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By Hand Delivery

August 10, 2001

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20552

Re: Docket No. 2001-41

Dear Sir:

This letter is submitted by MasterCard International Incorporated ("MasterCard")[1] in response to the request for comment issued by the Office of Thrift Supervision ("OTS") in connection with its study of banking regulations regarding the on-line delivery of financial services ("Study"). MasterCard appreciates the opportunity to submit these comments.

We commend the OTS for its efforts in recent years to ensure that savings associations have the clear authority to deliver the electronic banking services that consumers increasingly demand. We believe that the strong consumer demand for these services is a direct result of the significant benefits they provide to consumers. For example, as a result of electronic banking, consumers are able to shop among and establish relationships with financial institutions throughout the country without ever leaving the privacy of their own homes. In addition, many consumers and financial institutions find that a wide variety of financial programs, services, and products can be provided more inexpensively and efficiently when they are delivered electronically rather than through more traditional means.

The 106th Congress clearly recognized the importance of these and other consumer benefits when it enacted the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq. (the "E-Sign Act" or the "Act").

[1] MasterCard is a global membership organization comprised of financial institutions that are licensed to use the MasterCard service marks in connection with a variety of payments systems.

The E-Sign Act evidences a clear federal policy of promoting electronic commerce by ensuring that electronic documents are accorded the same treatment as those in paper form. Indeed, Congress plainly intended that electronic commerce should not be unduly hindered by prejudices or preconceived notions about electronic documents, and that no method of electronic communication be preferred over another method. Thus, for example, the E-Sign Act expressly states that any interpretations of the Act by federal regulatory agencies must, among other things: (i) not add to the requirements of the E-Sign Act; (ii) result in substantially equivalent requirements being imposed on non-electronic disclosures as on electronic ones; (iii) not impose unreasonable costs on acceptance and use of electronic disclosures; and (iv) not require, or accord greater legal status to, the implementation or application of specific technology. 15 U.S.C. § 7004(b). MasterCard fully supports these principles, and we believe that, as the OTS conducts its Study, it should give careful consideration to the implementation of these principles and the specific provisions of the E-Sign Act.

Delivering Disclosures Electronically

One of the key elements of the E-Sign Act is Section 101(c), which allows for the electronic delivery of federal- and state-mandated consumer disclosures. Section 101(c) allows a savings association to deliver mandated disclosures electronically if the association first makes certain disclosures to the consumer, including disclosures regarding the hardware and software requirements for accessing and retaining the electronic disclosures, and the consumer affirmatively consents to receive the disclosures electronically. Section 101(c) also provides that disclosures may be delivered electronically only to those consumers who have reasonably demonstrated that they are able to access the disclosure information in electronic form.

Most financial services that a savings association offers to consumers are subject to a wide variety of federal and/or state disclosure requirements. For example, the following are just some of the disclosure requirements a credit card issuer is subject to under the federal Truth In Lending Act ("TILA"): (i) advertising disclosures; (ii) disclosures in connection with applications and solicitations; (iii) "initial disclosures" provided when the account is established; (iv) periodic statement disclosures; (v) change-in-terms notices; and (vi) billing rights notices. Other products, programs, and services are subject to a similar array of disclosure requirements. As a result, the provisions of Section 101(c) are of special importance to savings associations that offer these services electronically. For those associations, it is imperative that the E-Sign Act requirements for delivering electronic disclosures be implemented in a way that does not undermine the objectives of the E-Sign Act. In particular, savings associations must be permitted to deliver electronic disclosures in a way that is both efficient and inexpensive for the savings association and that does not

undermine the convenience that drives the consumer to select the electronic product in the first place. It is possible, however, that because of recent regulatory developments in this area, the objectives and benefits of the E-Sign Act will not be fully realized.

Some of the difficulties in this regard stem from the requirement in Section 101(c) that a consumer may receive electronic disclosures only if the consumer "reasonably demonstrates" that he or she can access the disclosure information electronically. This provision arguably could require that a consumer who has consented to receiving electronic disclosures after full notice of the technological and other requirements of doing so must nevertheless affirmatively demonstrate that he or she has the ability to access the disclosures. This provision runs directly counter to the general policy that electronic and paper documents should be treated the same. In a paper-based transaction, where disclosures are furnished to a consumer by mail, the consumer simply must furnish an address at which the consumer will receive the disclosures. In at least some cases, the consumer may elect to pick up the paper disclosures rather than have them delivered to a particular address. We believe that the same should be true for electronic disclosures. Specifically, in our view, consumers should be permitted to consent to receive disclosures in a specified electronic manner and should not be required to take additional steps, such as logging on to a web site or engaging in other electronic communication to effectuate their clear intent. As a result, we urge the OTS to include in the final Study results a recommendation that the "reasonable demonstration" requirement of Section 101(c) be repealed.

Other impediments to fully implementing the benefits of the E-Sign Act have resulted from interpretations of how electronic disclosures must be delivered. For example, in the Federal Reserve Board's interim final rules on electronic disclosures ("Interim Rules") there is a requirement that consumers who have consented to receiving electronic disclosures on a web site must nonetheless be notified by e-mail of the availability of those disclosures. Once again, this type of provision runs counter to the intent that electronic and paper disclosures be treated equally. For example, under Regulation Z, which implements the Truth In Lending Act, consumers are permitted to pick up their periodic statements and there is no requirement that any notice of the availability of those statements be mailed to the consumers. We believe that there should not be any notice of availability requirements for electronic disclosures, either. If a consumer has agreed to receive disclosures in a particular fashion, such as at a web site, then he or she should be permitted to do so without any additional burdens being imposed on either party.

Another area of concern that arises from the Interim Rules is the length of time the disclosures must be available when they are presented to a consumer at a web site. The Interim Rules state that the disclosures must remain

available for at least 90 days. This requirement would be costly in that it would require the storage of literally millions of different, outdated disclosures. For example, the initial disclosures of every consumer who opens an account on-line, and receives the initial disclosures electronically, or the periodic disclosures of every consumer who elects to pick up the periodic statement on-line must be stored separately for 90 days. Similarly, any other type of disclosure that consumers have consented to receive at the web site must remain available for at least 90 days.

Once a consumer accesses a particular disclosure, the savings association should no longer be required to store that disclosure for subsequent access by the consumer. For example, continued availability should not be required when a consumer obtains disclosures that are provided during an on-line transaction, or where the consumer otherwise already has obtained that disclosure electronically. At the very least, even if it is necessary to allow consumers some amount of time to obtain the disclosures, 90 days appears to be excessive. We urge that the OTS recommend in its Study a more workable approach to the record availability requirement.

In addition, we urge that the OTS confirm that savings associations may offer certain products, programs, or services exclusively by electronic means and may also vary the price or other terms of products, programs, or services that are offered electronically. The E-Sign Act contemplates that financial institutions may choose to do business solely electronically. See 15 U.S.C. § 7001(c)(1)(B)(i)(II). Thus, for example, a savings association may determine to make loans solely over the Internet and only offer electronic Regulation Z disclosures to its customers. In addition, savings associations should, at their own discretion, be able to vary the consideration charged to a consumer for a financial product, program, or service depending on whether the consumer chooses paper or electronic disclosures. Many savings associations may wish to offer pricing incentives for consumers to engage in electronic commerce, thereby passing along savings resulting from less expensive and more efficient electronic procedures, including potentially significant cost savings by not paying for envelopes, paper, and postage.

Weblinking

The OTS has specifically requested comment on marketing arrangements that provide consumers with access to products offered by multiple entities through hypertext links on a savings association's web site. These links enable a consumer to transfer between the savings association's web site and another entity's web site. The OTS has specifically inquired whether the use of these weblinking arrangements creates the potential for consumer confusion.

The ability to enter into these weblinking arrangements is extremely important to savings associations who have chosen to offer products, programs, and services electronically. Weblinking enables a savings association to compete with larger or more diversified entities by offering consumers, on the savings association's web site, the opportunity to access a wider array of products, programs, and services than the savings association could offer by itself. We believe that these weblinking arrangements can be, and in fact are being, offered in a way that avoids customer confusion as to the sponsorship of the web site at which the consumer is transacting business. For instance, entities often use a web site border and brand location to indicate to consumers that they have accessed a different web site. Additional approaches include pop-up boxes or other methods of communication that notify consumers that they are exiting the site of a savings association and are transferring to an external web site.

In our experience, we do not believe that it is necessary for the OTS to establish additional specific guidelines on this issue. In the event that the OTS decides to do so, however, we urge that any such guidance allow each savings association the flexibility to design and implement its own methods for ensuring that consumers understand the arrangement between the savings association and its weblink partner.

Relationship to State Law

Another important consideration is the relationship between state and federal law with respect to the on-line delivery of financial services. We encourage the OTS to clarify the interplay between state and federal law with respect to these issues by expressly confirming that financial institutions that comply with the provisions of the E-Sign Act do not need to comply with additional or different requirements under state law with respect to electronic disclosures or signatures. The requirements of providing electronic disclosures or signatures under the E-Sign Act and Interim Rules, which are federal laws, should be governed by federal and not state law. The E-Sign Act recognizes a federal interest in not unduly burdening electronic commerce with state law requirements that are substantially different than requirements imposed by the federal statute. Importantly, the "negative federal preemption" applies only with respect to requirements imposed under state law and thus has no application to disclosures required under federal law, including under the Interim Rules. See 15 U.S.C. § 7002(a). Thus, in this area federal law evidences a strong desire for uniformity and promoting electronic commerce. Moreover, adopting a rule of simply complying with the E-Sign Act relieves savings associations of the potentially onerous requirements of determining when various state statutes are consistent with the E-Sign Act. Finally, the nature of electronic commerce may make it difficult to determine which state's laws should apply to a given situation.

Location Considerations

The OTS expressly requested comment on the interpretation of federal statutes and regulations applicable to a savings association on the basis of the "location" of the savings association. Savings associations that issue credit cards are authorized under section 4(g) of the Home Owners Loan Act, 12 U.S.C. § 1464(g) (and 12 C.F.R. § 560.110) ("HOLA") to charge interest allowed by the laws of the state in which the association is located and to "export" such interest charges on loans made to borrowers that reside in other states. MasterCard believes that the OTS should not attempt to provide guidance on the application of this federal interest statute in connection with electronic banking services as part of the OTS's current proceedings. If additional guidance would be appropriate at a later time, MasterCard believes that the particular issues and considerations relating to the location of a savings association for purposes of the HOLA § 4(g) should be considered fully and carefully in the context of that particular issue. Simply stated, the application of the usury laws is such an important issue that it deserves individualized attention if additional guidance is going to be provided.

Development of Electronic Financial Services

Finally, in connection with the adoption of the Electronic Operations rule, the OTS recognized two broad principles regarding the regulation of electronic financial services. The first principle is that the public and savings associations are best served if statutory and regulatory restrictions are kept to a minimum, and that the premature imposition of restrictive operational standards could impede the development of improved financial services. The second principle is that savings associations should be permitted to compete effectively with other regulated financial institutions and unregulated firms offering financial and related services.

MasterCard strongly supports these views and urges the OTS to continue to adhere to them in its current examination of electronic banking issues. Development of electronic financial services products is still occurring at a rapid pace today. As a result, MasterCard respectfully submits that the OTS generally should refrain from adopting new restrictions or requirements that could have the unintended consequence of unnecessarily impeding the development of improved financial services. Likewise, savings associations continue to compete with other depository institutions and with non-depository institutions, many of which may be regulated by the states or even unregulated. MasterCard urges the OTS to maintain the competitiveness of savings associations by avoiding the imposition of unnecessary regulations applicable to savings associations with which competitors are not required to comply.

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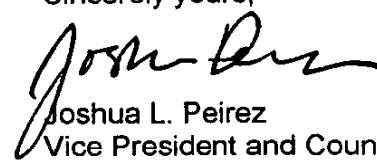
Once again, MasterCard greatly appreciates the opportunity to submit these comments regarding the Study. If you have any questions concerning this comment letter, or if we may otherwise be of assistance in connection with this issue, please do not hesitate to call me, at the number indicated above, or Michael McEneney at Sidley Austin Brown & Wood at (202) 736-8368, our counsel in connection with this matter.

Sincerely yours,



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cc: Michael F. McEneney, Esq.