

Supplementary
Comments
to the
FEDERAL TRADE COMMISSION
and
DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

Electronic Signatures in Global and National Commerce Act

E-SIGN Study – Comment P004102

Introduction

On behalf of its low income clients, the **National Consumer Law Center**¹ submits these supplementary comments to address a number of questions which arose during the workshop conducted on April 3, 2001.

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 intended 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 the significance of the agreement to receive records electronically and to ensure that there is actually a meeting of the minds.

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

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 publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions. These comments are written by Margot Saunders, Managing Attorney of NCLC's Washington office.

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 accessing the information.* (Emphasis added)²

II. The meaning of the statutory mandate that the electronic consent be executed “in a manner that reasonably demonstrates” that the consumer can access electronic information.

At the workshop there were some questions raised regarding the extent of the legislative requirement in E-Sign that the electronic consent be accomplished “*in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information . . .*” E-Sign, section 101(c)(1)(C)(ii).

The issue is whether the consent process itself must electronically indicate that the consumer can access the electronic records provided, or whether this requirement is satisfied by *allowing* the consumer the opportunity to test his capacity to access the electronic records. The example used to test this question was whether the requirement for an electronic consent was accomplished when an email that included an attachment in PDF format simply required the consumer provided to respond by email and affirm that the consumer could access the PDF attachment. The answer is unequivocal: unless the consumer's email response contains some information that necessitated the consumer's actual opening of the PDF attachment, this electronic consent would not satisfy the statutory requirement.

The statutory language itself is clear: “in a manner which demonstrates that the consumer can access” does not permit the consumer to simply affirm that access. The operation of consenting itself must provide the demonstration. This was a matter of considerable debate during the passage of E-Sign. Consumer advocates insisted that the electronic consent process test the consumer's computer's capacity to access the electronically provided information. We did not want to leave it to the consumer's subjective understanding of his or her computer's capacity. Every person who has ever received e-mail with attachments has found themselves unable to open some of those attachments. The electronic consent requirement mandates an electronic handshake – whereby the two computers communicating are assured that they can each open and read the electronic information to be shared between them.

This issue itself was the matter of extensive comment by Members of Congress involved in the passage of E-Sign. Consider the following excerpts from the Congressional Record regarding the language in 101(c)(1)(C)(ii).

By Senator Leahy:

Section 101(c) of the conference report requires the use of a technological check, while leaving companies with ample flexibility to develop their own procedures. The critical language, which Senator Wyden and I developed and proposed, provides that a consumer's consent to the provision of information in electronic

2 146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. Leahy).

form *must involve a demonstration that the consumer can actually receive and read the information*. Section 101(c) also provides that if there is a material change in the hardware or software requirements needed to access or retain the information, *the company must again verify that the consumer can receive and read the information*, or allow the consumer to withdraw his or her consent without the imposition of any conditions, consequences or fees.³

A joint statement by Senators Hollings, Wyden and Sarbanes, confirms this:

Today, many different technologies can be used to deliver information – each with its own hardware and software requirements. An individual may not know whether the hardware and software on his or her computer will allow a particular technology to operate. (All of us have had the experience of being unable to open an e-mail attachment.) Most individuals lack the technological sophistication to know the exact technical specifications of their computer equipment and software. *It is appropriate to require companies to establish an “electronic connection” with their customers in order to provide assurance that the consumer will be able to access the information in the electronic form in which it will be sent.* This one-time “electronic check” can be as simple as an e-mail to the customer asking the customer to confirm that he or she was able to open the attachment (if the company plans to send notices to the customer via e-mail attachments) and a reply from the customer *confirming* that he or she was *able to open the attachment*. (Emphasis added.)⁴

By Mr. Tauzin:

S. 761, I must also mention, provides for extensive consumer protection. Not only are existing state and federal consumer protection laws unaffected, but the provisions regarding consent afford consumers with the greatest possible safeguards against fraud imaginable. Consumers must opt-in to electronic transactions, receive full disclosure of terms and conditions, and *ultimately prove that they can electronically access and retain the information that is the subject of the consent*. I submit that in all my time in Congress, I have never seen a more involved statutory framework for purposes of manifesting consent.⁵ (Emphasis added.)

III. The legal consequences of a failure to obtain properly the consumer’s electronic consent on records delivered electronically, in light of the savings provision in E-Sign section 101(c)(3).

There was some confusion among participants on the panels at the workshop about the legal consequences of the failure to obtain electronic consent. One participant insisted on referring to the whole electronic consent provision as simply a safe harbor. This participant argued that a failure to comply fully with the consent provision did not, *by itself*, mean that the electronic delivery of records otherwise required to be in writing

3 *Id.*

4 146 Cong. Rec. S 5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

5 146 Cong. Rec. H4360 (daily ed. June 14, 2000) (statement of Mr. Tauzin).

was not accomplished.

We could not disagree with this more strongly. Unequivocally, the consumer consent provision in E-Sign establishes an “opt-in” regime. No records required to be in writing can be considered to be provided to a consumer if they were provided electronically, *unless* the consumer consented properly according to the requirements of 101(c). The consequences of that lack of consent are whatever consequences there are in the underlying law for the failure to deliver documents required to be in writing to the consumer. For example, if a state law states that a particular fee cannot be charged unless the consumer has been notified in writing that it will be charged, then the electronic delivery of that notice is invalid if the consumer’s consent did not comply with all of the requirements of 101(c). In this instance, that would mean that the imposition of the fee would be illegal.

E-Sign specifically distinguishes between its treatment of contracts and other records required to be in writing. There is a very limited, but clear, difference in the treatment of electronic contracts and other records provided electronically to consumers in section 101(c)(3), which says:

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).

This section indicates that the contract itself shall not be considered invalid just because the consumer did not electronically consent in conformance with the requirements of the statutory requirement. So, for example, a contract which was delivered electronically despite the fact that the consumer did not electronically consent, may still be fully enforceable. The effect of the failure to electronically consent has the same effect as failing to provide a copy of the contract to the consumer. In some cases, there may be no consequences from this. A contract enforced under the statute of frauds, for example, must be in writing and signed by the person against whom enforcement is sought. But this contract does not need to have been *provided* to the person against whom it is being enforced.⁶ If a contract governed only by the statute of frauds were entered into electronically by a consumer and a business, and the consumer had *not* electronically consented, then the contract would not be deemed *unenforceable* just because of the failure to obtain the consumer’s consent. (However, the fact that the consumer had not electronically consented could be raised to show that there had not been a meeting of the minds, or that the electronic signature did not actually belong to the consumer. There would be no bar against the consumer making some other argument to show that the contract could not be enforced against him.)

However, in many states, the failure to provide a copy of a small loan contract to a consumer carries the statutory consequence that the contract may be unenforceable against the consumer.⁷ Assume a consumer is provided with a copy of a contract governed by such a law only electronically, even though the consumer has not *electronically* consented to receive electronic records in a manner which complies with the requirements of section 101(c)(1)(C)(ii). In that case, the electronically delivered contract is not denied legal effect solely because of the failure to obtain electronic consent. Instead it is denied because it was not delivered to the consumer as was required by the underlying law, because the consumer’s lack of electronic consent meant that the contract was not

6 See e.g. U.C.C. § 2-201. Formal Requirements; Statute of Frauds
(1) . . . A contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement has been sought

7 See e.g. the law in North Carolina governing small consumer loans:
“(a) At the time a loan is made, the licensee shall deliver to the borrower . . . a copy of the loan contract . . . “ N.C.G.S. § 53-181.
The consequences under state law for failure to deliver the loan contract to the borrower is voiding of the loan. N.C.G.S. § 166(d).

provided to the consumer.

There need not be such complex analysis applied to the situation where a consumer has failed to electronically consent to receive records which are not contracts. The legal requirement in E-Sign for a consumer's consent is only triggered by the requirement of another law for a document to be in writing. Therefore, if the consumer has not properly consented to the receipt of that writing electronically – by electronically consenting pursuant to section 101(c)(1)(C)(ii) – the document cannot be considered to have been provided to the consumer. The consequences for not providing the document to the consumer are those that are specified in the underlying law.

To sum up, pursuant to section 101(c)(3), the electronic consent requirement does not invalidate the contract, but it can invalidate the *delivery* of that contract. But if *delivery* is required by the other law governing the contract then the repercussions flowing from the failure to deliver, including invalidation of the contract, should result if electronic delivery is not secured in compliance with E-Sign's requirements.

Conclusion

On behalf of our low income clients, we appreciate this opportunity to provide the Federal Trade Commission and the Department of Commerce with our views on the very important issues considered. Please feel free to call on us for further clarification, at any time.