



Publisher of Consumer
Reports

To: esign-study@ftc.gov, esign-study@ntia.doc.gov

Re: E-Sign Study—Comment P004102

1. Consumers Union, the nonprofit publisher of *Consumer Reports*¹, welcomes the opportunity to comment to the Federal Trade Commission and the National Telecommunications and Information Administration on the consumer consent procedure found in E-Sign section 101(c)(1)(C)(ii), as well as on other important issues for consumers raised by E-Sign.
2. Summary of comments

The E-Sign consumer consent requirement is a fundamental consumer protection. Because E-sign touches nearly every notice required by law to be placed in writing and sent to a consumer, this federal law has the potential both for good and for great harm. The law may assist those consumers who are ready and able to use e-commerce to do so effectively and efficiently. The consent requirement provides an important protection for consumers who are not ready to use or interested in using electronic communication. The E-Sign consent process should prevent many potential abuses. It should help to prevent E-Sign's general authorization to substitute electronic communications for paper communications from being used to defeat the purposes of particular consumer statutes. The consent requirement helps to ensure that consumers know that they are consenting to receive future information electronically; and that consumers who receive information electronically receive the information in a manner and in a form in which the consumer can use it. Section 101(c)(1)(C)(ii) is the most essential provision in E-Sign for consumers.

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life of consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

3. Background and statement of interest

Consumers Union's mission is to test, inform, and protect. We have done this in a variety of ways throughout our 65-year history. Over the past three years we have worked to protect consumers in connection with electronic notices, both by seeking changes in the Uniform Electronic Transactions Act and in the development of E-Sign. Consumers Union became involved in the issue of electronic consumer records as an outgrowth of our work since the late 1980s on the uniform law process. In 1999, an unpromulgated version of what subsequently became the Uniform Electronic Transactions Act (UETA) was introduced in the California legislature. Consumers Union analyzed that measure, then sought significant additions to its rules, plus exemptions. The statutes targeted for exemption were those where new problems for consumers could have been created by UETA's broad authorization to substitute electronic records for paper records after implied agreement. Some of the protections which were added to the California bill were also added UETA before it was promulgated as a final uniform act. Other protections were added only to the California Electronic Transactions Act. Finally, because certain protections were not acceptable to the sponsors of the UETA, many of California's statutes most closely affecting consumers were exempted from the application of the California Electronic Transactions Act. Some observers believe that those California exemptions triggered the activity in Congress to enact E-Sign.

4. Our office was directly involved in the development of E-Sign, through our Washington D.C. advocacy office. We also worked closely with the National Consumer Law Center in developing consumer protection proposals for additions to E-Sign. We supported a consent mechanism which would both: 1) permit and facilitate electronic commerce at the consumer's option, and 2) make it difficult for sellers and others obligated to provide consumer notices to use an electronic means to provide notices when there is no reasonable basis to believe that the consumer will actually receive the notice in a timely manner or in a usable form. Section 101(c)(1)(C)(ii) is a key section in providing that protection.

5. Value of the requirements of section 101(c)(1)(C)(ii)

The special value of E-Sign's consent requirement lies in the fact that it will permit consent in situations where an electronic notice is warranted and appropriate, but it is unlikely to permit consent in those situations where electronic notice might be used to reduce the likelihood that the consumer would, in fact, become aware of the notice. Each of the two requirements of the subsection are important to accomplish this goal. First, E-Sign requires that consent be given or confirmed electronically. This means that the consumer must be engaged in an electronic communication at least once before legally required notices may be delivered electronically. This

requirement reduces the likelihood of an accidental consent to future electronic communications when the consumer is not able to receive those communications, or is unlikely to retrieve them.

6. E-Sign offers a very significant improvement over UETA in this respect. UETA permits an agreement for future electronic communications to be made in a paper form contract, perhaps even as part of the boilerplate that might pass unnoticed by the consumer. Under UETA, a consumer might fill out a paper or an electronic form listing an email address that is infrequently checked, or an address which is primarily used by children in the household, without realizing that by filling in that information the consumer is consenting to receiving future electronic notices affecting the consumer's legal rights.
7. E-Sign's requirement that the consent be either provided or confirmed electronically ensures that the consumer at least is online at the time of consent or is able to go online at a later time and engage in the consent process. While electronic consent and confirmation does not ensure that consumers will check their email accounts frequently for legal notices, it at least indicates that the consumer has a degree of sophistication such that the consumer is doing one piece of business online—offering or confirming the consent. Because E-Sign permits *either* the consent or the confirmation of consent to be given electronically, it is flexible enough to permit an in-person sign-up for future electronic service. The consumer need only confirm the consent the first time that the consumer accesses that service electronically. We believe that the benefits of the requirement that either the consent or the confirmation be given electronically clearly outweigh any burden which it imposes on businesses or on consumers.
8. The second element of the E-Sign consent requirement in section 101(c)(1)(C)(ii) is equally important. E-Sign requires that the manner of the electronic consent or confirmation “reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.” This “reasonably demonstrates” requirement is essential. Consumers and businesses across America and globally use a wide variety of technologies, word processing formats, email, software, and Internet software. It is common for home computers to have an older and less sophisticated version of a software program than the version in use in large and even smaller business. The “reasonably demonstrates” requirement provides an important protection for consumers against the potential that an important notice will be sent in a format in which the notice cannot be opened and read by the recipient. Many people have received email from someone with a different or more sophisticated system and find that the mail can't be opened, or that it opens as gibberish. The “reasonably demonstrates” requirement makes this far less likely to occur in consumer notices.

9. The well-designed “reasonably demonstrates” requirement accomplishes an important goal without specifying any particular technology to be used in the sending of notices. A business has broad flexibility to choose the method of electronic communication so long as that method has been consented to and meets this basic workability standard. Consumers Union strongly believes that the benefits for consumers, and ultimately for consumer confidence in e-commerce, far outweigh any burden to businesses or to consumers imposed by this requirement.
10. Need to refrain from changes to E-Sign section 101(c)(1)(C)(ii)

We do not recommend any statutory changes to the language of section 101(c)(1)(C)(ii). We believe that it would be a serious mistake to make changes to this section. The section offers a new baseline rule. It will take some time for businesses to learn the rule, adapt to it, and design forms to suit the rule. It would be a mistake to make a change in this new standard while businesses are still learning how to best comply with it.

11. Additional issues for legislative, regulatory, and voluntary action

E-Sign was a hard-fought and delicately balanced Act. While it does not contain all the consumer protections that we believe are essential to fostering consumer confidence in e-commerce, E-Sign is a far better collection of statutory rules than its predecessor and model, UETA. For this reason, we recommend against reopening E-Sign for any statutory changes. However, if E-Sign were to be reopened, there are some changes that we would recommend. In addition, there are some other issues which should be addressed through a regulatory process and/or voluntary action. These issues are discussed below.

12. Need to periodically check for stale addresses before sending consumer notices

If statutory changes were to be made in E-Sign, one needed change is to require that an email address from which no mail has been received in six to twelve months be checked for continued viability prior to sending of a statutory or contractual notice to a consumer. A check of the email address is not needed prior to a notice sent within a short time after receiving an inquiry from the consumer from that address. However, some consumer contracts have a long life, such as a five-year loan. Email addresses may change during the life of the contract, and the consumer should not be at risk of nonreceipt of notices which are sent electronically after a long hiatus in communication.

13. Some additional exemptions are needed

E-Sign acknowledges a few types of consumer notices as having such special importance and urgency that the consumer should not bear the risk that the notice is delivered in a usable form. These types of notices include utility shut off notices; eviction and repossession notices related to an individual's primary residence; cancellation of life and health insurance notices; and certain product recall notices. Consumers Union believes that the set of exempted notices should be broader. In particular, automobile and homeowner's insurance should receive the same treatment as life and health insurance cancellation notices. Especially in western states, automobile ownership can be important to retaining a job. In addition, loan default, repossession and acceleration notices should be exempt from E-Sign whether or not the loan is secured by a personal residence. An auto loan repossession notice can have very serious financial consequences. Consumers need the assurance of receiving something that is readable, and likely to be forwarded, for an auto default or repossession notice. A paper back-up provides that assurance.

14. E-Sign section 102 could be clarified to plainly direct that a state legislature cannot displace the requirements of section 101(c), (d), and (e) with respect to consumers

The language in E-Sign section 102(a)(1) permitting a state to modify, limit, or displace E-Sign section 101 by the passage of UETA has created great confusion. Consumers Union believes that the intent of this section was to allow states to displace the general authorization of E-Sign section 101(a), and not to displace the important consumer protections of subsections (c), (d) and (e). However, the plain language of the statute suggests that even the consumer protections can be displaced if a state affirmatively expresses a choice to do so in its UETA legislation. This would be a serious mistake, because it could deprive consumers in those states of important rights with respect to nonfederal notices that similar consumers have elsewhere. Any clarification of E-Sign should clarify that the consumer protections of 101(c), (d), and (e) cannot be "modified, limited or superceded" under E-Sign section 102.

15. E-Sign should plainly permit states to require delivery of paper contracts, notices, and related documents in a face to face sale

One of the surprises presented by UETA, and to a lesser extent, by E-Sign, is the possibility that a consumer in a face to face sale will be handed a disk or will be told--"All the documents you just agreed to have been emailed to you." This is less likely to occur under E-Sign because the consent should fail to qualify under the "reasonably demonstrates" test if the consent is acquired in the showroom on the seller's computer.

In-person delivery requirements often are designed to assure that consumers have all the relevant papers at a time when the consumer can study—or at least review—them before signing. When the sale is remote, electronic delivery of these documents can make sense, so long as the documents are offered for review in an effective manner before there is an electronic signature binding the consumer to those documents. In a face to face sale, loan, or other consumer contract, however, electronic delivery might be employed to deprive the customer of a practical means to review the documents, to compare the written documents to the merchant’s oral promises; or to ask questions about the contract terms. A merchant or lender might, for example, email the documents to another location; then assert that a statutory obligation to deliver the documents at the time of the sale or loan was met by contemporaneous emailing of the documents. The purpose of a requirement for delivery “at the time of the contract” is defeated if the consumer has to go elsewhere to read the material required by law to be delivered at the time of a sale or loan.

If E-Sign is amended, it should clarify that state legislatures, and state and federal regulatory agencies, may always require delivery of paper documents in a face to face transaction. These would be not automatic requirements; instead, states and regulators could act where necessary for specific types of face to face transactions.

16. If E-Sign were to be reopened, Consumers Union also would recommend a rule that a consumer may always reply electronically to an electronic notice. If a notice is given electronically, the commercial party should not be able to require a paper response. Sending a consumer an electronic notice is likely to induce an electronic reply; that reply should be effective. This is particularly important for notices where the consumer’s reply to the notice affects legal rights, such as a reply to a notice of the right to cancel.
17. Protections to ensure that a timeline which runs against a consumer starts only after a notice is received in a manner in which it can be opened, read, stored, and printed

If E-Sign were to be reopened, we would also favor a rule that a notice affecting a consumer’s legal rights does not operate against the consumer or start any time period for action by the consumer until the notice has been received in a manner in which it can be opened, read, stored, and printed. Because notices may trigger timeframes for action, such as exercise of the right to cancel, or filing of an appeal of a denial of homeowner’s insurance coverage, it is important that the consumer actually receive the notice before the notice starts a time clock for the response.

18. Protections should be added to section 201 on transferable records.

The comments to section 16 of the Uniform Electronic Transactions Act recognize "the extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper document or instrument ...". There is considerable expert discussion suggesting that there is a greater risk of multiple apparent originals in an electronic "transferable record" than with a paper loan note. Academics and lawyers studying electronic loan notes reported to the UETA drafters: "When information is stored in a digital format, it becomes possible to make a virtually unlimited number of copies that are virtually indistinguishable from the original electronic record in every respect." *Joint Report to the UETA Drafting Committee on the UETA Provisions governing Transferable Records.*² Thus, there is some heightened risk of a holder of an electronic note claiming holder in due course status of a forged, altered, or duplicate note. Parsing extremely carefully through section 201 reveals that if there are two records which both apparently achieve transferable record status, then neither record qualifies as a transferable record and neither holder retains holder in due course status. It is difficult to get to that result, however, without a very detailed examination of the statute. For this reason, we suggest that any future revision of E-Sign should include provisions to:

- Protect a consumer who makes payment on an electronic note which purports to be a transferable record from having to make the same payment again, even if it is later determined that the consumer paid on a forged or duplicate note.
- Preserve defenses of alteration and unauthorized signature against a holder in due course of a transferable record.
- Clearly state that an electronic note is not a transferable record if more than one apparently authoritative copy exists.
- Give the consumer a right to a paper copy of the note on request.

² This report was prepared by the American Bar Association Science and Technology Section, Electronic Commerce Division, Committee on Electronic Commercial Payments, Working Group on Negotiability and Electronic Commerce ABA Business Law Section, Cyberspace Law Committee, Task Force on Transferability of Electronic Assets.

19. Issues for voluntary or regulatory action that must be addressed

The remaining issues discussed in this comment are issues for voluntary, regulatory, or legislative action.

First, the Federal Trade Commission should consider advising companies to use meaningful “Re” lines in email messages which communicate legally required information to consumers. A consumer is more likely to open email with a “Re” line which says:

- Price increase
- Checking account fee
- Change in your auto warranty

A consumer is less likely to open notices with a “Re” line such as:

- New opportunity
- Legal information
- Account status
- Terms and conditions

Unfortunately, senders may lack an incentive to frame legally required notices in the kind of effective language that will encourage consumers to open those notices. The FTC should engage in informal industry education, develop opinion letters or guidelines, or take other steps to prevent the use of vague, general, or misleading “Re” lines which are likely to reduce the possibility that consumers will read electronically sent, legally required notices.

20. Encourage use of a low-tech legend offering a way to get a readable copy of any electronically delivered notice

The FTC should actively encourage companies to include a standard notice such as the following in a low-tech, widely readable format at the beginning of any legally required consumer notice which is sent electronically. The legend could read something like the following:

This document contains information that affects your legal rights. If you can't open or read this file, call ____ for a free paper copy of the information.

Of course, E-Sign does not require provision of a free paper copy. However, it would be good business practice to offer to do so if the consumer cannot open and read a notice that has been sent electronically. The FTC could play an important role by encouraging business to adopt a widely readable and “low-tech” standard legend telling consumers who to

contact and how to get the notice if it arrives in an unreadable form. This would assist consumers in the transition to electronic notices.

21. Discourage delivery of legally required notices by attachment

Virus scares are usually accompanied by advice to individuals and businesses not to open an attachment unless the attachment was expected and comes from a trusted source. If a consumer is not expecting a notice from a company that she has done business with in the past, the consumer might very well delete an attachment containing a consumer notice unopened as an anti-virus measure. This could cause consumers to miss important information. Unfortunately, simply putting language in the email telling the consumer that the notice is important will not solve this problem, because impersonators could be expected to use the same language to induce people to open virus-laden attachments. There is an important role for the Federal Trade Commission to play in encouraging businesses who deliver notices to consumers electronically not to use a PDF or other attachment-based format to do so.

22. Need to develop an email change of address system

Legal and contractual notices may be sent over a long period of time. Consumers who change their email provider may not close old accounts, but simply abandon them. The Federal Trade Commission should educate consumers on the need to close abandoned accounts. There is also a need for a simple change of address notification system for email forwarding for those consumers who wish to have their email forwarded. E-Sign appears to place a burden on the consumer to notify each entity with whom the consumer has consented to electronic communication of a change in e-address. This is highly unrealistic, particularly in contracts of several years duration.

23. Need to make E-Sign requirements work with existing and future junkmail filters

One of the difficult issues remaining for consumers after E-Sign is the probability that some notices affecting consumers' legal and contractual rights will be screened out by junk mail filters. The Federal Trade Commission, the NTIA, and others should work together to develop a flag or notifier for use in messages which are sent pursuant to statute, or which affect contractual rights, so that these messages are not screened out by commercially available junk filters. This project would involve four parts:

- Developing a technological flag;

- Persuading junk mail filter offerors to permit messages bearing the flag through their filters;
- Educating consumers about the need for a junk mail filter which honors the legal notices flag; and
- Protecting the integrity of the flag by enforcing use of the flag only for notices affecting legal or contractual rights (not for advertising of any kind).

24. Thank you for the opportunity to comment on these important issues. Consumers Union is interested in participating in the April 3 workshop on these and related issues. For further information and analysis, please see our web site and related pages "*E-Sign and UETA: What Should States Do Now?*" located at http://www.consumersunion.org/finance/e_sign.htm and "*Uniform Electronic Transactions Act: Consumer Opportunity or Nightmare?*" located at <http://www.consumersunion.org/finance/899nclwc.htm>.

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