN Act,⁹ national banks may wish to consider providing consumers with effective prior notice that the bank will be electronically delivering to them important notices, statements, or disclosures. Banks might want to inform consumers what technology they will need to receive and retain those disclosures. Likewise, banks are encouraged to advise consumers of any special fees or charges imposed if the consumer requests a paper copy of an electronic document and whether (and how) consumers can withdraw their consent to electronic disclosures and, if so, what consequences follow.

General Issues on Electronic Disclosures

In designing and implementing electronic consumer disclosures, regardless of whether E-SIGN applies to particular disclosures, the OCC encourages national banks to consider the following issues:

- Whether procedures are needed to deal with electronic disclosures that are returned undelivered;
- Whether electronic disclosures are provided in a form that can be retained by consumers;
- Duration of electronic notices or disclosures availability to consumers through the bank's systems;
- Establishing a process to respond appropriately to consumer requests for paper copies of electronic notices and disclosures; and
- Dealing with changes in hardware or software that may create a risk that consumers will no longer be able to access or retain electronic disclosures.

In addition, national banks should ensure their electronic disclosures comply with the timing, format, content, and recordkeeping requirements of the underlying substantive rule (*e.g.*, Regulation Z (Truth in Lending) and Regulation B (Equal Credit Opportunity Act)).

The technology used by the bank to provide electronic disclosures to consumers deserves careful consideration. National banks should consider whether their disclosure technologies will:

- Reasonably be expected to reliably deliver disclosures to consumers,
- Maintain the security of sensitive customer information,
- Limit or prevent fraudulent and other illegal activities, and
- Provide disclosures in a form that consumers can retain.

⁹ Some terms and phrases that appear in OCC regulations and laws are format-neutral and do not expressly or implicitly require a "writing" such as "provide notice" and "make available."

For example, in considering whether to provide disclosures by e-mail technology, banks should be aware of the inherently insecure nature of most conventional e-mail and consider whether such practice is consistent with the bank's obligation to maintain the security of sensitive customer information.¹⁰ Banks should consider that many consumers are using software that filters incoming e-mail (spam filters) that could affect the consumer's ability to reliably receive e-mail disclosures.

Likewise, the use of "pop-up" mobile code technology to deliver notices and disclosures may be problematic.¹¹ Frequently, consumers are using a browser configuration or installing software that could block disclosures delivered via mobile codes. Additionally, disclosures delivered by pop-up technology may be difficult for consumers to retain.

National banks should also consider a method to educate their customers about "phishing" attacks and related types of on-line fraud to help customers avoid becoming victims of such illegal activities. These educational efforts should include providing information to help customers identify the potential risks associated with identity theft, as well as descriptions of the most frequently used fraudulent schemes.¹²

RESPONSIBLE OFFICE

Questions regarding this advisory letter can be directed to the OCC Compliance Division at (202) 874-4428.

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¹⁰ See Interagency Guidelines for Establishing Standards for Safeguarding Customer Information, 12 CFR 30, appendix B.

¹¹ A "pop up" is a screen generated by mobile code, for example Java or Active X, when the customer clicks on a particular hyperlink. Mobile code is used to send small programs to the user's browser.

¹² See OCC Bulletin 2004-42 (FFIEC Customer Brochure: Protecting Customers' Personal Financial Information).