

March 30, 2001

Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: ESIGN Study Comment P004102

To whom it may concern:

The Securities Industry Association (“SIA”)¹ welcomes the opportunity to express its views on the consumer consent provisions of the new Electronic Signatures in Global and National Commerce Act (ESIGN). SIA was a strong proponent of legislation to provide equal and uniform legal recognition of electronic signatures, records, and contracts. Over the past several years, the securities industry has been actively developing and deploying new technology to open accounts, access information, raise capital and interact with the financial markets, and otherwise provide investors with useful and cost-effective products and services. Working with our primary regulator, the Securities and Exchange Commission (SEC), the industry has sought to ensure that rules and regulations keep pace with developments in technology, particularly in allowing the use of electronic media to replace or supplement paper-based products and services.

In keeping with this approach, SIA is fully supportive of the provisions of the legislation that give legal standing to electronic signatures and records and believes that the legislation has opened up new opportunities for businesses and consumers. Our primary concerns at this point, however, are twofold. First, we are concerned that ESIGN’s consumer consent provisions not be narrowly or unreasonably interpreted so as to impose unnecessary and undue burdens on the ability of businesses to offer electronic services to their customers. Second, we are concerned that the provisions of the legislation not be interpreted in such a way as to supplant or duplicate the work already done by our primary regulator - the SEC.

One area in which ESIGN potentially overlaps with existing SEC regulation is the SEC’s comprehensive interpretive guidance covering the use of electronic media. For over five years, broker-dealers have operated under the SEC’s consent-based regime for the electronic delivery of

¹ The Securities Industry Association brings together the shared interests of more than 740 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates more than \$300 billion of revenues yearly in the U.S. economy and employs more than 700,000 individuals. (More information about the SIA is available on its home page: <http://www.sia.com>.)

documents to investors. With three interpretive and concept releases on this subject,² the SEC has demonstrated its ability to keep abreast of technological change in the context of investor protection. Although the securities industry continues to suggest additional reforms to SEC policies,³ we recognize that the agency is in the best position among interested government entities to weigh the interests of investors, issuers and broker-dealers and strike the proper balance.

BURDENS IDENTIFIED

Since the enactment of ESIGN, securities firms have had to assess how ESIGN interacts with and affects the SEC's 1995, 1996 and 2000 interpretive releases, and how to structure their electronic services to comply with the requirements of both. This assessment has been most challenging in the area of consent. When interpreted and applied with common sense, SIA believes ESIGN's consent requirements can be met without undue burden and are generally compatible with the SEC's guidance. However, there is some uncertainty whether ESIGN could be interpreted to impose stricter and more burdensome consent requirements than the SEC. SIA believes such interpretations would in fact impose undue and unmanageable burdens on both firms and consumers, and that such additional burdens would be unnecessary since the SEC guidelines and consent requirements already protect investor interests. Set forth below are some of the areas in which potential differences exist between the SEC's current guidance and ESIGN.

First, the 1995 and 1996 Releases summarize the general attributes of informed consent, leaving firms with the flexibility to design their own consent processes. Section 101(c)(1) of ESIGN, on the other hand, imposes a detailed set of specific requirements that must be followed in order to obtain consumer consent. Again, so long as the ESIGN requirements are reasonably interpreted to allow firms similar flexibility while still meeting Congress' underlying consumer protection objectives, these differences should not pose unmanageable problems. Second, the SEC's 2000 release clarifies that investors may consent to electronic delivery telephonically. Section 101(c) of ESIGN clearly allows telephonic consent generally, and a reasonable reading of Section 101(c)(1)(C)(ii) would allow consumers to consent or confirm their consent to electronic delivery telephonically in appropriate circumstances. To resolve any doubt that might exist on this point, however, the SEC should consider confirming that telephonic consent meets the ESIGN requirements.

Finally, as mentioned above, one attribute of the SEC's guidance on electronic delivery from 1995 to the present has been its general approach of leaving details such as the format of the consent and the format of the electronic disclosure itself to the industry and the market. Section 101(c)(1)(C)(ii) of ESIGN requires that a "consumer consents electronically, or confirms his or her consent electronically, in a manner that *reasonably demonstrates* that the consumer can access the information in the electronic form that will be used to provide the information that is the subject of the consent (emphasis added)." SIA believes Congress intended the "reasonable demonstration" requirement to be applied with common sense so that firms can design workable and pragmatic consent regimes while still reasonably ensuring that consumers can access electronic information. So long as it is read in this light, Section 101(c)(1)(C)(ii) and the SEC guidelines do not conflict. For example, the SEC guidelines allow information to be delivered

² SEC Releases 33-7233 (10/6/95) 60 FR 53458; 33-7288 (5/9/96) 61 FR 24644; 33-7856 (4/28/00).

³ The SIA comment letter (8/25/00) responding to the SEC's 2000 release can be found at <http://www.sec.gov/rules/interp/s71100/michael1.htm>

through the use of a PDF file if the process is not so burdensome as effectively to prevent access.⁴ Firms can meet this requirement by informing investors of the requirements for accessing PDF and providing them with the necessary software and technical support. We believe this approach would satisfy ESIGN's requirements as well. However, it would be helpful for the SEC to confirm its agreement on this point.

Simplifying the rules applicable to electronic delivery in the securities industry is also vital to achieving some of the most important projects the industry now faces, including providing investors with timely access to information and shortening the settlement cycle for securities transactions.

SEC GUIDANCE SHOULD REMAIN UNDISTURBED

SIA takes the position that the SEC's pre-ESIGN interpretive guidance remains valid. In general, in the context of the securities industry, SIA believes that ESIGN's consumer consent provisions are unnecessary and potentially duplicative in light of existing SEC guidance in this area.

First, the purpose of the electronic delivery provisions of the legislation, indeed of the whole Act, seems to be to *enable* e-commerce where it might otherwise be prohibited (or inhibited) by existing statute or rule. The consumer consent provisions were necessary to create some kind of ground rules for industries without any rules, but surely were not intended to toughen or duplicate the rules for industries already subject to a consent-based regime established by the primary regulator for that market.⁵

The consumer consent provisions seem concerned with businesses that would seek to rely on this legislation to do away with an established way of doing business in order to be able to unilaterally impose an electronic-only relationship on customers. For example, an exterminator that has service contracts with customers could not simply begin communicating renewals and contract changes to those customers via e-mail on the basis that the legislation gives legal effect to electronic contracts. The consumer consent provisions prevent companies from imposing such a substitution without first obtaining the customers' permission. Senator Patrick Leahy recognized that the consumer consent provisions were not intended to be a prerequisite to all electronic commerce when he noted, "the Conference report [accompanying the legislation] ensures effective consumer consent to the *replacement* of paper notices with electronic notices ...so that consumers are not forced or tricked into receiving notices and disclosures in an electronic form that they cannot access or decipher (emphasis added)."⁶

This is not the case with SEC-regulated broker dealers. The applicable SEC rules already provide for a consent-based electronic delivery alternative in the securities world. As such,

⁴ As a presumably non-exclusive example of permissible PDF document use, the SEC states that a PDF file could be used if the requirements necessary to download PDF files are part of the investor's informed consent and the necessary software and technical assistance are provided at no cost.

⁵ This is demonstrated by the fact that ESIGN does not require firms who have already obtained consents under an existing regulatory scheme to obtain new consents under Section 101(c). See ESIGN Section 101(c)(5).

⁶ See Congressional Record at S5219

broker-dealers are not relying on this legislation in order to enter into electronic contracts with, or offer an electronic delivery alternative to, its customers. Investors are now and have been protected by preexisting SEC authority. Thus, it would appear that the concern sought to be addressed by the consumer consent provisions is not present in the case of a broker dealer following SEC guidelines.

CONCLUSION

While SIA has recommended significant changes in the SEC's interpretations with respect to electronic delivery, it is SIA's view that ESIGN did not preempt the SEC's role as the regulator charged with interpreting the application of the securities laws to the delivery of documents to investors. SIA believes that the SEC should publicly confirm that it concurs with this position as soon as possible. If the SEC does not agree with this interpretation of ESIGN, it should promptly utilize the interpretive rulemaking and exemptive authority provided in the legislation⁷ to clarify that existing rules, regulations and interpretations remain in effect.

We welcome the opportunity to discuss this with you further. If you have any questions, please contact Scott Kursman, Associate General Counsel, at 212-618-0508.

Very truly yours,

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⁷ Section 104(d)(1) of the Act permits agencies such as the SEC to continue to provide flexibility in interpreting consent provisions anticipated by the Conference Report.