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-and-

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RE: ESIGN Study - Comment P004102

Dear Ms. Major and Ms. Smith:

I would like to thank you both for asking me to participate as a panelist during the April 3, 2001 public workshop, on the two panels for which you each served as moderator. I thought the workshop was very productive, in large part because of your able efforts as moderators.

I submit this letter as a supplement to my earlier letter of March 15, 2001, and also as a follow-up to the April 3, 2001 public workshop. I submit these comments in my personal capacity only, based on my personal observations, and not on behalf of any client.

1. There was general agreement among the panelists at the April 3 workshop, that it is still too early to ask Congress to amend Section 101(c)(1)(C)(ii) of E-SIGN. Federal regulators are gradually providing their regulated entities with additional guidance concerning how certain documents that should otherwise be "in writing" may be provided electronically to individual consumers in a manner consistent with Sections 101(c) and (e) of E-SIGN. For example, as was discussed by several panelists during the April 3 workshop, the Federal Reserve Board issued

new interim regulations in its press release dated March 29. The interim regulations for electronic disclosure pursuant to Regulations M and Z were published in the March 30 Federal Register. The interim regulations for electronic disclosure pursuant to Regulations B, E, and DD were published in the April 4 Federal Register. These interim regulations are open for public comment until June 1, so there is a very real possibility that fine-tuning revisions may be made to these interim regulations later this year.

In addition, the Internal Revenue Service recently announced that it will permit the electronic provision of Forms 1098-E and 1098-T (two information statements relevant to student loans) to those taxpayers who agree to such electronic provision. (See 66 Fed. Reg. 10191 (February 14, 2001).) Notably, the IRS has not yet indicated whether it will allow the electronic provision of various Forms 1099 or of Form 1098 (the latter pertaining to mortgage interest paid). (I would also like to take this opportunity to correct one item in my earlier comment letter of March 15, 2001 - the IRS has issued guidance concerning the electronic provision of Form W-8BEN. See 65 Fed. Reg. 32152, 32183 (May 22, 2000).)

In addition, numerous state legislatures are presently in session considering (among other things) the adoption of the Uniform Electronic Transactions Act (UETA).

Thus, regulated entities are presently grappling not only with a relatively new ESIGN (a statute that took effect on October 1, 2000, less than 7 months ago), but also new federal regulatory guidance and state legislation affecting how disclosures and other documents generally required to be provided to consumers "in writing" may instead be provided in electronic form. All of this combines to reinforce the general consensus expressed at the April 3 workshop, that it is too early to ask Congress to amend Section 101(c)(1)(C)(ii) of ESIGN. Both industry and consumers need more opportunity to work with ESIGN before any meaningful conclusions may be drawn about ESIGN's effectiveness, benefits and burdens.

2. The United States Postal Service is apparently considering cost-cutting maneuvers right now, including the possibility of discontinuing Saturday mail delivery. Press reports indicate that a decision about Saturday mail delivery will likely be made in the next 90 days. Curtailment of current U.S. Postal Service delivery services may make the electronic delivery and receipt of documents look more attractive to consumers, and may also help mitigate current consumer concerns about the costs of paying a private commercial enterprise for an e-mail account or Internet access. Curtailment of current U.S. Postal Service delivery services may also provide businesses with greater incentives to consider innovative use of electronic document delivery methods, encouraging greater implementation of ESIGN and related state and federal electronic disclosure regulations and statutes. (A recent American Bankers Association survey of bank web sites indicated that, at present, only 5% of bank web sites avail themselves of the benefits of ESIGN.)

3. With respect to the issue of legislation inadvertently "locking" web sites into current technology and inhibiting technological change, I would note that Section 101(c)(1)(D) of ESIGN (which incorporates Section 101(c)(1)(C)(ii) by reference) provides a substantial disincentive to providers of electronic disclosures who might otherwise consider changing (upgrading) the hardware and software required to access or retain such disclosures. In general, unilateral changes to the hardware and software necessary for existing customers to access or retain electronic disclosures are not allowed by ESIGN - instead, the pending changes must first be disclosed to existing affected customers, who in turn must first reasonably demonstrate their

ability to accommodate the pending hardware and/or software changes before the changes may be implemented.

This poses a potential Catch -22, since “self-proving” or “auto-validating” navigation by pre-existing customers through a web site that already incorporates the changed (upgraded) hardware and software features will be difficult (unless special “demo” web pages are set up using the changed hardware and software features, while the functional web pages accessible by pre-existing customers continue to operate under the older, previously-disclosed hardware and software configuration). As a practical matter, as long as one single pre-existing customer fails to reasonably demonstrate his or her ability to accommodate the pending hardware and/or software changes, the changes cannot be implemented across-the-board for the entire affected customer base. A consumer may choose not to provide the “reasonable demonstration” simply because the consumer is busy with other things - silence on the consumer’s part will not always mean that the consumer is unable to handle the proposed hardware and software changes.

Section 101(c)(1)(D) of ESIGN provides a major disincentive to upgrading the hardware and software utilized on various web sites. After we gain more experience with ESIGN, we may wish to consider allowing unilateral changes to hardware and software, coupled with the requirement that pre-existing consumers be given a reasonable opportunity to try out the changed hardware and software, and the requirement that consumers give notice only if they are unable (or unwilling) to handle the changed hardware/software configuration.

Section 101(c)(1)(B)(iv) of ESIGN also requires all providers of electronic disclosures to retain the ability to provide copies of all such disclosures in paper form upon the consumer’s request, which in turn makes it difficult to design a truly paperless financial service. After we gain more experience with ESIGN, we may wish to reconsider Section 101(c)(1)(B)(iv).

I thank you again for giving me the opportunity to participate in your public workshop, and to present these additional comments to you. Please do not hesitate to contact me at (203) 776-1911 during regular business hours (Eastern Time) if you have any questions about any of the matters discussed in this letter or would like any further information.

Sincerely,
/s/ Elizabeth C. Yen
Elizabeth C. Yen