ELECTRONIC FINANCIAL SERVICES COUNCIL

1717 Pennsylvania Avenue, NW Suite 500, Washington, D.C. 20006

202.974.1036

info@efscouncil.org

April 18, 2001

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Sallianne Fortunato
National Telecommunications and Information Administration
Room 4716
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: <u>ESIGN Study - Comment P004102 – Additional Comments</u>

To the Federal Trade Commission ("FTC"):

This letter is provided in response to your invitation to provide additional comments following the FTC Public Workshop on the Electronic Signatures in Global and National Commerce Act ("ESIGN") on April 3, 2001. The Electronic Financial Services Council ("EFSC") was pleased to participate in the Workshop. The views expressed by the participants, and the information shared, offered useful insight into the ESIGN consumer consent rules and the challenges they present.

The EFSC would like to highlight two important points that were made during the Workshop concerning the Section 101(c)(1)(C)(ii) requirements (the "electronic consent requirement"):

- Empirical evidence presented at the Workshop, particularly the information supplied by Paul Gallagher of Fidelity, suggests that the electronic consent requirement is creating a barrier to adoption of electronic communications by consumers who are willing and able to do so; and
- The principal rationale for the electronic consent requirement may be based on a faulty premise.

The Electronic Consent Requirement As A Barrier To E-Commerce

At the Workshop, Fidelity Investments shared its experience with the impact of the electronic consent requirement on consumer adoption of electronic communication. Prior to ESIGN, Fidelity had been obtaining in-person agreement from new customers willing to receive electronic delivery of information. Many of Fidelity's customers opted for electronic delivery and used it successfully. Since beginning ESIGN compliance, Fidelity now requires electronic confirmation and a "reasonable demonstration" test as part of the consent process. As a result, the percentage of new customers who complete the consent process and use electronic delivery has fallen off measurably. The only apparent explanation is that the additional steps required by ESIGN serve as an unintentional deterrent to giving consent.

The securities industry is the industry where, because of SEC initiatives, there was the most use of electronic media to complete financial transactions. As such, it provides a valuable testing ground for the impact of the two requirements mentioned above. Because Fidelity is among the larger players in the electronic delivery of securities services, its testimony should be given great weight by the FTC and the Commerce Department. Given the fact that other industries will not have the "control"' of pre- and post-ESign experience, this may be the most valuable data in evaluating the impact of the requirements on which the Workshop focused, and as such is more valuable than speculation about what consumers expect or need. So far as we are aware there were no complaints about fraud or deception related to companies operating under the old SEC rules.

The Electronic Consent Requirement May Be Based On A Faulty Premise

Workshop participants supporting the electronic consent requirement suggested that its primary purpose is to prevent the abuse of electronic disclosures: a seller or service provider otherwise dealing in paper documents as part of an in-person transaction might obtain consent on paper for the purpose of diverting disclosures to an electronic environment in the hope that the disclosures would either be inaccessible or not accessible on a timely basis, or that the consumer would not bother to review them. Participants suggested that, absent the electronic consent requirement, ESIGN would validate these practices. As the EFSC pointed out, a variety of existing laws protect consumers against such behavior.

An attempt to obtain paper consent and use electronic disclosures for fraudulent purposes would run afoul of state and federal laws on deceptive trade practices, as well as disclosure timing and delivery rules. Absent a valid, articulated business purpose, the fact that a face-to-face transaction was otherwise being documented on paper while important disclosures were being delivered electronically could, in and of itself, serve as an indication of fraudulent intent. The electronic consent requirement appears to take aim at practices for which other, better-targeted protections exist.

Any legitimate firm has a strong motivation to assure that the electronic method of communication adopted by the firm and its customer works for both. It is the intention that this electronic channel of communication will be used not simply for delivery of disclosures, but will serve as the means of ongoing communication with customers such as sending periodic statements, reminder notices, updated agreements or additions to agreements, tax-related information, and even solicitations for new and improved products and services.

While the EFSC continues to believe that it is premature for Congress to amend ESign, we strongly urge that your report to Congress reflect the fact that initial indications are that the provisions cited are having an negative impact on usage of ESign and that the anti-fraud purposes for which they are designed may be more appropriately addressed by other means.

Thanks again for the opportunity to participate in the Workshop. If you have any questions, or would like any additional information, please do not hesitate to contact the EFSC at the address and telephone number above.

Sincerely,

Jeremiah S. Buckley

Jeremiah S. Buckley
General Counsel

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