



FEDERAL RESERVE BANK
OF DALLAS

April 13, 2001

DALLAS, TEXAS
75265-5906

Notice 01-33

TO: The Chief Executive Officer of each
financial institution and others concerned
in the Eleventh Federal Reserve District

SUBJECT

**Interim Final Rules and Requests for
Public Comments on Amendments to Regulations
B (Equal Credit Opportunity), E (Electronic Fund Transfers),
M (Consumer Leasing), Z (Truth in Lending), and
DD (Truth in Savings)**

DETAILS

The Board of Governors of the Federal Reserve System has adopted interim final rules to establish uniform standards for the electronic delivery of federally mandated disclosures under the following five consumer protection regulations:

- B (*Equal Credit Opportunity*) – Docket No. R-1040;
- E (*Electronic Fund Transfers*) – Docket No. R-1041;
- M (*Consumer Leasing*) – Docket No. R-1042;
- Z (*Truth in Lending*) – Docket No. R-1043; and
- DD (*Truth in Savings*) – Docket No. R-1044.

The rules provide guidance on the timing and delivery of electronic disclosures to ensure that applicants have adequate opportunity to access and retain required information. Under the rules, financial institutions, creditors, lessors, and others may deliver disclosures electronically if they obtain applicants' consent in accordance with the Electronic Signatures in

Global and National Commerce Act. In addition, Regulations B, E, and Z have been revised to allow financial institutions and creditors to provide disclosures in foreign languages.

The interim rules became effective March 30, 2001; however, to allow operational changes, mandatory compliance has been delayed until October 1, 2001.

All five rules have been adopted as interim rules to allow commenters to present new information or views not previously considered by the Board. The Board must receive comments by June 1, 2001. Please address comments to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, DC 20551. Also, you may mail comments electronically to <mailto:regs.comments@federalreserve.gov>. All comments should refer to the appropriate docket number.

MORE INFORMATION

Copies of the Board's notices as they appear in the *Federal Register* on pages 17322–41, Vol. 66, No. 62, dated March 30, 2001, and pages 17779–804, Vol. 66, No. 65, dated April 4, 2001, are attached.

For more information, please contact Eugene Coy, Banking Supervision Department, (214) 922-6201. For additional copies of this Bank's notice, contact the Public Affairs Department at (214) 922-5254 or access District Notices on our web site at <http://www.dallasfed.org/banking/notices/index.html>.

ADDRESSES: Comments, which should refer to Docket No. R-1042, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, and to the security control room at all other times. The mail room and the security control room, both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in room MP-500 in the Board's Martin Building between 9 a.m. and 5 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.

FOR FURTHER INFORMATION CONTACT: Jane E. Ahrens, Senior Counsel, or David A. Stein, Attorney, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667.

SUPPLEMENTARY INFORMATION:

I. Background

The Consumer Leasing Act (CLA), 15 U.S.C. 1667-1667e, was enacted into law in 1976 as an amendment to the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.* The CLA requires lessors to provide lessees with uniform cost and other disclosures about consumer lease transactions. The act generally applies to consumer leases of personal property in which the contractual obligation does not exceed \$25,000 and has a term of more than four months. An automobile lease is the most common type of consumer lease covered by the act. The Board's Regulation M (12 CFR part 213) implements the act.

The CLA and Regulation M require disclosures to be provided in writing, presuming that lessors provide paper documents. Under the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*), however, electronic documents and signatures have the same validity as paper documents and handwritten signatures.

Board Proposals Regarding Electronic Disclosures

Over the past few years, the Board has published several interim rules and proposals regarding the electronic delivery of disclosures. In 1996, after a comprehensive review of Regulation E (Electronic Fund Transfers), the Board proposed to amend the regulation to permit financial institutions to provide

FEDERAL RESERVE SYSTEM

12 CFR Part 213

[Regulation M; Docket No. R-1042]

Consumer Leasing

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule; request for comments.

SUMMARY: The Board is adopting an interim rule amending Regulation M, which implements the Consumer Leasing Act, to establish a uniform standard for the timing of the electronic delivery of disclosures required by the act and regulation. The rule provides guidance on the timing and delivery of electronic disclosures to ensure lessees have adequate opportunity to access and retain cost information when shopping for a lease or becoming obligated for a lease. (Similar rules are being adopted under other consumer financial services and fair lending regulations administered by the Board.) Under the rule, lessors may deliver disclosures electronically if they obtain lessees' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act. The rule is being adopted as an interim rule to allow for additional public comment.

DATES: The interim rule is effective March 30, 2001; however, to allow time for any necessary operational changes, the mandatory compliance date is October 1, 2001. Comments must be received by June 1, 2001.

disclosures by sending them electronically. (61 FR 19696, May 2, 1996) Based on comments received on the 1996 proposal, on March 25, 1998, the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14528) and similar proposals under Regulation M (63 FR 14538), and other financial services and fair lending regulations administered by the Board. The 1998 interim rule and proposed rule were similar to the 1996 proposed rule under Regulation E.

The 1998 proposals and interim rule allowed depository institutions, creditors, lessors, and others to provide disclosures electronically if the consumer agreed, with few other requirements. For ease of reference, this background section uses the terms "institutions" and "consumers."

Industry commenters generally supported the Board's 1998 proposals and interim rule, but many of them sought specific revisions and additional guidance on how to comply with the disclosure requirements in certain transactions and circumstances. In particular, they expressed concern that the rule did not specify a uniform method for establishing that an "agreement" was reached for sending disclosures electronically. Consumer advocates, on the other hand, generally opposed the 1998 proposals and the interim rule. They believed that consumer protections in the proposals were inadequate, especially in connection with transactions that are typically consummated in person (such as automobile loans and leases, home-secured loans, and door-to-door credit sales).

September 1999 Proposals

In response to comments received on the 1998 proposals, the Board published revised regulatory proposals in September 1999 under Regulations B, E, M, Z, and DD, (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999) (collectively, the "1999 proposals"), and an interim rule under Regulation DD (64 FR 49846). The interim rule under Regulation DD allowed depository institutions to deliver disclosures on periodic statements electronically if the consumer agrees.

Generally, the 1999 proposals required institutions to use a standardized form containing specific information about the electronic delivery of disclosures so that consumers could make informed decisions about whether to receive disclosures electronically. If the consumer affirmatively consented, most

disclosures could be provided electronically. To address concerns about potential abuses, the 1999 proposals generally would have required disclosures to be given in paper form when consumers transacted business in person. The proposals contained rules for disclosures that are made available to consumers at an institution's Internet web site (governing, for example, how long disclosures must remain posted at a web site).

Comments on the September 1999 Proposals

The Board received letters representing 115 commenters expressing views on the revised proposals. Industry commenters generally supported the Board's approach of establishing federal rules for a uniform method of obtaining consumers' consent to the receipt of electronic disclosures instead of deferring to state law. Still, many sought specific additional guidance and in some cases wanted more flexibility. They were concerned about the length of time the proposals would have required electronic disclosures to remain available to a consumer at an institution's Internet web site or upon request. In addition, they believed the proposed rule requiring paper disclosures for mortgage loans closed in person was not sufficiently flexible. Consumer advocates believed the 1999 proposals addressed many of their concerns about the 1998 proposals. Nevertheless, they urged the Board to incorporate greater protections for consumers, such as restricting the delivery of electronic disclosures to only those consumers who initiate transactions electronically.

The Board also obtained views through four focus groups with individual consumers, conducted in the Washington-Baltimore metropolitan area. Participants reviewed and commented on the format and content of the proposed sample consent forms, as well as on alternative revised forms.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed the E-Sign Act, which was enacted to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that electronic documents and signatures have the same validity as paper documents and handwritten signatures. The act contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in

electronic form only if the consumer affirmatively consents after receiving certain information specified in the statute.

The Board and other government agencies are permitted to interpret the E-Sign Act's consumer consent requirements within prescribed limits, but may not impose additional requirements for consumer consent. In addition, agencies generally may not reimpose a requirement for using paper disclosures in particular transactions, such as those conducted in person.

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to use electronic disclosures under Regulations B, E, M, Z and DD if the consumer affirmatively consents in the manner required by the E-Sign Act.

II. The Interim Rule

The Board is adopting an interim final rule to establish uniform standards for the electronic delivery of disclosures required under Regulation M. Consistent with the requirements of the E-Sign Act, lessors must obtain lessee's affirmative consent to provide disclosures electronically.

The interim rules also establish uniform requirements for the timing and delivery of electronic disclosures. Disclosures may be sent by e-mail to an electronic address designated by the lessee, or they may be made available at another location, such as an Internet web site. If the disclosures are not sent by e-mail, lessees must receive a notice alerting them to the availability of the disclosures. Disclosures posted on a web site must be available for at least 90 days, to allow lessees adequate time to access and retain the information. With regard to the timing of electronic disclosures, lessees are required to access the disclosures before becoming obligated on a lease. Under the interim rule, lessors must make a good faith attempt to redeliver electronic disclosures that are returned undelivered, using the address information available in their files. Similar rules are being adopted under Regulations B, E, Z, and DD.

III. Request for Comment

Interim Rules

The interim rules include most of the revisions that were part of the 1999 proposals and were not affected by the E-Sign Act. The Board is adopting these rules with some minor changes discussed below. The rules are adopted as interim rules, to allow commenters to

present new information or views not previously considered in the context of the 1998 and 1999 proposals. Since the Board's 1999 proposals were issued, more institutions have gained experience in offering financial services electronically. The Board believes that additional comments, beyond those previously considered in connection with the Board's earlier proposals, might inform the Board whether any developments in technology or industry practices have occurred that warrant further changes in the rules. The comment period ends on June 1, 2001. The Board expects to adopt final rules on a permanent basis prior to October 1, 2001.

Interpreting E-Sign Provisions

Under section 104(b) of the E-Sign Act, the Board and other government agencies are permitted to interpret the act, within prescribed limits. The Board may issue rules that interpret how the E-Sign Act's consumer consent requirements apply for purposes of the laws administered by the Board. Also, the Board may, by regulation, exempt a particular category of disclosures from the E-Sign Act's consumer consent requirements if it will eliminate a substantial burden on electronic commerce without creating material risk for consumers.

The Board requests comment on whether the Board should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provisions, or other provisions of the act, as they affect the Board's consumer protection regulations. Comment is requested on whether the statutory provisions relating to consumer consent are sufficient, or whether additional guidance is needed. For example, is interpretative guidance needed concerning the statutory requirement that lessees confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the lessor? Is clarification needed on the effect of lessees withdrawing their consent, or on requesting paper copies of electronic disclosures? Lessors must also inform lessees of changes in hardware and software requirements if the change creates a material risk that the lessee will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk" for purposes of Regulation M and other financial services and fair lending laws administered by the Board, and if so what standards should apply.

Under section 104(d) of the E-Sign Act, the Board is authorized to exempt specific disclosures from the consumer consent requirements of section 101(c) of the E-Sign Act, if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. The Board requests comment on whether it should consider exercising this exemption authority.

Study on Adapting Requirements to Online Banking and Lending

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures. The Board requests comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

The comments may assist the Board in future efforts to update the regulations. The comments may also be used in connection with a study required under the Gramm-Leach-Bliley Act of 1999. That act requires the federal bank supervisory agencies to conduct a study of banking regulations that affect the electronic delivery of financial services and to submit to the Congress a report recommending any legislative changes that are needed to facilitate online banking and lending.

IV. Section-by-Section Analysis

Pursuant to its authority under section 187 of the CLA, the Board amends Regulation M to establish uniform standards for the use of electronic communication to provide disclosures required by this regulation. Electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. Leasing disclosures are typically provided in the lease contract, but disclosures can be provided in a separate statement or in the lease contract or other document evidencing the lease. Leases are not typically be consummated on-line, but consumers are able to shop and apply for leases on-line. The purpose of the Regulation M disclosures is to ensure that consumers have meaningful information about lease terms and to promote comparison shopping. The use of electronic communication may allow lessors to provide Regulation M disclosures to consumers earlier in the leasing process. To the extent that a lessor may make electronic disclosures available at its Internet web site instead of providing the disclosures directly to the lessee, the Board finds that such an exception is warranted, acting pursuant to its

authority under section 105(a) of TILA. Below is a section-by-section analysis of the rules for providing disclosures by electronic communication, including references to changes in the official staff commentary.

Section 213.3 General Disclosure Requirements

3(a) General Requirements

Section 213.3(a)(5) is added to provide a cross reference to rules governing the electronic delivery of disclosures in § 213.6.

Section 213.6 Electronic Communication

6(a) Definition

As adopted, the definition of the term "electronic communication" remains substantially unchanged from the 1999 proposals. Section 213.6(a) limits the term to a message transmitted electronically that can be displayed on equipment as visual text; an example is a message displayed on a personal computer monitor screen. Thus, audio- and voice-response telephone systems are not included. Because the rule permits the use of electronic communication to satisfy the statutory requirement for written disclosures that must be clear and conspicuous, the Board believes visual text is an essential element of the definition.

Some commenters asked for clarification that the definition was not intended to preclude the use of devices other than personal computers, which also can display visual text. The equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the "clear and conspicuous" format requirement, discussed below.

6(b) General Rule

Effective October 1, 2000, the E-Sign Act permits lessors to provide disclosures using electronic communication, if the lessor complies with consumer consent requirements in section 101(c). Under section 101(c) of the E-Sign Act, lessors must provide specific information about the electronic delivery of disclosures before obtaining the lessee's affirmative consent to receive electronic disclosures. The consent requirements in the E-Sign Act are similar but not identical to the Board's 1999 proposal. Accordingly, § 213.6(b) sets forth the general rule that lessors subject to Regulation M may provide disclosures electronically if the lessor complies with section 101(c) of the E-Sign Act.

The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under the CLA other than a requirement that disclosures be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and conspicuous standard. Comment 6(b)-1 contains this guidance.

Presenting Disclosures in a Clear and Conspicuous Format

Electronic disclosures must be clear and conspicuous as is the case for all written disclosures under the CLA and Regulation M. See § 213.3(a). A lessor must provide electronic disclosures using a clear and conspicuous format. Also in accordance with the E-Sign Act: (1) The lessor must disclose the requirements for accessing and retaining disclosures in that format; (2) the lessee must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and (3) the lessor must provide the disclosures in accordance with the specified requirements. Comment 6(b)-2 contains this guidance.

Commenters asked about the use of navigational tools with electronic disclosures. For example, some believed that such tools might be helpful in directing consumers to related information that explains the terminology used in the disclosures. Many Internet web sites use navigational tools that are conspicuous through the use of bold text, larger fonts, different colors, underlining, or other methods of highlighting. Such tools are not per se prohibited so long as they are not used in a manner that would violate the clear and conspicuous standard.

Providing Timely Disclosures

Disclosures delivered electronically must comply with existing timing requirements under the CLA and Regulation M. See § 213.3(a)(3). Disclosures generally must be provided before the lessee becomes obligated. For example, if a lessor permits the lessee to lease a vehicle on-line, the lessee must be required to access the disclosures required under § 213.4 before becoming obligated. A link to the disclosures satisfies the timing rule if the lessee cannot bypass the disclosures before becoming obligated. Or the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Comment 6(b)-3 contains this guidance.

The CLA and Regulation M require that disclosures be given to lessees. It is

not sufficient for lessors to provide a bypassable navigational tool that merely gives lessees the option of receiving disclosures. Such an approach reduces the likelihood that lessees will notice and receive the disclosures. The final rule ensures that lessees see cost disclosures provided electronically so that they have the opportunity to read them when shopping for a lease or before becoming obligated for a lease.

Commenters on the various proposals requested guidance regarding an institution's duty in cases where the institution cannot provide timely disclosures because automated equipment controlled by the institution malfunctions or otherwise fails to operate properly. To the extent applicable in connection with a lease transaction, if a lessor controls the equipment and disclosures are required at that time, a lessor might not be liable for failing to provide timely disclosures if the defense in section 130(c) of TILA is available.

Providing Disclosures in a Form the Consumer May Keep

Under the CLA and Regulation M, disclosures required to be in writing also must be in a form the consumer can retain. (See § 213.3(a).) Electronic disclosures are subject to this requirements. Comment 6(b)-4 contains guidance on this requirement.

Lessees may communicate electronically with lessors through a variety of means and from various locations. Depending on the location (at home, at work, in a public place such as a library), a lessee may not have the ability at a given time to preserve CLA disclosures presented on-screen. To ensure that lessees have an adequate opportunity to access and retain the disclosures, the lessor also must send them to the lessee's designated e-mail address or make them available at another location, for example, on the lessor's Internet web site, where the information may be retrieved at a later date.

To the extent applicable in connection with a lease transaction, if a lessor controls the equipment providing the electronic disclosures (for example, a computer terminal located in the lessor's place of business) the lessor must ensure that the lessee has the opportunity to retain the required information. Comment 6(b)-5 contains guidance on this requirement.

6(c) When Consent is Required

Under the E-Sign Act, consumers must affirmatively consent before they receive electronic disclosures "relating to a transaction" if the disclosures are

required by law or regulation to be in writing. Section 213.6(c) is added to provide that disclosures required in advertisements are not deemed to be related to a transaction for purposes of the E-Sign Act's consumer consent provision.

6(d) Address or Location to Receive Electronic Communication

Consistent with the 1999 proposals, the interim rule provides that lessors may deliver electronic disclosures by sending them to a lessee's e-mail address. Alternatively, the rule provides that lessors may make the disclosures available at another location such as an Internet web site. If the lessor makes a disclosure available at such a location, the lessor effectively delivers the disclosure by sending a notice alerting the lessee when the disclosure can be accessed and preserving the disclosure at the location for at least 90 days. The time period for keeping disclosures available at a location such as a lessor's Internet web site under the interim rule differs from the 1999 proposals, based on commenters' concerns as discussed below.

6(d)(1)

For purposes of § 213.6(d), a lessee's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the lessor. This guidance is contained in comment 6(d)(1)-1.

6(d)(2)

As proposed, under § 226.36(d)(2)(ii) of the interim rule, disclosures provided at an Internet web site must remain available for at least 90 days. The requirement seeks to ensure that lessees have adequate time to access and retain a disclosure under a variety of circumstances, such as when a lessee may not be able for an extended period of time to access the information due to computer malfunctions, travel, or illness. Comment 6(d)(2)-1 is added to provide that during this period, the actual disclosures must be available to the lessee, but the lessor has discretion to determine whether they should be available at the same location for the entire period.

Some commenters on the various proposals believed the 90-day time period is reasonable and feasible. About an equal number of commenters believed it was too burdensome and costly; some of these commenters suggested periods that ranged from 30 to 60 days.

The 1999 proposals provided that after the 90-day time period, disclosures would be available upon consumers'

request, generally for 24 months, in the same format as initially provided to the consumer. The 24-month period is consistent with a lessor's duty to retain records that evidence compliance. Consumer advocates supported the proposed retention period; some recommended that disclosures should be available upon request for the length of the contractual relationship with the consumer.

Industry commenters strongly opposed the 24-month period. Many believed that keeping copies of electronic disclosures actually provided to consumers for that period of time would be costly and burdensome. Moreover, industry commenters believed that once a consumer has accessed the disclosures, the consumer rather than the lessor should have the duty to retain them for future reference. They also noted that under existing record retention requirements applicable to paper disclosures, a lessor need only demonstrate compliance with the rules, but need not retain copies of the actual disclosure provided to consumers.

The requirement for lessors to provide duplicate disclosures upon request for 24 months has not been adopted. A lessor's duty to retain evidence of compliance for 24 months remains unchanged.

6(d)(3) Exception

Section 213.6(d)(3) is added to make clear that the requirements of paragraphs (i) and (ii) of § 213.6(d)(2) do not apply to disclosures in lease advertisements (§ 213.7).

6(e) Redelivery

Industry commenters on the 1998 proposal asked for clarification that sending the electronic disclosures complies with the regulation, and the institutions are not required to confirm that the consumer actually received them. Consumer advocates asked that institutions be required to verify the delivery of disclosures by return receipt, in the case of e-mail. In the 1999 proposals, the Board solicited comment on the need for and the feasibility of such a requirement.

Consumer advocates believe that e-mail systems are not yet sufficiently reliable, and that safeguards are necessary to ensure that consumers actually receive disclosures. Industry commenters stated that a return receipt requirement would be costly and burdensome, and would require lessors to monitor return receipts in every case to determine that an individual consumer received the disclosures.

Section 101(c) of the E-Sign Act requires that consumers consent electronically, or confirm their consents electronically, in a manner that reasonably demonstrates that the consumer can access the information that the lessor will be providing. This requirement seeks to verify at the outset that the consumer is actually capable of receiving the information in the electronic format being used by the lessor. After the consumer consents, the E-Sign Act also requires lessors to notify consumers of changes that materially affect consumer's ability to access electronic disclosures.

The interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of all disclosures would not be warranted. When electronic disclosures are returned undelivered, however, § 213.6(e) imposes a duty to attempt redelivery (either electronically or to a postal address) based on address information in the lessor's own files. Unlike paper disclosures delivered by the postal service, there generally is no commonly-accepted mechanism for reporting a change in e-mail or for forwarding e-mail. Where a lessor actually knows that the delivery of an electronic disclosure did not take place, the lessor should take reasonable steps to effectuate delivery in some way. For example, if an e-mail message to the lessee (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if the lessor sends the disclosure to a different e-mail address or postal address that the lessor has on file for the lessee. Sending the disclosures a second time to the same electronic address would not be sufficient if the lessor has a different address for the lessee on file. Comment 6(e)-1 provides this guidance.

This redelivery requirement is limited to situations where the electronic communication cannot be delivered and does not apply to situations where the disclosure is delivered but, for example, cannot be read by the lessee due to technical problems with the lessee's software. A lessor's duty to redeliver a disclosure under § 213.6(e) does not affect the timeliness of the disclosure. Lessors comply with the timing requirements of the regulation when a disclosure is sent in a timely manner, even though the disclosure is returned undelivered and the lessor is required under § 213.6(e) to take reasonable steps to attempt redelivery.

Section 213.7 Advertising

7(b) Clear and Conspicuous Standard

7(b)(1) Amount Due at Lease Signing or Delivery

Under § 213.7(b)(1), a lease advertisement cannot refer to a component of the total amount due prior to or at consummation or by delivery (except for the periodic payment amount) more prominently than the total amount due. In addition, with the exception of the notice required by § 213.4(s), the rate cannot be more prominent than any other § 213.4 disclosure stated in the advertisement. Comment 7(b)(1)-3 contains guidance on how this rule applies in an electronic advertisement.

7(b)(2) Advertisement of a Lease Rate

Under § 213.7(b)(2), a lessor that advertises a percentage rate must include a statement about the limitations of the rate in close proximity to the rate without any other intervening language or symbols. Comment 7(b)(2)-1 is revised to provide guidance on how this rule applies in an electronic advertisement.

7(c) Catalogs and Other Multi-Page Advertisements; Electronic Advertisements

Stating certain credit terms in an advertisement for a lease triggers the disclosure of additional terms. Section 213.7(c) permits lessors using a multiple-page advertisement to state the additional disclosures in a table or schedule as long as the triggering lease terms appearing anywhere else in the advertisement refer to the page where the table or schedule is printed. The Board proposed to extend the multiple-page advertisement provisions to electronic advertisements and provided that lessors complied with § 213.7(c) if the table or schedule with the additional information is set forth clearly and conspicuously and the triggering lease terms appearing anywhere else in the advertisement clearly refer to the page or location where the table or schedule begins. Comment 7(c)-2 is revised to reflect this guidance.

Additional Issues

Document Integrity

The interim rule does not impose document integrity standards. Consumer advocates and others expressed concerns that electronic documents can be altered more easily than paper documents. They say that consumers' ability to enforce rights under the consumer protection laws could be impaired, in some cases, if the

authenticity of disclosures they retain cannot be demonstrated.

Institutions are generally required to retain evidence of compliance with the Board's consumer regulations. Accordingly, the Board requested comment on the feasibility of requiring institutions to have systems in place capable of detecting whether or not information has been altered, or to use independent certification authorities to verify disclosure documents.

Consumer advocates strongly supported document integrity requirements (including the use of certification authorities) that would apply to all-electronic disclosures. Signatures, notary seals, and verification procedures such as recordation are used to protect against alterations for transactions memorialized in paper form. Consumer advocates believe that comparable verification procedures are needed for electronic disclosures as well.

Industry commenters opposed mandatory document integrity standards for electronic disclosures. Because the technology in this area is still evolving, they believe that mandatory standards would be premature. Others believe that imposing document integrity standards or requiring the use of certification authorities would be costly to implement.

The Board recognizes the concerns about document integrity, but believes it is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Effective methods may be too costly. Other less costly methods may deter alterations in some cases, but would not necessarily ensure document integrity.

Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the consumer protection laws administered by the Board. Section 104(b)(3) of the E-Sign Act authorizes federal or state regulatory agencies to specify performance standards to assure the accuracy, record integrity, and accessibility of records that are required to be retained, but prohibits the agencies from requiring the use of a particular type of software or hardware in order to comply with record retention requirements. Technology is likely to develop to protect electronic contracts and other legal documents. Thus, it seems premature for the Board to specify any particular standards or methods for consumer disclosure at this time.

V. Form of Comment Letters

Comment letters should refer to Docket No. R-1042, and, when possible, should use a standard typeface with a font size of 10 or 12. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch computer diskettes in any IBM-compatible DOS- or Windows-based format.

VI. Regulatory Flexibility Analysis

The Board has reviewed these interim amendments to Regulation M, in accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 604). Two of the three requirements of a final regulatory flexibility analysis under the Act are (1) a succinct statement of the need for and the objectives of the rule and (2) a summary of the issues raised by the public comments, the agency's assessment of those issues, and a statement of the changes made in the final rule in response to the comments. These two areas are discussed above.

The third requirement of the analysis is a description of significant alternatives to the rule that would minimize the rule's economic impact on small entities and reasons why the alternatives were rejected. This interim final rule is designed to provide lessors with an alternative method of providing disclosures; the rule will relieve compliance burden by giving lessors flexibility in providing disclosures required by the regulation. Overall, the costs of providing electronic disclosures are not expected to have significant impact on small entities. The expectation is that providing electronic disclosures may ultimately reduce the costs associated with providing disclosures.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0202.

The collection of information that is revised by this rulemaking is found in 12 CFR Part 213.3, 213.4, 213.5, 213.7,

213.8 and in Appendix A. This information is mandatory (15 U.S.C. 1667 *et seq.*) to evidence compliance with the requirements of the Regulation M and the Consumer Leasing Act (CLA). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for twenty-four months. This regulation applies to all types of depository institutions, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The revisions provide that lessors may deliver disclosures electronically upon obtaining consumers' affirmative consent in accordance with the E-Sign Act. The revisions provide guidance to institutions on the timing and delivery of electronic disclosures, to ensure that consumers have adequate opportunity to access and retain the information. With respect to state member banks, it is estimated that there are 310 respondent/recordkeepers and an average frequency of 6,200 responses per respondent each year. The current annual burden is estimated to be 11,179 hours. No comments specifically addressing the burden estimate were received, therefore, the numbers remain unchanged. There is estimated to be no additional cost burden and no capital or start up cost associated with the interim final rule.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality under the Freedom of Information Act.

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0202), Washington, DC 20503.

VIII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January

1, 2000. The Board invites comments on whether the interim rule is clearly stated and effectively organized, and how the Board might make the rule easier to understand.

List of Subjects in 12 CFR Part 213

Advertising, Federal Reserve System, Reporting and record keeping requirements, Truth in lending.

For the reasons set forth in the preamble, the Board amends Regulation M, 12 CFR part 213, as set forth below:

PART 213—CONSUMER LEASING (REGULATION M)

1. The authority citation for part 213 continues to read as follows:

Authority: 15 U.S.C. 1604; 1667f.

2. Section 213.3 is amended by adding a new paragraph (a)(5) to read as follows:

§ 213.3 General disclosure requirements.

(a) General requirements. * * *

(5) Electronic communication. For rules governing the electronic delivery of disclosures, including a definition of electronic communication, see § 213.6.

3. Section 213.6 is added to read as follows:

§ 213.6 Electronic communication.

(a) Definition. "Electronic communication" means a message transmitted electronically between a lessor and a lessee in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) General rule. In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 et seq.) and the rules of this part, a lessor may provide by electronic communication any disclosure required by this part to be in writing.

(c) When consent is required. Under the E-Sign Act, a lessor is required to obtain a lessee's affirmative consent when providing disclosures related to a transaction. For purposes of this requirement, the disclosures required under § 213.7 are deemed not to be related to a transaction.

(d) Address or location to receive electronic communication. A lessor that uses electronic communication to provide disclosures required by this part shall:

- (1) Send the disclosure to the consumer's electronic address; or
(2) Make the disclosure available at another location such as a web site; and
(i) Alert the lessee of the disclosure's availability by sending a notice to the consumer's electronic address (or to a

postal address, at the lessor's option). The notice shall identify the transaction involved and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the lessee of the disclosure, whichever comes later.

(3) Exceptions. A lessor need not comply with paragraph (d)(2)(i) and (ii) of this section for the disclosures required under § 213.7.

(e) Redelivery. When a disclosure provided by electronic communication is returned to a lessor undelivered, the lessor shall take reasonable steps to attempt redelivery using information in its files.

4. In Supplement I to Part 213, the following amendments are made:

a. A new Section 213.6—Electronic Communication is added.

b. In Section 213.7—Advertising, under 7(b)(1) Amount due at Lease Signing or Delivery, a new paragraph 3. is added.

c. In Section 213.7—Advertising, under 7(b)(2) Advertisement of a Lease Rate, paragraph 1. is revised.

d. In Section 213.7—Advertising, the heading 7(c) Catalogs and Multi-Page advertisements is revised and paragraph 12 is redesignated as paragraph 2 and revised.

The amendments read as follows:

Supplement I to Part 213 Official Staff Commentary to Regulation M

* * * * *

Section 213.6—Electronic Communication

6(b) General rule

1. Relationship to the E-Sign Act. The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a requirement that disclosures be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and conspicuous standard. For example, to satisfy the clear and conspicuous standard for disclosures, electronic disclosures must use visual text.

2. Clear and conspicuous standard. A lessor must provide electronic disclosures using a clear and conspicuous format. Also in accordance with the E-Sign Act:

- i. The lessor must disclose the requirements for accessing and retaining disclosures in that format;
ii. The lessee must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and
iii. The lessor must provide the disclosures in accordance with the specified requirements.

3. Timing and effective delivery. When a lessor permits the lessee to consummate a lease transaction on-line, the lessee must be required to access the required disclosures before becoming obligated. A link to the disclosures satisfies the timing rule if the lessee cannot bypass the disclosures before becoming obligated. Or the disclosures in this example must automatically appear on screen, even if multiple screens are required to view the entire disclosure. The lessor is not required to confirm that the lessee has read the disclosures.

4. Retainability of disclosures. A lessor satisfies the requirement that disclosures be in a form that the lessee may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be consistent with the information required to be provided under section 101(c)(1)(C)(i) of the E-Sign Act (15 U.S.C. 7001(c)(1)(C)(i)) about the hardware and software requirements for accessing and retaining electronic disclosures.

5. Disclosures provided on lessor's equipment. To the extent applicable in connection with a lease transaction, a lessor that controls the equipment providing electronic disclosures to lessees (for example, a computer terminal in a lessor's place of business) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the lessee may keep. For example, if disclosures are required at the time of an on-line transaction, the disclosures must be sent to the lessee's e-mail address or must be made available at another location such as the lessor's Internet web site, unless the lessor provides a printer that automatically prints the disclosures.

6(d) Address or Location to Receive Electronic Communication

Paragraph 6(d)(1)

1. Electronic address. A lessee's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the lessor.

Paragraph 6(d)(2)

1. 90-day rule. The actual disclosures provided to a lessee must be available for at least 90-days, but the lessor had discretion to determine whether they should be available at the same location for the entire period.

6(e) Redelivery.

1. E-mail message returned as undeliverable. If an e-mail message to the lessee (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the lessor sends the disclosure to a different e-mail address or postal address that the lessor has on file for the lessee. Sending the disclosures a second time to the same electronic address is not sufficient if the lessor has a different address for the lessee on file.

Section 213.7—Advertising

* * * * *

7(b)(1) Amount Due at Lease Signing or Delivery

* * * * *

3. *Electronic advertisements.* For advertisements using electronic communication, to satisfy the prominence rule in § 213.7(b)(1), both the triggering terms and the required disclosures must appear in the same location so that they can be viewed simultaneously.

7(b)(2) Advertisement of a Lease Rate

1. *Location of statement.* The notice required to accompany a percentage rate stated in an advertisement must be placed in close proximity to the rate without any other intervening language or symbols. For example, a lessor may not place an asterisk next to the rate and place the notice elsewhere in the advertisement. In addition, with the exception of the notice required by § 213.4(s), the rate cannot be more prominent than any other § 213.4 disclosure stated in the advertisement. For advertisements using electronic communication, to comply with proximity rule in, both the rate and the accompanying notice must appear in the same location so that they can be viewed simultaneously. The prominent rule in § 213.7(b)(2) is not met if the disclosures can be viewed only by use of a link that connects the consumer to the information appearing at another location.

7(c) Catalogs or Other Multipage Advertisements; Electronic Advertisements

* * * * *

2. *Cross references.* A catalog or other multiple-page advertisement or an electronic advertisement is a single advertisement (requiring only one set of lease disclosures) if it contains a table, chart, or schedule with the disclosures required under § 213.7(d)(2)(i) through (v). If one of the triggering terms listed in § 213.7(d)(1) appears in a catalog, or in a multiple-page or electronic advertisement, it must clearly direct the consumer to the page or location where the table, chart, or schedule begins. For example, in an electronic advertisement, a term triggering additional disclosures may be accompanied by a link that directly connects the consumer to the additional information (but see comments under § 213.7(b) about rules regarding the prominence of disclosures).

* * * * *

By order of the Board of Governors of the Federal Reserve System, March 23, 2001.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 01-7726 Filed 3-29-01; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R-1043]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule; request for comments.

SUMMARY: The Board is adopting an interim final rule amending Regulation Z, which implements the Truth in Lending Act, to establish uniform standards for the electronic delivery of disclosures required by the act and regulation. The rule provides guidance on the timing and delivery of electronic disclosures to ensure consumers have adequate opportunity to access and retain cost information when shopping for credit or before becoming obligated for an extension of credit. (Similar rules are being adopted under other consumer financial services and fair lending regulations administered by the Board.) Under the rule, creditors may deliver disclosures electronically if they obtain consumers' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act. In addition, the regulation is revised to allow creditors to provide disclosures in foreign languages. The rule is being adopted as an interim rule to allow for additional public comment.

DATES: The interim rule is effective March 30, 2001; however, to allow time for any necessary operational changes, the mandatory compliance date is October 1, 2001. Comments must be received by June 1, 2001.

ADDRESSES: Comments, which should refer to Docket No. R-1043, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, and to the security control room at all other times. The mail room and the security control room, both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in room MP-500 in the Board's Martin Building between 9:00 a.m. and 5:00 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.

FOR FURTHER INFORMATION CONTACT: Jane E. Ahrens, Senior Counsel; Kathleen Ryan, Senior Attorney; or Deborah J. Stipick, Attorney; Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is to promote the informed use of consumer credit by requiring disclosures about its terms and cost. The Board's Regulation Z (12 CFR part 226) implements the act. The act requires creditors to disclose the cost of credit as a dollar amount (the finance charge) and as an annual percentage rate (the APR). Uniformity in creditors' disclosures is intended to promote the informed use of credit and assist in shopping for credit. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions that involve their principal dwellings.

TILA and Regulation Z require a number of disclosures to be provided in writing, presuming that creditors provide paper documents. Under the Electronic Signatures in Global and National Commerce Act (the E-Sign Act)(15 U.S.C. 7001 *et seq.*), however, electronic documents and signatures have the same validity as paper documents and handwritten signatures.

Board Proposals Regarding Electronic Disclosures

Over the past few years, the Board has published several interim rules and proposals regarding the electronic delivery of disclosures. In 1996, after a comprehensive review of Regulation E (Electronic Fund Transfers), the Board proposed to amend the regulation to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696, May 2, 1996). Based on comments received on the 1996 proposal, on March 25, 1998, the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14528) and similar proposals under Regulation Z (63 FR 14548) and other financial services and fair lending regulations administered by the Board. The 1998 interim rule and proposed rules were similar to the 1996 proposed rule under Regulation E.

The 1998 proposals and interim rule allowed depository institutions, creditors, lessors, and others to provide disclosures electronically if the consumer agreed, with few other requirements. For ease of reference, this background section uses the terms "institutions" and "consumers."

Industry commenters generally supported the Board's 1998 proposals and interim rule, but many of them sought specific revisions and additional guidance on how to comply with the

disclosure requirements in certain transactions and circumstances. In particular, they expressed concern that the rule did not specify a uniform method for establishing that an "agreement" was reached for sending disclosures electronically. Consumer advocates, on the other hand, generally opposed the 1998 proposals and the interim rule. They believed that consumer protections in the proposals were inadequate, especially in connection with transactions that are typically consummated in person (such as automobile loans and leases, home-secured loans, and door-to-door credit sales).

September 1999 Proposals

In response to comments received on the 1998 proposals, the Board published revised regulatory proposals in September 1999 under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999) (collectively, the "1999 proposals"), and an interim rule under Regulation DD (64 FR 49846). The interim rule under Regulation DD allowed depository institutions to deliver disclosures on periodic statements electronically if the consumer agrees.

Generally, the 1999 proposals required institutions to use a standardized form containing specific information about the electronic delivery of disclosures so that consumers could make informed decisions about whether to receive disclosures electronically. If the consumer affirmatively consented, most disclosures could be provided electronically. To address concerns about potential abuses, the 1999 proposals generally would have required disclosures to be given in paper form when consumers transacted business in person. The proposals contained rules for disclosures that are made available to consumers at an institution's Internet web site (governing, for example, how long disclosures must remain posted at a web site).

Comments on the September 1999 Proposals

The Board received letters representing 115 commenters expressing views on the revised proposals. Industry commenters generally supported the Board's approach of establishing federal rules for a uniform method of obtaining consumers' consent to the receipt of electronic disclosures instead of deferring to state law. Still, many sought specific additional guidance and in

some cases wanted more flexibility. They were concerned about the length of time the proposals would have required electronic disclosures to remain available to a consumer at an institution's Internet web site or upon request. In addition, they believed the proposed rule requiring paper disclosures for mortgage loans closed in person was not sufficiently flexible. In addition, they believed the proposed rule requiring paper disclosures for mortgage loans closed in person was not sufficiently flexible. Consumer advocates believed the 1999 proposals addressed many of their concerns about the 1998 proposals. Nevertheless, they urged the Board to incorporate greater protections for consumers, such as restricting the delivery of electronic disclosures to only those consumers who initiate transactions electronically.

The Board also obtained views through four focus groups with individual consumers, conducted in the Washington-Baltimore metropolitan area. Participants reviewed and commented on the format and content of the proposed sample consent forms, as well as on alternative revised forms.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed the E-Sign Act, which was enacted to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that electronic documents and signatures have the same validity as paper documents and handwritten signatures. The act contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in electronic form only if the consumer affirmatively consents after receiving certain information specified in the statute.

The Board and other government agencies are permitted to interpret the E-Sign Act's consumer consent requirements within prescribed limits, but may not impose additional requirements for consumer consent. In addition, agencies generally may not reimpose a requirement for using paper disclosures in particular transactions, such as those conducted in person.

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to use electronic disclosures under Regulations B, E, M, Z and DD if the consumer affirmatively consents in the manner required by section 101(c) of the E-Sign Act. Under section 101(c)(5)

of the E-Sign Act, consumers who consented prior to the effective date of the act to receive electronic disclosures as permitted by any law or regulation, are not subject to the consent requirements.

II. The Interim Rule

The Board is adopting an interim final rule to establish uniform standards for the electronic delivery of disclosures required under Regulation Z. Consistent with the requirements of the E-Sign Act, creditors generally must obtain consumer's affirmative consent to provide disclosures electronically.

The interim rules also establish uniform requirements for the timing and delivery of electronic disclosures. Disclosures may be sent by e-mail to an electronic address designated by the consumer, or they may be made available at another location, such as an Internet web site. If the disclosures are not sent by e-mail, consumers must receive a notice alerting them to the availability of the disclosures. Disclosures posted on a web site must be available for at least 90 days, to allow consumers adequate time to access and retain the information. With regard to the timing of electronic disclosures, for disclosures that must be provided before the consumer becomes obligated for an extension of credit, consumers are required to access the disclosures before becoming obligated. Under the interim rule, institutions must make a good faith attempt to redeliver electronic disclosures that are returned undelivered, using the address information available in their files. Similar rules are being adopted under Regulations B, E, M, and DD.

III. Request for Comment

Interim Rules

The interim rules include most of the revisions that were part of the 1999 proposals and were not affected by the E-Sign Act. The Board is adopting these rules with some minor changes discussed below. The rules are adopted as interim rules, to allow commenters to present new information or views not previously considered in the context of the 1998 and 1999 proposals. Since the Board's 1999 proposals were issued, more institutions have gained experience in offering financial services electronically. The Board believes that additional comments, beyond those previously considered in connection with the Board's earlier proposals, might inform the Board whether any developments in technology or industry practices have occurred that warrant further changes in the rules. The

comment period ends on June 1, 2001. The Board expects to adopt final rules on a permanent basis prior to October 1, 2001.

Interpreting E-Sign Provisions

Under section 104(b) of the E-Sign Act, the Board and other government agencies are permitted to interpret the act, within prescribed limits. The Board may issue rules that interpret how the E-Sign Act's consumer consent requirements apply for purposes of the laws administered by the Board. Also, the Board may, by regulation, exempt a particular category of disclosures from the E-Sign Act's consumer consent requirements if it will eliminate a substantial burden on electronic commerce without creating material risk for consumers.

The Board requests comment on whether the Board should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provisions or other provisions of the act, as they affect the Board's consumer protection regulations. Comment is requested on whether the statutory provisions relating to consumer consent are sufficient, or whether additional guidance is needed. For example, is interpretative guidance needed concerning the statutory requirement that consumers confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the creditor? Is clarification needed on the effect of consumers' withdrawing their consent, or on requesting paper copies of electronic disclosures? Institutions must also inform consumers of changes in hardware or software requirements if the change creates a material risk that the consumer will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk" for purposes of Regulation Z and other financial services and fair lending laws administered by the Board, and if so what standards should apply.

Under section 104(d) of the E-Sign Act, the Board is authorized to exempt specific disclosures from the consumer consent requirements of section 101(c) of the E-Sign Act, if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. The Board requests comment on whether it should consider exercising this exemption authority.

Study on Adapting Requirements to Online Banking and Lending

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures. The Board requests comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

As an example, under Regulations Z and DD, periodic statements inform consumers about their account activity over a period of time, typically monthly. The beginning and ending dates of the cycle determine costs and other information that must be disclosed. In addition, transmittal of the periodic statement triggers important consumer protections such as billing error resolution procedures. Online banking, however, can provide consumers with up-to-date information about their accounts on a continuing basis. Such information is a helpful supplement to—but does not comply as a substitute for—periodic statements. Should the rules for periodic statements be modified for online banking, and if so, how could the rules be crafted to maintain for consumers (1) a perspective of the cost and activity of an account over time, and (2) protections for resolving errors or liability for unauthorized transactions.

The comments may assist the Board in future efforts to update the regulations. The comments may also be used in connection with a study required under the Gramm-Leach-Bliley Act of 1999. That act requires the federal bank supervisory agencies to conduct a study of banking regulations that affect the electronic delivery of financial services and to submit to the Congress a report recommending any legislative changes that are needed to facilitate online banking and lending.

IV. Section-by-Section Analysis

Pursuant to its authority under section 105 of TILA, the Board amends Regulation Z to establish uniform standards for the use of electronic communication to provide disclosures required by this regulation. Electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. The purpose of Regulation Z disclosures is to ensure that consumers have meaningful information about credit terms and to promote comparison shopping. The use of electronic communication may allow creditors to provide Regulation Z disclosures to the consumer earlier in the lending process.

To the extent that a creditor may make electronic disclosures available at its Internet web site instead of providing the disclosures directly to the consumer, the Board finds that such an exception is warranted, acting pursuant to its authority under section 105(a) of TILA. Below is a section-by-section analysis of the rules for providing disclosures by electronic communication, including references to changes in the official staff commentary.

Subpart B—Open-end Credit

Section 226.5 General Disclosure Requirements

5(a) Form of Disclosures

Section 226.5(a)(5) is added to provide a cross reference to rules governing the electronic delivery of disclosures in § 226.36.

5(b) Time of Disclosures

5(b)(2) Periodic Statements

Comment 5(b)(2)(ii)–3 is revised. Under the current rules for open-end plans, creditors may permit, but may not require, consumers to pick up their periodic statements in lieu of receiving them automatically. In 1997, the staff commentary was revised to clarify that consumers who elect to pick up written periodic statements might, instead, receive copies of such statements by electronic means (62 FR 10193, March 6, 1997). Consumers making that election, however, would not waive their right to also obtain written periodic statements. Accordingly, the comment did not specify the manner or form of consumers' consent to electronic copies of their statement.

As discussed below, § 226.36(b) as adopted sets forth the general rule that a creditor subject to Regulation Z may provide disclosures electronically only if the creditor complies with section 101(c) of the E-Sign Act. This requirement applies to electronic statements provided in accordance with comment 5(b)(2)(ii)–3, and the comment has been revised accordingly.

Section 226.5a Credit and Charge Card Applications and Solicitations

Regulation Z requires credit and charge card issuers to provide cost disclosures in certain applications and solicitations to open card accounts.

5a(a) General Rules

5a(a)(2) Form of Disclosures

Regarding the timing of the § 226.5a disclosures, the 1999 proposal stated that for electronic card applications or solicitations, the disclosures must appear on the screen before the

application or solicitation appears. Under the final rule, a consumer must be able in all cases to access the disclosures at the time the blank application or reply form is made available by electronic communication, such as on a card issuer's Internet web site. Card issuers have flexibility in satisfying this requirement. For example, if a link is not used, the application or reply form must clearly and conspicuously refer to the fact that rate, fee and other cost information either precedes or follows the application or reply form. Alternatively, card issuers may provide a link to electronic disclosures as long as consumers cannot bypass the disclosures before submitting the application or reply form. Or the disclosures could automatically appear on the screen when the application or reply form appears. A card issuer need not confirm that the consumer has read the disclosures. As adopted, comment 5a(a)(2)–8 has been modified from the 1999 proposal to provide additional guidance. Similar guidance is provided for home-equity lines of credit and adjustable rate mortgage (ARM) loans.

5a(b) Required Disclosures

5a(b)(1) Annual Percentage Rate

Section 226.5a(b)(1)(ii) is revised and (iii) is added to address the accuracy of the APR in connection with electronic credit and charge card applications and solicitations. Where terms are disclosed in card applications and solicitations, card issuers are required to disclose the periodic rate that would apply, expressed as an APR. For fixed rates, card issuers are required to disclose the APR currently available under the plan. For variable rates, the APR disclosed in a direct mail solicitation must be accurate within 60 days before mailing; in a take-one, within 30 days before printing.

As part of the 1999 proposals, the Board proposed a single standard for APR accuracy in electronic disclosures: for a variable-rate plan, the disclosed APR would be deemed accurate if it is one that was in effect within 30 days before the disclosures are sent to the consumer's e-mail address. If disclosures are made available at another location such as the card issuer's Internet web site, the APR would be one in effect within the last 30 days. Commenters generally supported applying a uniform standard to both the e-mail and web site posting methods of providing applications or solicitations. The final rule is adopted as proposed.

5a(c) Direct-mail and Electronic Applications and Solicitations

The format and content requirements differ for cost disclosures in card applications or solicitations sent in direct mail campaigns and for those made available to the general public such as in "take-one" applications and catalogs or magazines. Disclosures accompanying direct mail applications and solicitations must be presented in a table. Disclosures in a take-one also may be presented in a table with the same content as for direct mail, but the act and regulation permit two alternatives for format and content: (1) A narrative that describes how finance charges and other charges are assessed, and (2) a statement that costs are involved, along with a toll-free telephone number to call for further information.

With regard to the format and content of disclosures, the Board's 1999 proposals generally applied the same rules to card applications and solicitations made in the electronic context as apply to paper-based applications and solicitations. Card issuers sending applications or solicitations to a consumer's e-mail address would follow the direct mail rules; applications or solicitations made available to the general public would follow the take-one rules. Commenters generally supported the proposal.

The Board believes that in the context of on-line credit shopping, consumers would benefit from consistent disclosures among credit card issuers, whether consumers view an application or solicitation from an e-mail address or at another location such as a card issuer's web site. The option to distribute paper-based take-ones without cost information addresses, in part, a concern that the disclosures may become inaccurate with no practical means to recall the take-ones. This concern is not an issue for disclosures posted on an Internet web site. Requiring all card issuers to post a table on web sites that have credit and charge card applications or solicitation would not be unduly burdensome. Pursuant to the Board's general authority under section 105(a) to create exceptions to carry out the purposes of the act and the Board's specific authority under section 127(c)(5) to modify disclosures to carry out the purposes of the rules affecting applications and solicitations, § 226.5a(c) is revised to apply the direct mail rules to electronic credit and charge card applications or solicitations.

Section 226.5b Requirements for Home-Equity Plans

5b(b) Time of Disclosures

Comment 5b(b)–7 is added to provide guidance on the timing of disclosures for electronic applications for a home-equity line of credit (HELOC). Regulation Z requires that disclosures (including a brochure) be provided at the time an application for a HELOC is provided to a consumer. The disclosures generically describe the creditor's HELOC product. In the September 1999 proposal, comment 5b(b)–7 stated that if a HELOC application is made available electronically, such as on a creditor's Internet web site, the disclosures must appear before the application is provided.

The final comment has been modified to provide guidance similar to that given for credit and charge card applications and solicitations under § 226.5a and ARM loans under § 226.19(b). In all cases, a consumer must be able to access the disclosures (including the brochure) at the time the blank application or reply form is made available by electronic communication, such as on a creditor's Internet web site.

5b(c) Duties of Third Parties

Under § 226.5b(c), persons other than the creditor that provide applications for a HELOC must give the consumer a brochure at the time the application is given, and in some cases also provide other disclosures. Section 226.5b(c)(2) is added to clarify that such persons who are required to comply with Regulation Z may use electronic communication to do so, as long as the requirements of § 226.36(b) are satisfied.

Section 226.15 Right of Rescission

15(b)(1) Notice of Right to Rescind

Section 226.15 provides that in certain open-end plans secured by a consumer's principal dwelling, the consumer has three business days to rescind the transaction after becoming obligated on the debt. Consumers with an ownership interest in the dwelling used as security must receive (1) cost disclosures about the transaction, and (2) two copies of a notice that explains consumers' rescission rights and how to effect rescission, including a form the consumer may use to notify the creditor if the consumer decides to rescind the transaction.

Section 226.15(b)(1) is revised to permit a creditor to provide a single rescission notice by electronic communication to each consumer with an ownership interest in the dwelling who has affirmatively consented to

electronic delivery of the notice. Comment 15(b)-1 is revised to provide guidance on electronic rescission notices. Similar guidance is provided under § 226.23 regarding rescission notices for closed-end transactions.

Section 226.16 Advertising

16(c) Catalogs or Other Multiple-page Advertisements; Electronic Advertisements

Stating certain credit terms in an advertisement for an open-end credit plan triggers the disclosure of additional terms. Section 226.16(c) permits creditors using a multiple-page advertisement to state the additional disclosures in a table or schedule as long as the triggering credit terms appearing anywhere else in the advertisement refer to the page where the table or schedule is printed. Of the few comments received on this provision, commenters supported expanding the use of a table or schedule to electronic advertisements. Section 226.16(c) is revised to cover electronic advertisements as proposed and a conforming amendment in the staff commentary is made to comment 16(c)(1)-1. Comment 16(c)(1)-2 is added as proposed to provide guidance in complying with the requirements of this section for creditors using electronic communication.

Subpart C—Closed-end Credit

Section 226.17 General Disclosure Requirements

17(a) Form of Disclosures

Section 226.17(a)(3) is added to provide a cross reference to rules governing the electronic delivery of disclosures in § 226.36.

17(g) Mail or Telephone Orders—Delay in Disclosures

Section 226.17(g) allows creditors to defer TILA disclosures when a consumer makes a credit purchase or requests credit by mail, telephone, or any other written or “electronic communication” without face-to-face or direct solicitation by the creditor. The deferral rule pre-dates online or Internet banking; the term “electronic communication” included credit requests by telegraph transmissions and facsimiles. The rationale underlying the deferral is that creditors cannot provide transaction-specific disclosures in written form as required by the regulation at the time of the consumer’s purchase or request. In such cases, creditors may delay providing disclosures until the first payment due date, provided certain information has

been “made available in written form” before the consumer’s request.

The interim final rule provides as did the 1999 proposal that creditors offering loan products by electronic communication (for example, those offered on the Internet) may not delay providing disclosures under § 226.17(g). The difficulties in providing disclosures for credit requests by mail or telephone are not present for credit requests received by e-mail or through the Internet. Thus, specific disclosures must be provided before transactions are consummated using electronic communication as defined in § 226.36. The language has been revised from the proposal to clarify that the deferral rule in § 226.17(g) remains available to creditors offering loan products by facsimile machine (as well as mail and telephone) without face-to-face or direct telephone solicitation.

Section 226.19 Certain Residential Mortgage and Variable-rate Transactions

19(b) Certain Variable-rate Transactions

For certain loans with variable-rate features (loans where the APR may increase during the loan term) that are secured by the consumer’s principal dwelling, creditors must provide consumers with a booklet and other disclosures generically describing the creditor’s product when an application is given (or a nonrefundable fee is paid, whichever occurs earlier). In the September 1999 proposal, comment 19(b)-2 was revised to address the timing for providing disclosures required by § 226.19(b) when electronic communication is used. The final rule has been modified consistent with the rules for providing disclosures with applications and solicitations for credit and charge cards under § 226.5a and applications for home-equity lines of credit under § 226.5b. In all cases, a consumer must be able to access the disclosures (including the brochure) at the time the blank application is made available by electronic communication, such as on a creditor’s Internet web site.

Section 226.23 Right of Rescission

23(b)(1) Notice of Right to Rescind

Section 226.23 provides that in certain transactions secured by a consumer’s principal dwelling, the consumer has three business days to rescind the transaction after becoming obligated on the debt. Consumers with an ownership interest in the dwelling used as security must receive (1) cost disclosures about the transaction, and (2) two copies of a notice that explains consumers’ rescission rights and how to

effect rescission, including a form the consumer may use to notify the creditor if the consumer decides to rescind the transaction. Consistent with amendments to § 226.15(b)(1) regarding rescission notices provided electronically for open-end credit plans, § 226.23(b)(1) is amended to permit a creditor delivering rescission notices electronically to send a single notice to each consumer with an ownership interest in the dwelling used as security (rather than two notices). Comment 23(b)-1 is added to provide guidance on electronic rescission notices.

Section 226.24 Advertising

Regulation Z prescribes certain disclosures for closed-end loan advertisements. Although the specific requirements differ somewhat for closed-end loans and open-end credit plans, the revisions adopted by the Board for closed-end loan advertisements are substantially similar to those discussed above for open-end credit plans.

24(b) Advertisement of Rate of Finance Charge

Section 226.24(b) permits creditors to state a simple annual rate of interest or periodic rate in addition to the APR, as long as the rate is stated in conjunction with, but not more conspicuously than, the APR. Comment 24(b)-6 contains guidance on how this rule applies to an electronic advertisement.

24(d) Catalogs and Other Multiple-page Advertisements; Electronic Advertisements

Stating certain credit terms in an advertisement for closed-end credit triggers the disclosure of additional terms. Section 226.24(d) permits creditors using a multiple-page advertisement to state the additional disclosures in a table or schedule as long as the triggering credit terms appearing elsewhere in the advertisement refer to the page where the table or schedule is printed. Section 226.24(d) is revised to cover electronic advertisements, as proposed, and a conforming amendment is made to comment 24(d)-2. Comment 24(d)-4 is added as proposed to provide guidance in complying with the requirements of this section for creditors using electronic communication.

Subpart D—Miscellaneous

Section 226.27 Language of Disclosures

To provide consistency among the regulations, § 226.27 is revised as proposed to permit creditors to provide disclosures in languages other than

English as long as disclosures in English are available to consumers who request them.

Subpart E—Special Rules for Certain Home Mortgage Transactions

Section 226.31 General Rules

31(b) Form of Disclosures

Section 226.31(b) is revised to provide a cross reference to rules governing the electronic delivery of disclosures in § 226.36.

Subpart F—Electronic Communication

Section 226.36 Requirements for Electronic Communication

36(a) Definition

As adopted, the definition of the term “electronic communication” remains substantially unchanged from the 1999 proposals. Section 226.36(a) limits the term to a message transmitted electronically that can be displayed on equipment as visual text; an example is a message displayed on a personal computer monitor screen. Thus, audio- and voice-response telephone systems are not included. Because the rule permits the use of electronic communication to satisfy the statutory requirement for written disclosures that must be clear and conspicuous, the Board believes visual text is an essential element of the definition. Creditors that accommodate vision-impaired consumers by providing disclosures that do not use visual text must also provide disclosures using visual text.

Some commenters asked for clarification that the definition was not intended to preclude the use of devices other than personal computers, which also can display visual text. The equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the “clear and conspicuous” format requirement, discussed below.

36(b) General Rule

Effective October 1, 2000, the E-Sign Act permits creditors to provide disclosures using electronic communication, if the creditor complies with the consumer consent requirements in Section 101(c). Under section 101(c) of the E-Sign Act, creditors must provide specific information about the electronic delivery of disclosures before obtaining the consumer’s affirmative consent to receive electronic disclosures. The consent requirements in the E-Sign Act are similar but not identical to the Board’s 1999 proposal. Accordingly, § 226.36(b) sets forth the general rule

that creditors subject to Regulation Z may provide disclosures electronically if the creditor complies with section 101(c) of the E-Sign Act.

The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under TILA other than a requirement that disclosures be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation’s format, timing and retainability rules and the clear and conspicuous standard. Comment 36(b)–1 contains this guidance.

Presenting Disclosures in a Clear and Conspicuous Format

Electronic disclosures must be clear and conspicuous, as is the case for all written disclosures under TILA and Regulation Z. See §§ 226.5(a)(1), 226.17(a)(1), and 226.31(b). A creditor must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act: (1) The creditor must disclose the requirements for accessing and retaining disclosures in that format; (2) the consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and (3) the creditor must provide the disclosures in accordance with the specified requirements. Comment 36(b)–2 contains this guidance.

Commenters posed a few questions about the applicability of the clear and conspicuous standard to particular situations. Some asked whether electronic advertisements or other unrelated promotional information may appear on the same screen as mandatory disclosures that are posted on an Internet web site. Except to the extent required by the regulation, disclosures do not have to be provided separately from other information. Advertisements should not be integrated into the text of the disclosure in a manner that violates the clear and conspicuous standard.

Commenters also had questions about the use of navigational tools with electronic disclosures. For example, some believed that such tools might be helpful in directing consumers to related information that explains the terminology used in the disclosures. Many Internet web sites use navigational tools that are conspicuous through the use of bold text, larger fonts, different colors, underlining, or other methods of highlighting. Such tools are not per se prohibited so long as they are not used in a manner that would violate the clear and conspicuous standard.

Providing Timely Disclosures

Disclosures delivered electronically must comply with existing timing requirements under TILA and Regulation Z. See, for example, §§ 226.5(b), 226.17(b), and 226.31(c). Commenters on the Board’s 1999 proposals requested specific guidance that an electronic disclosure would be considered timely based on the time it is sent by e-mail or posted on an Internet web site, regardless of when the consumer receives or reads the disclosure.

Under the final rule, consistent with rules for disclosures that are sent by postal mail, disclosures provided by e-mail are timely when they are sent by the required time. Disclosures posted periodically at an Internet web site are timely if, by the required time, the creditor both makes the disclosures available at that location and, in accordance with § 226.36(d)(2), sends a notice alerting the consumer that the disclosures have been posted. For example, under § 226.9, creditors offering open-end plans must provide a change-in-terms notice to consumers at least 15 days in advance of certain changes. For a change-in-terms notice posted on the Internet, a creditor must both post the notice and notify consumers of its availability at least 15 days in advance of the change. Comment 36(b)–4 contains this guidance.

Certain disclosures must be provided before the consumer becomes obligated. For example, when a creditor permits the consumer to consummate a closed-end transaction on-line, the consumer must be required to access the disclosures required under § 226.18 before becoming obligated. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before becoming obligated. Or, the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Comment 36(b)–3 contains this guidance, as proposed, but has been expanded to provide the following additional guidance.

For disclosures that are not required to be segregated and thus may be interspersed into the text of another document, the creditor may satisfy the requirement to provide the disclosures if the document appears automatically or via a nonbypassable link. For example, when a creditor permits the consumer to open a credit card account and make a purchase immediately thereafter, disclosures required under § 226.6 must be provided before the first

transaction. The consumer must be required to access the disclosures (or the document containing the disclosures such as a credit card agreement) before becoming obligated for the plan (or before the first transaction).

Some industry commenters believed that requiring disclosures to automatically appear or be accessed by the consumer is cumbersome and unnecessary. Some commenters suggested that the Board allow the required disclosures to be accessible via a clearly marked navigational tool; they believe that once the tool is provided, the disclosure should be deemed to have been provided to the consumer.

TILA and Regulation Z require that creditors provide or send disclosures to consumers. It is not sufficient for creditors to provide a bypassable navigational tool that merely gives consumers the option of receiving the disclosures. Such an approach reduces the likelihood that consumers will notice and receive the disclosures. The final rule ensures that consumers actually see cost disclosures provided electronically so that they have the opportunity to read them when shopping for credit or before becoming obligated for an extension of credit, as applicable.

Commenters on the various proposals requested guidance regarding the creditor's duty in cases where a creditor cannot provide timely disclosures because an automated loan machine or other automated equipment controlled by the creditor malfunctions or otherwise fails to operate properly. Where the creditor controls the equipment and disclosures are required at that time, a creditor might not be liable for failing to provide timely disclosures if the defense in section 130(c) of TILA is available.

Providing Disclosures in a Form the Consumer May Keep

Under TILA and Regulation Z, many of the disclosures required to be in writing must be in a form the consumer can retain. Electronic disclosures are subject to this requirement. Comment 36(b)–5 contains guidance on this requirement.

Consumers may communicate electronically with creditors through a variety of means and from various locations. Depending on the location (at home, at work, in a public place such as a library), a consumer may not have the ability at a given time to preserve TILA disclosures presented on-screen. To ensure that consumers have an adequate opportunity to access and retain the disclosures, the creditor also must send them to the consumer's

designated e-mail address or make them available at another location, for example, on the creditor's Internet web site, where the information may be retrieved at a later date.

Where the creditor controls the equipment providing the electronic disclosures (for example, an automated loan machine or computer terminal located in the creditor's lobby), the creditor must ensure that the consumer has the opportunity to retain the required information. Comment 36(b)–6 contains guidance on this requirement.

36(c) When Consent is Required

Under the E-Sign Act, consumers must affirmatively consent before they receive electronic disclosures "relating to a transaction" if the disclosures are required by law or regulation to be in writing. Section 226.36(c) is added to provide that certain disclosures are not deemed to be related to a transaction for purposes of the E-Sign Act's consumer consent provision. These include disclosures in connection with advertisements (§ 226.16 and § 226.24), credit and charge card applications and solicitations (§ 226.5a), HELOC and ARM loan applications (§ 226.5b and § 226.19(b)), and disclosures under § 226.17(g)(1)–(5). In some circumstances, disclosures are available to the general public, such as advertisements and solicitations; in other circumstances, consumers receiving disclosures with a solicitation for credit may not enter in the credit transaction. Those entering into credit transactions will ultimately receive disclosures subject to the consent requirements.

36(d) Address or Location to Receive Electronic Communication

Consistent with the 1999 proposals, the interim rule provides that creditors may deliver electronic disclosures by sending them to a consumer's e-mail address. Alternatively, the rule provides that creditors may make the disclosures available at another location such as an Internet web site. If the creditor makes a disclosure available at such a location, the creditor effectively delivers the disclosure by sending a notice alerting the consumer when the disclosure can be accessed and preserving the disclosure at the location for at least 90 days. The time period for keeping disclosures available at a location such as a creditor's Internet web site under the interim rule differs from the 1999 proposals, based on commenters' concerns as discussed below.

36(d)(1)

For purposes of § 226.36(d), a consumer's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the creditor, as proposed. This guidance is contained in comment 36(d)(1)–1.

An electronic address would not include systems that permit communication only between the consumer and the creditor, for example, home-banking programs that allow consumers to communicate directly with a creditor on-line with the use of a computer and modem. These systems, like a creditor's web site accessed via the Internet, give consumers access to information about their accounts at a location controlled by the creditor. In both cases, the creditor determines how long account information will be available to the consumer. Consumers who receive disclosures at their e-mail address, however, may choose when to review, and for how long to retain, account information. Consumers who receive disclosures by contacting a creditor's site need to be alerted when the information is first available in order to ensure that they have the opportunity to access the information before it is removed. Thus, disclosures provided using systems such as home-banking programs are treated in the same manner as disclosures made available at an Internet web site, and a notice alerting the consumer when disclosures are posted must be sent, by e-mail or to a postal address, at the creditor's option.

36(d)(2)

Under § 226.36(d)(2)(i) of the interim rule, for disclosures made available at an Internet web site, a notice alerting the consumer when disclosures are posted must be sent by e-mail (or to a postal address, at the creditor's option). Section 226.36(d)(2)(i) requires that the alert notice identify the account involved and the address or other location where the disclosure is available. Comment 36(d)(2)–1 provides guidance on the level of detail required in identifying the account.

As proposed, under § 226.36(d)(2)(ii) of the interim rule, disclosures provided at an Internet web site must remain available for at least 90 days. The requirement seeks to ensure that consumers have adequate time to access and retain a disclosure under a variety of circumstances, such as when a consumer may not be able for an extended period of time to access the information due to computer malfunctions, travel, or illness. Making the periodic statement for 90 days also

ensures that it will be available for a sufficient time in most cases to allow alleged errors to be resolved under the procedures in Regulation Z. The 90-day period is uniform for all disclosures, for ease of compliance. Comment 36(d)(2)-2 is added to provide that during this period, the actual disclosures must be available to the consumer, but the creditor has discretion to determine whether they should be available at the same location for the entire period.

Some industry commenters believed the 90-day time period is reasonable and feasible. About an equal number of commenters believed it was too burdensome and costly; some of these commenters suggested periods that ranged from 30 to 60 days.

The 1999 proposals provided that after the 90-day time period, disclosures would be available upon consumers' request, generally for 24 months, in the same format as initially provided to the consumer. The 24-month period is consistent with a creditor's duty to retain records that evidence compliance. Consumer advocates supported the proposed retention period; some recommended that disclosures should be available upon request for the length of the contractual relationship with the consumer.

Industry commenters strongly opposed the 24-month period. Many believed that keeping copies of electronic disclosures actually provided to consumers for that period of time would be costly and burdensome. Moreover, industry commenters believed that once a consumer has accessed the disclosures, the consumer rather than the creditor should have the duty to retain them for future reference. They also noted that under existing record retention requirements applicable to paper disclosures, a creditor need only demonstrate compliance with the rules, but need not retain copies of the actual disclosures provided to consumers.

The requirement for creditors to provide duplicate disclosures upon request for 24 months has not been adopted. A creditor's duty to retain evidence of compliance for 24 months remains unchanged.

36(d)(3) Exceptions

Section 226.36(d)(3) is added to make clear that the requirements of paragraphs (i) and (ii) of § 226.36(d)(2) do not apply to disclosures in credit and charge card applications and solicitations mailed or otherwise distributed to the general public (§ 226.5a), certain credit advertisements (§§ 226.16 and .24), cost information for representative transactions made

available to consumers or to the public (§ 226.17(g)), or disclosures for certain home-secured credit (§§ 226.5b and 19(b)).

36(e) Redelivery

Industry commenters on the 1998 proposal asked for clarification that sending the electronic disclosures complies with the regulation, and that institutions are not required to confirm that the consumer actually received them. Consumer advocates asked that institutions be required to verify the delivery of disclosures by return receipt, in the case of e-mail. In the 1999 proposals, the Board solicited comment on the need for and the feasibility of such a requirement.

Consumer advocates believe that e-mail systems are not yet sufficiently reliable, and that safeguards are necessary to ensure that consumers actually receive disclosures. Industry commenters stated that a return receipt requirement would be costly and burdensome, and would require creditors to monitor return receipts in every case to determine that individual consumers received the disclosures.

Section 101(c) of the E-Sign Act requires that consumers consent electronically, or confirm their consents electronically, in a manner that reasonably demonstrates that the consumer can access the information that the creditor will be providing. This requirement seeks to verify at the outset that the consumer is actually capable of receiving the information in the electronic format being used by the creditor. After the consumer consents, the E-Sign Act also requires creditors to notify consumers of changes that materially affect consumers' ability to access electronic disclosures.

The interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of all disclosures would not be warranted. When electronic disclosures are returned undelivered, however, § 226.36(e) imposes a duty to attempt redelivery (either electronically or to a postal address) based on address information in the institution's own files. Unlike paper disclosures delivered by the postal service, there generally is no commonly-accepted mechanism for reporting a change in electronic address or for forwarding e-mail. Where a creditor actually knows that the delivery of an electronic disclosure did not take place, the creditor should take reasonable steps to effectuate delivery in some way. For example, if an e-mail message to the consumer (containing an alert notice or other disclosure) is

returned as undeliverable, the redelivery requirement is satisfied if the creditor sends the disclosure to a different e-mail address or postal address that the creditor has on file. Sending the disclosures a second time to the same electronic address would not be sufficient if the institution has a different address for the consumer on file. Comment 36(e)-1 provides this guidance.

This redelivery requirement is limited to situations where the electronic communication cannot be delivered and does not apply to situations where the disclosure is delivered but, for example, cannot be read by the consumer due to technical problems with the consumer's software. A creditor's duty to redeliver a disclosure under § 226.36(e) does not affect the timeliness of the disclosure. Creditors comply with the timing requirements of the regulation when a disclosure is initially sent in a timely manner, even though the disclosure is returned undelivered and the creditor is required under § 226.36(e) to take reasonable steps to attempt redelivery.

36(f) Electronic Signatures

The E-Sign Act provides that electronic signatures have the same validity as handwritten signatures. Section 106 of the act defines an electronic signature. Section 226.36(f) is added to incorporate the E-Sign Act's definition of electronic signature into the regulation. To comply with the E-Sign Act, an electronic signature must be executed or adopted by a consumer with the intent to sign the record. Accordingly, regardless of the technology used to meet this requirement, the process must evidence the consumer's identity. Comment 36(f)-1 provides this guidance.

Additional Issues

Document Integrity

The interim rule does not impose document integrity standards. Consumer advocates and others expressed concerns that electronic documents can be altered more easily than paper documents. They say that consumers' ability to enforce rights under the consumer protection laws could be impaired, in some cases, if the authenticity of disclosures they retain cannot be demonstrated.

Institutions are generally required to retain evidence of compliance with the Board's consumer regulations. Accordingly, the Board requested comment on the feasibility of requiring institutions to have systems in place capable of detecting whether or not information has been altered, or to use

independent certification authorities to verify disclosure documents.

Consumer advocates strongly supported document integrity requirements (including the use of certification authorities) that would apply to all-electronic disclosures. Signatures, notary seals, and verification procedures such as recordation are used to protect against alterations for transactions memorialized in paper form. Consumer advocates believe that comparable verification procedures are needed for electronic disclosures as well.

Industry commenters opposed mandatory document integrity standards for electronic disclosures. Because the technology in this area is still evolving, they believe that mandatory standards would be premature. Others believe that imposing document integrity standards or requiring the use of certification authorities would be costly to implement.

The Board recognizes the concerns about document integrity, but believes it is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Effective methods may be too costly. Other less costly methods may deter alterations in some cases, but would not necessarily ensure document integrity.

Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the consumer protection laws administered by the Board. Section 104(b)(3) of the E-Sign Act authorizes federal or state regulatory agencies to specify performance standards to assure the accuracy, record integrity, and accessibility of records that are required to be retained, but prohibits the agencies from requiring the use of a particular type of software or hardware in order to comply with record retention requirements. Technology is likely to develop to protect electronic contracts and other legal documents. Thus, it seems premature for the Board to specify any particular standards or methods for consumer disclosure at this time.

V. Form of Comment Letters

Comment letters should refer to Docket No. R-1043, and, when possible, should use a standard typeface with a font size of 10 or 12. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for

review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch computer diskettes in any IBM-compatible DOS- or Windows-based format.

VI. Regulatory Flexibility Analysis

The Board has reviewed these interim amendments to Regulation Z, in accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 604). Two of the three requirements of a final regulatory flexibility analysis under the Act are (1) a succinct statement of the need for and the objectives of the rule and (2) a summary of the issues raised by the public comments, the agency's assessment of those issues, and a statement of the changes made in the final rule in response to the comments. These two areas are discussed above.

The third requirement of the analysis is a description of significant alternatives to the rule that would minimize the rule's economic impact on small entities and reasons why the alternatives were rejected. This interim final rule is designed to provide creditors with an alternative method of providing disclosures; the rule will relieve compliance burden by giving creditors flexibility in providing disclosures required by the regulation. Overall, the costs of providing electronic disclosures are not expected to have significant impact on small entities. The expectation is that providing electronic disclosures may ultimately reduce the costs associated with providing disclosures.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0199.

The collection of information that is revised by this rulemaking is found in 12 CFR Part 226 and in Appendices F, G, H, J, K, and L. This information is mandatory (15 U.S.C. 1601 *et seq.*) to evidence compliance with the requirements of the Regulation Z and the Truth in Lending Act (TILA). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for twenty-four months. This regulation applies to all types of

creditors, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The revisions provide that creditors may deliver disclosures electronically upon obtaining consumers' affirmative consent in accordance with the E-Sign Act. The revisions also provide guidance to institutions on the timing and delivery of electronic disclosures, to ensure that consumers have adequate opportunity to access and retain the information.

With respect to state member banks, it is estimated that there are 1000 respondent/recordkeepers and an average frequency of 136,294 responses per respondent each year. The current annual burden is estimated to be 1,886,392 hours. No comments specifically addressing the burden estimate were received, therefore, the numbers remain unchanged. There is estimated to be no additional cost burden and no capital or start up cost associated with the interim final rule.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality arises under the Freedom of Information Act.

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0199), Washington, DC 20503.

VIII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the interim rule is clearly stated and effectively organized, and how the Board might make the rule easier to understand.

List of Subjects in 12 CFR Part 226

Advertising, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604 and 1637(c)(5).

Subpart B—Open-End Credit

2. Section 226.5 is amended by adding a new paragraph (a)(5) as follows:

§ 226.5 General disclosure requirements.

(a) *Form of disclosures.* * * *

(5) *Electronic communication.* For rules governing the electronic delivery of disclosures, including the definition of electronic communication, see § 226.36.

* * * * *

3. Section 226.5a is amended by revising paragraph (b)(1)(ii), adding a new paragraph (b)(1)(iii), and revising paragraph (c) as follows:

§ 226.5a Credit and charge card applications and solicitations.

* * * * *

(b) *Required disclosures.* * * *

(1) *Annual percentage rate.* * * *

(ii) When variable rate disclosures are provided under paragraph (c) of this section, an annual percentage rate disclosure is accurate if the rate was in effect within 60 days before mailing the disclosures. When variable rate disclosures are provided under paragraph (e) of this section, an annual percentage rate disclosure is accurate if the rate was in effect within 30 days before printing the disclosures. Disclosures provided by electronic communication are subject to paragraph (b)(1)(iii) of this section.

(iii) When variable rate disclosures are provided by electronic communication, an annual percentage rate disclosure is accurate if the rate was in effect within 30 days before mailing the disclosures to a consumer's electronic mail address. If disclosures are made available at another location such as the card issuer's Internet web site, the annual percentage rate must be one in effect within the last 30 days.

* * * * *

(c) *Direct-mail and electronic applications and solicitations.* The card issuer shall disclose the applicable items in paragraph (b) of this section on or with an application or solicitation that is mailed to consumers or provided by electronic communication.

* * * * *

4. Section 226.5b is amended by redesignating paragraph (c) as paragraph (c)(1), adding a heading for paragraph (c)(1), and adding a new paragraph (c)(2) as follows:

§ 226.5b Requirements for home-equity plans.

* * * * *

(c) *Duties of third parties.* (1) *General.* * * *

(2) *Electronic communication.* Persons other than the creditor that are required to comply with paragraphs (d) and (e) of this section may use electronic communication in accordance with the requirements of § 226.36, as applicable.

* * * * *

5. Section 226.15 is amended by revising the first sentence of the introductory text of paragraph (b) as follows:

§ 226.15 Right of rescission.

* * * * *

(b) *Notice of right to rescind.* In any transaction or occurrence subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in § 226.36(b)). * * *

* * * * *

6. Section 226.16 is amended by revising paragraph (c) as follows:

§ 226.16 Advertising.

* * * * *

(c) *Catalogs or other multiple-page advertisements; electronic advertisements.* (1) If a catalog or other multiple-page advertisement, or an advertisement using electronic communication, gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (b) of this section, it shall be considered a single advertisement if:

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of terms set forth in § 226.6 appearing anywhere else in the catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an advertisement using electronic communication complies with this paragraph if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold

higher-priced property or services offered.

* * * * *

Subpart C—Closed-End Credit

7. Section 226.17 is amended by:
a. Adding a new paragraph (a)(3); and
b. Revising the introductory text in paragraph (g).

§ 226.17 General disclosure requirements.

(a) *Form of disclosures.* * * *

(3) *Electronic communication.* For rules governing the electronic delivery of disclosures, including a definition of electronic communication, see § 226.36.

* * * * *

(g) *Mail or telephone orders—delay in disclosures.* If a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or facsimile machine without face-to-face or direct telephone solicitation, the creditor may delay the disclosures until the due date of the first payment, if the following information for representative amounts or ranges of credit is made available in written form to the consumer or to the public before the actual purchase order or request:

* * * * *

8. Section 226.23 is amended by revising the first sentence of paragraph (b)(1) as follows:

§ 226.23 Right of rescission.

* * * * *

(b)(1) *Notice of right to rescind.* In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered by electronic communication as provided in § 226.36(b)). * * *

* * * * *

9. Section 226.24 is amended by revising paragraph (d) as follows:

§ 226.24 Advertising.

* * * * *

(d) *Catalogs or other multiple-page advertisements; electronic advertisements.* (1) If a catalog or other multiple-page advertisement, or an advertisement using electronic communication, gives information in a table or schedule in sufficient detail to permit determination of the disclosures required by paragraph (c)(2) of this section, it shall be considered a single advertisement if:

(i) The table or schedule is clearly and conspicuously set forth; and

(ii) Any statement of terms of the credit terms in paragraph (c)(1) of this section appearing anywhere else in the

catalog or advertisement clearly refers to the page or location where the table or schedule begins.

(2) A catalog or other multiple-page advertisement or an advertisement using electronic communication complies with paragraph (c)(2) of this section if the table or schedule of terms includes all appropriate disclosures for a representative scale of amounts up to the level of the more commonly sold higher-priced property or services offered.

Subpart D—Miscellaneous

10. Section 226.27 is revised to read as follows:

§ 226.27 Language of disclosures.

Disclosures required by this regulation may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request. This requirement for providing English disclosures on request does not apply to advertisements subject to §§ 226.16 and 226.24.

Subpart E—Special Rules for Certain Home Mortgage Transactions

11. Section 226.31 is amended by revising paragraph (b) to read as follows:

§ 226.31 General rules.

* * * * *

(b) *Form of disclosures.* (1) *General.* The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep.

(2) *Electronic communication.* For rules governing the electronic delivery of disclosures, including a definition of electronic communication, see § 226.36.

* * * * *

§ 226.35 [Reserved]

12. Add and reserve a new § 226.35.

13. Add a new subpart F to part 226 to read as follows:

Subpart F—Electronic Communication

§ 226.36 Requirements for electronic communication.

(a) *Definition.* “Electronic communication” means a message transmitted electronically between a creditor and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) *General rule.* In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 *et seq.*) and the rules of this part, a creditor may provide by

electronic communication any disclosure required by this part to be in writing.

(c) *When consent is required.* Under the E-Sign Act, a creditor is required to obtain a consumer's affirmative consent when providing disclosures related to a transaction. For purposes of this requirement, the disclosures required under §§ 226.5a, 226.5b(d) and 226.5b(e), 226.16, 226.17(g)(1) through (5), 226.19(b) and 226.24 are deemed not to be related to a transaction.

(d) *Address or location to receive electronic communication.* A creditor that uses electronic communication to provide disclosures required by this part shall:

(1) Send the disclosure to the consumer's electronic address; or

(2) Make the disclosure available at another location such as an Internet web site; and

(i) Alert the consumer of the disclosure's availability by sending a notice to the consumer's electronic address (or to a postal address, at the creditor's option). The notice shall identify the account involved and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the consumer of the disclosure, whichever comes later.

(3) *Exceptions.* A creditor need not comply with paragraphs (d)(2)(i) and (ii) of this section for the disclosures required under §§ 226.5a, 226.5b(d) and 226.5b(e), 226.16, 226.17(g)(1) through (5), 226.19(b) and 226.24.

(e) *Redelivery.* When a disclosure provided by electronic communication is returned to a creditor undelivered, the creditor shall take reasonable steps to attempt redelivery using information in its files.

(f) *Electronic signatures.* An electronic signature as defined under the E-Sign satisfies any requirement under this part for a consumer's signature or initials.

14. In Supplement I to Part 226, the following amendments are made:

a. In *Section 226.5—General Disclosure Requirements*, under *Paragraph 5(b)(2)(ii)*, paragraph 3. is revised.

b. In *Section 226.5a—Credit and Charge Card Applications and Solicitations*, under *5a(a)(2) Form of Disclosures*, a new paragraph 8. is added.

c. In *Section 226.5b—Requirements for Home Equity Plans*, under *5b(b) Time of Disclosures*, a new paragraph 7. is added.

d. In *Section 226.15—Right of Rescission*, under *15(b) Notice of Right to Rescind.*, two new sentences are added at the end of paragraph 1.

e. In *Section 226.16—Advertising*, the heading *16(c) Catalogs and Multiple-page Advertisements* is revised and under *Paragraph 16(c)(1).*, paragraph 1. is revised and a new paragraph 2. is added.

f. In *Section 226.19—Certain Residential Mortgage and Variable-Rate Transactions*, under *19(b) Certain variable-rate transactions.*, paragraph 2. is revised.

g. In *Section 226.23—Right of Rescission*, under *23(b) Notice of Right to Rescind.*, two new sentences are added at the end of paragraph 1.

h. In *Section 226.24—Advertising*, under *24(b) Advertisement of rate of finance charge*, a new paragraph 6. is added.

i. In *Section 226.24—Advertising*, the heading *24(d) Catalogs and multiple-page advertisements* is revised and under *24(d)*, paragraph 2. is revised and a new paragraph 4. is added.

j. A new Subpart F is added to Supplement I.

The amendments read as follows:

Supplement I to Part 226—Official Staff Interpretations

* * * * *

Subpart B—Open-End Credit

Section 226.5—General Disclosure Requirements

* * * * *

(b)(2) *Periodic Statements*

* * * * *

Paragraph 5(b)(2)(ii)

* * * * *

3. *Calling for periodic statements.* When the consumer initiates a request, the creditor may permit, but may not require, consumers to pick up their periodic statements. If the consumer wishes to pick up the statement and the plan has a free-ride period, the statement must be made available in accordance with the 14-day rule. If the consumer wishes to receive the statement by electronic communication, the creditor must comply with the consumer consent requirements as provided in § 226.36(b).

* * * * *

Section 226.5a—Credit and Charge Card Applications and Solicitations

* * * * *

5a(a) *General Rules*

5a(a)(2) *Form of Disclosures*

* * * * *

8. *Timing of disclosures for electronic applications or solicitations.* In all cases, a consumer must be able to access the disclosures at the time the blank application

or reply form is made available by electronic communication, such as on a card issuer's Internet web site. Card issuers have flexibility in satisfying this requirement. For example, if a link is not used, the application or reply form must clearly and conspicuously refer to the fact that rate, fee, and other cost information either precedes or follows the application or reply form. Alternatively, card issuers may provide a link to electronic disclosures on or with the application (or reply form) as long as consumers cannot bypass the disclosures before submitting the application or reply form. Or the disclosures could automatically appear on the screen when the application or reply form appears. A card issuer need not confirm that the consumer has read the disclosures.

* * * * *

Section 226.5b—Requirements for Home-Equity Plans

* * * * *

5b(b) Time of Disclosures

* * * * *

7. Applications available by electronic communication. In all cases, a consumer must be able to access the disclosures (including the brochure) at the time the blank application or reply form is made available by electronic communication, such as on a creditor's Internet web site. Creditors have flexibility in satisfying this requirement. For example, if a link is not used, the application or reply form must clearly and conspicuously refer the consumer to the fact that rate, fee, and other cost information either precedes or follows the application or reply form. Alternatively, creditors may provide a link to electronic disclosures as long as consumers cannot bypass the disclosures before submitting the application or reply form. Or the disclosures could automatically appear on the screen when the application or reply form appears. A creditor need not confirm that the consumer has read the disclosures or brochure.

* * * * *

Section 226.15—Right of Rescission

* * * * *

15(b) Notice of Right to Rescind

1. Who receives notice. * * * If e-mail is used, the creditor complies with § 226.15(b)(1) if one notice is sent to each co-owner. Each co-owner must consent to receive electronic disclosures and each must designate an electronic address for receiving the disclosure.

* * * * *

Section 226.16—Advertising

* * * * *

16(c) Catalogs or Other Multiple-page Advertisements; Electronic Advertisements

* * * * *

Paragraph 16(c)(1)

1. General. Section 226.16(c)(1) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement or an electronic advertisement. The rule applies only if the advertisement

contains one or more of the triggering terms from § 226.16(b).

2. Electronic communication. If an advertisement using electronic communication contains the table or schedule permitted under § 226.16(c)(1), any statement of terms set forth in § 226.6 appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.

* * * * *

Subpart C Closed—End Credit

* * * * *

Section 226.19—Certain Residential Mortgage and Variable-Rate Transactions

* * * * *

19(b) Certain Variable-rate Transactions

* * * * *

2. Timing. A creditor must give the disclosures required under this section at the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier.

i. Intermediary agent or broker. In cases where a creditor receives a written application through an intermediary agent or broker, however, footnote 45b provides a substitute timing rule requiring the creditor to deliver the disclosures or place them in the mail not later than three business days after the creditor receives the consumer's written application. (See comment 19(b)-3 for guidance in determining whether or not the transaction involves an intermediary agent or broker.) This three-day rule also applies where the creditor takes an application over the telephone.

ii. Telephone request. In cases where the consumer merely requests an application over the telephone, the creditor must include the early disclosures required under this section with the application that is sent to the consumer.

iii. Mail solicitations. In cases where the creditor solicits applications through the mail, the creditor must also send the disclosures required under this section if an application form is included with the solicitation.

iv. Conversion. In cases where an open-end credit account will convert to a closed-end transaction subject to this section under a written agreement with the consumer, disclosures under this section may be given at the time of conversion. (See the commentary to § 226.20(a) for information on the timing requirements for § 226.19(b)(2) disclosures when a variable-rate feature is later added to a transaction.)

v. Electronic applications. In all cases, a consumer must be able to access the disclosures (including the brochure) at the time the blank application form is made available by electronic communication, such as on a creditor's Internet web site. Creditors have flexibility in satisfying this requirement. For example, if a link is not used, the application form must clearly and conspicuously refer the consumer to the fact

that rate, fee, and other cost information either precedes or follows the application or reply form. Alternatively, creditors may provide a link to electronic disclosures as long as consumers cannot bypass the disclosure before submitting the application form. Or the disclosures could automatically appear on the screen when the application form appears. A creditor need not confirm that the consumer has read the disclosures or brochure.

* * * * *

Section 226.23—Right of Rescission

* * * * *

23(b) Notice of right to rescind

1. Who receives notice. * * * If e-mail is used, the creditor complies with § 226.23(b)(1) if one notice is sent to each co-owner. Each co-owner must consent to receive electronic disclosures and each must designate an electronic address for receiving the disclosure.

* * * * *

Section 226.24—Advertising

* * * * *

24(b) Advertisement of Rate of Finance Charge

* * * * *

6. Electronic communication. A simple annual rate or periodic rate that is applied to an unpaid balance may be stated only if it is provided in conjunction with an annual percentage rate. In an advertisement using electronic communication, the consumer must be able to view both rates simultaneously. This requirement is not satisfied if the consumer can view annual percentage rate only by use of a link that takes the consumer to information appearing at another location.

* * * * *

24(d) Catalogs or Other Multiple-page Advertisements; Electronic Advertisements

* * * * *

2. General. Section 226.24(d) permits creditors to put credit information together in one place in a catalog or other multiple-page advertisement, or in an electronic advertisement. The rule applies only if the advertisement contains one or more of the triggering terms from § 226.24(c)(1). A list of different annual percentage rates applicable to different balances, for example, does not trigger further disclosures under § 226.24(c)(2) and so is not covered by § 226.24(d).

* * * * *

4. Electronic communication. If an advertisement using electronic communication contains the table or schedule permitted under § 226.24(d)(1), any statement of terms set forth in § 226.24(c)(1) appearing anywhere else in the advertisement must clearly direct the consumer to the location where the table or schedule begins. For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information (but see comment 24(b)-6).

* * * * *

Subpart F—Electronic Communication*Section 226.36—Requirements for Electronic Communication***36(b) General Rule**

1. *Relationship to the E-Sign Act.* The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a requirement that disclosures be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and conspicuous standard. For example, to satisfy the clear and conspicuous standard for disclosures, electronic disclosures must use visual text.

2. *Clear and conspicuous standard.* A creditor must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act:

i. The creditor must disclose the requirements for accessing and retaining disclosures in that format;

ii. The consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and

iii. The creditor must provide the disclosures in accordance with the specified requirements.

3. *Timing and effective delivery when a consumer becomes obligated on-line.*

i. When a creditor permits the consumer to consummate a closed-end transaction on-line, the consumer must be required to access the disclosures required under § 226.18 before becoming obligated. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before becoming obligated. Or the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. The creditor is not required to confirm that the consumer has read the disclosures.

ii. For disclosures that are not required to be segregated and thus may be interspersed into the text of another document, the creditor may satisfy the requirement to provide the disclosures if the document appears automatically or via a nonbypassable link. For example, when a creditor permits the consumer to open a credit card account and make a purchase immediately thereafter, disclosures required under § 226.6 must be provided before the first transaction. The consumer must be required to access the disclosures (or the document containing the disclosures such as a credit card agreement) before becoming obligated for the plan (or before the first transaction). The creditor is not required to confirm that the consumer has read the disclosures.

4. *Timing and effective delivery for disclosures provided periodically.*

Disclosures provided by e-mail are timely based on when the disclosures are sent. Disclosures posted at an Internet web site such as periodic statements, or change-in-terms and other notices, are timely when the creditor has both made the disclosures available and sent a notice alerting consumer that the disclosures have been posted. For

example, under § 226.9, creditors offering open-end plans must provide a change-in-terms notice to consumers at least 15 days in advance of certain changes. For a change-in-terms notice posted on the Internet, a creditor must both post the notice and notify consumers of its availability at least 15 days in advance of the change.

5. *Retainability of disclosures.* Creditors satisfy the requirement that disclosures be in a form that the consumer may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be consistent with the information required to be provided under section 101(c)(1)(C)(i) of the E-Sign Act (15 U.S.C. 7001(c)(1)(C)(i)) about the hardware and software requirements for accessing and retaining electronic disclosures.

6. *Disclosures provided on creditor's equipment.* A creditor that controls the equipment providing electronic disclosures to consumers (for example, a computer terminal in a creditor's lobby or an automated loan machine at a public kiosk) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the consumer may keep. For example, if disclosures are required at the time of an on-line transaction, the disclosures must be sent to the consumer's e-mail address or must be made available at another location such as the creditor's Internet web site, unless the creditor provides a printer that automatically prints the disclosures.

36(d) Address or Location to Receive Electronic Communication**Paragraph 36(d)(1)**

1. *Electronic address.* A consumer's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the creditor.

Paragraph 36(d)(2)

1. *Identifying account involved.* A creditor may identify a specific account in a variety of ways and is not required to identify an account by reference to the account number. For example, where the consumer has only one credit card account, and no confusion would result, the card issuer may refer to "your credit card account." If the consumer has two credit card accounts, the card issuer may, for example, differentiate accounts based on the card program or by using a truncated account number.

2. *90-day rule.* The actual disclosures provided to consumer must be available for at least 90 days, but the creditor has discretion to determine whether they should be available at the same location for the entire period.

36(e) Redelivery

1. *E-mail returned as undeliverable.* If an e-mail to the consumer (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the creditor sends the disclosure to a different e-mail address or postal address that the creditor has on file for the consumer. Sending the disclosures a second time to the same electronic address is

not sufficient if the creditor has a different address for the consumer on file.

36(f) Electronic Signatures

1. *Relationship to E-Sign Act.* The E-Sign Act provides that electronic signatures have the same validity as handwritten signatures. Section 106 of the E-Sign Act (15 U.S.C. 7006) defines an electronic signature. To comply with the E-Sign Act, an electronic signature must be executed or adopted by a consumer with the intent to sign the record. Regardless of the technology used to meet this requirement, the process must evidence the consumer's identity.

By order of the Board of Governors of the Federal Reserve System, March 23, 2001.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 01-7727 Filed 3-29-01; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM**12 CFR Part 202****[Regulation B; Docket No. R-1040]****Equal Credit Opportunity****AGENCY:** Board of Governors of the Federal Reserve System.**ACTION:** Interim rule; request for comments.

SUMMARY: The Board is adopting an interim final rule amending Regulation B, which implements the Equal Credit Opportunity Act, to establish uniform standards for the electronic delivery of disclosures required by the act and regulation. The rule provides guidance on the timing and delivery of electronic disclosures to ensure that applicants have adequate opportunity to access and retain required information. (Similar rules are being adopted under other consumer financial services regulations administered by the Board.) Under the rule, creditors may deliver disclosures electronically if they obtain applicants' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act. In addition, the regulation is revised to allow creditors to provide disclosures in foreign languages. The rule is being adopted as an interim rule to allow for additional public comment.

DATES: The interim rule is effective March 30, 2001; however, to allow time for any necessary operational changes, the mandatory compliance date is October 1, 2001. Comments must be received by June 1, 2001.

ADDRESSES: Comments, which should refer to Docket No. R-1040, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15

p.m. weekdays, and to the security control room at all other times. The mail room and the security control room, both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments may be inspected in room MP-500 in the Board's Martin Building between 9:00 a.m. and 5:00 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.

FOR FURTHER INFORMATION CONTACT: Natalie E. Taylor or John C. Wood, Counsel, or Minh-Duc Le, Attorney, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667.

SUPPLEMENTARY INFORMATION:**I. Background**

The Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age (provided the applicant has the capacity to contract), because all or part of an applicant's income derives from public assistance, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Board's Regulation B (12 CFR part 202) implements the act.

The ECOA and Regulation B require that some disclosures be provided in writing, presuming that creditors provide paper documents. Under the Electronic Signatures in Global and National Commerce Act (E-Sign Act), however, electronic documents and signatures have the same validity as paper documents and handwritten signatures.

Board Proposals Regarding Electronic Disclosures

Over the past few years, the Board has published several interim rules and proposals regarding the electronic delivery of disclosures. In 1996, after a comprehensive review of Regulation E (Electronic Fund Transfers), the Board proposed to amend the regulation to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696, May 2, 1996). Based on comments received on the 1996 proposal, on March 25, 1998, the Board published an interim rule permitting the electronic delivery of

disclosures under Regulation E (63 FR 14528) and similar proposals under Regulation B (63 FR 14552) and other financial services regulations administered by the Board. The 1998 interim rule and proposed rules were similar to the 1996 proposed rule under Regulation E.

The 1998 proposals and interim rule allowed depository institutions, creditors, lessors, and others to provide disclosures electronically if the consumer agreed, with few other requirements. For ease of reference, this background section uses the terms "institutions" and "consumers."

Industry commenters generally supported the Board's 1998 proposals and interim rule, but many of them sought specific revisions and additional guidance on how to comply with the disclosure requirements in certain transactions and circumstances. In particular, they expressed concern that the rule did not specify a uniform method for establishing that an "agreement" was reached for sending disclosures electronically. Consumer advocates, on the other hand, generally opposed the 1998 proposals and the interim rule. They believed that consumer protections in the proposals were inadequate, especially in connection with transactions that are typically consummated in person (such as automobile loans and leases, home-secured loans, and door-to-door credit sales).

September 1999 Proposals

In response to comments received on the 1998 proposals, the Board published revised regulatory proposals in September 1999 under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999) (collectively, the "1999 proposals"), and an interim rule under Regulation DD (64 FR 49846). The interim rule under Regulation DD allowed depository institutions to deliver disclosures on periodic statements electronically if the consumer agrees.

Generally, the 1999 proposals required institutions to use a standardized form containing specific information about the electronic delivery of disclosures so that consumers could make informed decisions about whether to receive disclosures electronically. If the

consumer affirmatively consented, most disclosures could be provided electronically. To address concerns about potential abuses, the 1999 proposals generally would have required disclosures to be given in paper form when consumers transacted business in person. The proposals contained rules for disclosures that are made available to consumers at an institution's Internet web site (governing, for example, how long disclosures must remain posted at a web site).

Comments on the September 1999 proposals—The Board received letters representing 115 commenters expressing views on the revised proposals. Industry commenters generally supported the Board's approach of establishing federal rules for a uniform method of obtaining consumers consent to the receipt of electronic disclosures instead of deferring to state law. Still, many sought specific additional guidance and in some cases wanted more flexibility. They were concerned about the length of time the proposals would have required electronic disclosures to remain available to a consumer at an institution's Internet web site or upon request. In addition, they believed the proposed rule requiring paper disclosures for mortgage loans closed in person was not sufficiently flexible. Consumer advocates believed the 1999 proposals addressed many of their concerns about the 1998 proposals. Nevertheless, they urged the Board to incorporate greater protections for consumers, such as restricting the delivery of electronic disclosures to only those consumers who initiate transactions electronically.

The Board also obtained views through four focus groups with individual consumers, conducted in the Washington-Baltimore metropolitan area. Participants reviewed and commented on the format and content of the proposed sample consent forms, as well as on alternative revised forms.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed the E-Sign Act, which was enacted to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that electronic documents and signatures have the same validity as paper documents and handwritten signatures. The act contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in electronic form only if the consumer

affirmatively consents after receiving certain information specified in the statute.

The Board and other government agencies are permitted to interpret the E-Sign Act's consumer consent requirements within prescribed limits, but may not impose additional requirements for consumer consent. In addition, agencies generally may not reimpose a requirement for using paper disclosures in particular transactions, such as those conducted in person.

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to use electronic disclosures under Regulations B, E, M, Z and DD if the consumer affirmatively consents in the manner required by section 101(c) of the E-Sign Act. Under section 101(c)(5) of the E-Sign Act, consumers who consented prior to the effective date of the act to receive electronic disclosures as permitted by any law or regulation, are not subject to the consent requirements.

II. The Interim Rule

The Board is adopting an interim final rule to establish uniform standards for the electronic delivery of disclosures required under Regulation B. Consistent with the requirements of the E-Sign Act, creditors generally must obtain applicants' affirmative consent to provide disclosures electronically.

The interim rules also establish uniform requirements for the timing and delivery of electronic disclosures. Disclosures may be sent by e-mail to an electronic address designated by the applicant, or they may be made available at another location, such as an Internet web site. If the disclosures are not sent by e-mail, applicants must receive a notice alerting them to the availability of the disclosures. Disclosures posted on a web site must be available for at least 90 days, to allow applicants adequate time to access and retain the information. With regard to the timing of electronic disclosures, for disclosures that must be provided at application, applicants are required to access the disclosures before submitting the application. Under the interim rule, creditors must make a good faith attempt to redeliver electronic disclosures that are returned undelivered, using the address information available in their files. Similar rules are being adopted under Regulations E, M, Z, and DD.

III. Request for Comment

The interim rules include most of the revisions that were part of the 1999 proposals and were not affected by the E-Sign Act. The Board is adopting these rules with some minor changes discussed below. The rules are adopted as interim rules, to allow commenters to present new information or views not previously considered in the context of the 1998 and 1999 proposals. Since the Board's 1999 proposals were issued, more institutions have gained experience in offering financial services electronically. The Board believes that additional comments, beyond those previously considered in connection with the Board's earlier proposals, might inform the Board whether any developments in technology or industry practices have occurred that warrant further changes in the rules. The comment period ends on June 1, 2001. The Board expects to adopt final rules on a permanent basis prior to October 1, 2001.

Interpreting E-Sign Provisions

Under section 104(b) of the E-Sign Act, the Board and other government agencies are permitted to interpret the act, within prescribed limits. The Board may issue rules that interpret how the E-Sign Act's consumer consent requirements apply for purposes of the laws administered by the Board. Also, the Board may, by regulation, exempt a particular category of disclosures from the E-Sign Act's consumer consent requirements if it will eliminate a substantial burden on electronic commerce without creating material risk for consumers.

The Board requests comment on whether the Board should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provisions or other provisions of the act, as they affect the Board's consumer protection regulations. Comment is requested on whether the statutory provisions relating to consumer consent are sufficient, or whether additional guidance is needed. For example, is interpretative guidance needed concerning the statutory requirement that applicants confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the creditor? Is clarification needed on the effect of applicants withdrawing their consent, or on requesting paper copies of electronic disclosures? Creditors must also inform applicants of changes in hardware or software requirements if the change creates a material risk that the applicant

will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk" for purposes of Regulation B and financial services laws administered by the Board, and if so what standards should apply.

Under section 104(d) of the E-Sign Act, the Board is authorized to exempt specific disclosures from the consumer consent requirements of section 101(c) of the E-Sign Act, if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. The Board requests comment on whether it should consider exercising this exemption authority.

Study on Adapting Requirements to Online Banking and Lending

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures. The Board requests comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

The comments may assist the Board in future efforts to update the regulations. The comments may also be used in connection with a study required under the Gramm-Leach-Bliley Act of 1999. That act requires the federal bank supervisory agencies to conduct a study of banking regulations that affect the electronic delivery of financial services and to submit to the Congress a report recommending any legislative changes that are needed to facilitate online banking and lending.

IV. Section-by-Section Analysis

Pursuant to its authority under section 703 of the ECOA, the Board amends Regulation B to establish uniform standards for the use of electronic communication to provide disclosures required by this regulation. Electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. To the extent that a creditor may make electronic disclosures available at its Internet web site instead of providing the disclosures directly to the applicant, the Board finds that such an exception is warranted, acting pursuant to its authority under section 703(a)(1) of the ECOA. Below is a section-by-section analysis of the rules for providing disclosures by electronic communication, including references to changes in the official staff commentary.

Section 202.4 General Rules

4(b) Foreign Language Disclosures

To provide consistency among the regulations, as proposed, § 202.4(b) permits creditors to provide disclosures in languages other than English as long as disclosures in English are available to applicants who request them.

Section 202.9 Notifications

9(h) Duties of Third Parties

Under § 202.9(g), when an application for credit is submitted through a third party to more than one creditor and no credit is offered (or the applicant does not expressly accept or use any credit offered) each creditor taking adverse action must provide the notice required by § 202.9(a), but may do so through a third party. Third parties may use electronic communication to provide required disclosures, provided the requirements of § 202.17 are satisfied. This guidance is provided in new § 202.9(h).

Section 202.17 Requirements for Electronic Communication

17(a) Definition

As adopted, the definition of the term "electronic communication" remains substantially unchanged from the 1999 proposals. Section 202.17(a) limits the term to a message transmitted electronically that can be displayed on equipment as visual text; an example is a message displayed on a personal computer monitor screen. Thus, audio- and voice-response telephone systems are not included. Creditors that accommodate vision-impaired applicants by providing disclosures that do not use visual text must also provide disclosures using visual text.

Some commenters asked for clarification that the definition was not intended to preclude the use of devices other than personal computers, which also can display visual text. The equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the "clear and conspicuous" format requirement, discussed below.

17(b) General Rule

Effective October 1, 2000, the E-Sign Act permits creditors to provide disclosures using electronic communication, if the creditor complies with the consumer consent requirements in section 101(c). Under section 101(c) of the E-Sign Act, creditors must provide specific information about the electronic delivery of disclosures before obtaining

the consumer's affirmative consent to receive electronic disclosures. The consent requirements in the E-Sign Act are similar but not identical to the Board's 1999 proposal. Section 202.17(b) sets forth the general rule that creditors subject to Regulation B may provide disclosures electronically if the creditor complies with section 101(c) of the E-Sign Act. Pursuant to the Board's authority under section 703(a) of the ECOA, § 202.17(b) applies to consumer and business credit applicants.

The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under the ECOA other than a requirement that disclosures be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing and retainability rules and the clear and conspicuous standard. Comment 17(b)-1 contains this guidance.

Presenting Disclosures in a Clear and Conspicuous Format

The interim final rule imposes a new clear and conspicuous standard for electronic disclosures under Regulation B. See § 202.17(b). (As part of a comprehensive review of Regulation B, the Board proposed in August 1999 to apply the standard to all disclosures required to be in writing (64 FR 44581, August 16, 1999).) Commenters generally supported the standard; most believed a consistent standard should apply to all of the regulations.

A creditor must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act: (1) The creditor must disclose the requirements for accessing and retaining disclosures in that format; (2) the applicant must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and (3) the applicant must provide the disclosures in accordance with the specified requirements. Comment 17(b)-2 contains this guidance.

Commenters posed a few questions about the applicability of the clear and conspicuous standard to particular situations. Some asked whether electronic advertisements or other unrelated promotional information may appear on the same screen as mandatory disclosures that are posted on an Internet web site. Except to the extent required by the regulation, disclosures do not have to be provided separately from other information. Advertisements should not be integrated into the text of the disclosure in a manner that violates the clear and conspicuous standard.

Commenters also had questions about the use of navigational tools with electronic disclosures. For example, some believed that such tools might be helpful in directing consumers to related information that explains the terminology used in the disclosures. Many Internet web sites use navigational tools that are conspicuous through the use of bold text, larger fonts, different colors, underlining, or other methods of highlighting. Such tools are not per se prohibited so long as they are not used in a manner that would violate the clear and conspicuous standard.

Providing Timely Disclosures

Disclosures delivered electronically must comply with existing timing requirements under the ECOA and Regulation B. See, for example, §§ 202.5a, 202.9, and 202.13. Commenters on the Board's 1999 proposals requested specific guidance that an electronic disclosure would be considered timely based on the time it is sent by e-mail or posted on an Internet web site, regardless of when the consumer receives or reads the disclosure.

Under the interim final rule, consistent with rules for disclosures that are sent by postal mail, disclosures provided by e-mail are timely when they are sent by the required time. Disclosures posted at an Internet web site are timely if, by the required time, the creditor both makes the disclosures available at that location and, in accordance with § 202.17(d)(2), sends a notice alerting the applicant that the disclosures have been posted. For example, under § 202.9, a creditor must provide a notice of action taken within 30 days of receiving a completed application. For an adverse action notice posted on the Internet, a creditor must both post the notice and notify the applicant of its availability within 30 days of receiving the completed application. Comment 17(b)-3(ii) contains this guidance.

Certain disclosures must be provided at the time of application. For example, if the creditor's procedures permit the applicant to apply for a mortgage loan on-line, the applicant must be required to access the disclosures required under § 202.13 before submitting the application. A link to the disclosures satisfies the timing rule if the applicant cannot bypass the disclosures before submitting the application. Or, the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Comment 17(b)-3 contains this guidance, as proposed, but has been expanded.

The on-line mortgage loan example was used in the supplementary information of the September 1999 proposed rule to illustrate the timing requirements. Some commenters expressed concern that the example required creditors to provide in writing—on the application—the information required by § 202.13. These commenters asked the Board to clarify that the information required by § 202.13(a) may be requested separately after the creditor begins processing the application.

Regulation B currently requires a creditor that receives an application for a mortgage loan, where the credit will be secured by the dwelling, to request "as part of the application" certain applicant characteristic information. See § 202.13(a). The official staff commentary further provides that a creditor may collect the § 202.13(a) information on the application form itself or on a separate form that refers to the application. See comment 13(b)-1. Thus, while § 202.13(a) requires creditors to collect the required information prior to submission of an application, a creditor need not request the information on the application itself. Accordingly, for a dwelling-secured mortgage loan taken over the Internet, the creditor need not include the request on the actual application. A link to the disclosure satisfies the rule if the applicant cannot bypass the disclosure before submitting the application. Or, the information must automatically appear on the screen. In addition, while the disclosure required by § 202.13(c) may be provided orally or in writing, for a mortgage loan taken over the Internet the disclosure would have to appear on the screen—although not on the application form itself—or be accessed before the application is submitted to the creditor.

Some commenters asked the Board to clarify whether there is a requirement to request monitoring information for mortgage loan applications taken over the Internet. The Regulation B commentary currently provides that for purposes of the requirements of § 202.13(a), a creditor may treat an application taken through an electronic medium without video capability as a telephone or mail application. Where applications are taken by telephone, a creditor is not required to request applicant characteristic information; where taken by mail, the information must be requested, but the creditor is not required to make a special request if the applicant did not provide the information. See comment 13(b)-3(i)(A), (B). (Creditors should note, however, that in the August 1999 review of

Regulation B, the Board proposed to require creditors to treat applications taken through an electronic medium without video capability as taken by mail (64 FR 44581).)

Some industry commenters believed that requiring disclosures to automatically appear or be accessed by the applicant is cumbersome and unnecessary. Some commenters suggested that the Board allow the required disclosures to be accessible via a clearly marked navigational tool; they believe that once the tool is provided, the disclosure should be deemed to have been provided to the applicant.

The ECOA and Regulation B require that disclosures be provided to applicants. It is not sufficient for creditors to provide a bypassable navigational tool that merely gives applicants the option of receiving the disclosures. Such an approach reduces the likelihood that applicants will notice and receive the disclosures. The interim final rule ensures that applicants actually see disclosures provided electronically so that they have the opportunity to read the disclosures in a timely fashion.

Commenters on the various proposals requested guidance regarding the creditor's duty in cases where a creditor cannot provide timely disclosures because an automated loan machine or other automated equipment controlled by the creditor malfunctions or otherwise fails to operate properly. Where the creditor controls the equipment and disclosures are required at that time, a creditor might not be liable for failing to provide timely disclosures if the defense in § 202.14(c) of Regulation B is available.

Providing Disclosures in a Form the Consumer May Keep

With one exception (§ 202.9(a)(3)(i)(B), regarding business credit), retainability is a new standard for disclosures under Regulation B. (In August 1999, the Board requested comment on whether a retainability standard should apply to all disclosures and information required by Regulation B to be in writing (64 FR 44581).) Electronic disclosures required to be in writing are subject to this requirement. Comment 17(b)-4 contains guidance on this requirement.

Applicants may communicate electronically with creditors through a variety of means and from various locations. Depending on the location (at home, at work, in a public place such as a library), an applicant may not have the ability at a given time to preserve ECOA disclosures presented on-screen. To ensure that applicants have an

adequate opportunity to access and retain the disclosures, the creditor also must send them to the applicant's designated e-mail address or make them available at another location, for example, on the creditor's Internet web site, where the information may be retrieved at a later date.

Where the creditor controls the equipment providing the electronic disclosures (for example, an automated loan machine or computer terminal located in the creditor's lobby), the creditor must ensure that the applicant has the opportunity to retain the required information. Comment 17(b)–5 contains guidance on this requirement.

17(c) When Consent Is Required

Under the E-Sign Act, consumers must affirmatively consent before they receive electronic disclosures "relating to a transaction" if the disclosures are required by law or regulation to be in writing. Under Regulation B, the consent requirement has been expanded to include both consumer and business applicants. Some disclosures required to be in writing may be included on or with an application provided to applicants for certain credit regardless of whether the applicant applies for the loan (§§ 202.5a(a)(2)(i) (notice of right to copy of appraisal), 202.9(a)(3)(i)(B) (notice of right to a statement of reasons), and 202.13(a) (request for monitoring information)). Section 202.17(c) is added to make clear that an applicant's affirmative consent is not required before creditors use electronic communication to provide these disclosures on or with an application.

17(d) Address or Location To Receive Electronic Communication

Consistent with the 1999 proposals, the interim rule provides that creditors may deliver electronic disclosures by sending them to an applicant's e-mail address. Alternatively, the rule provides that creditors may make the disclosures available at another location such as an Internet web site. If the creditor makes a disclosure available at such a location, the creditor effectively delivers the disclosure by sending a notice alerting the applicant when the disclosure can be accessed and making the disclosure available for at least 90 days. The time period for keeping disclosures available at a location such as a creditor's Internet web site under the interim rule differs from the 1999 proposals, based on commenters' concerns as discussed below.

17(d)(1)

For purposes of § 202.17(d), an applicant's electronic address is an e-

mail address that is not limited to receiving communication transmitted solely by the creditor, as proposed. This guidance is contained in comment 17(d)(1)–1.

An electronic address would not include systems that permit communication only between the consumer and the creditor, for example, home-banking programs that allow consumers to communicate directly with a creditor on-line with the use of a computer and modem. Thus, disclosures provided using systems such as home-banking programs are treated in the same manner as disclosures made available at an Internet web site, and a notice alerting the applicant when disclosures are posted must be sent by e-mail, or to a postal address, at the creditor's option.

17(d)(2)

Under § 202.17(d)(2)(i) of the interim rule, for disclosures made available at an Internet web site, a notice alerting the applicant when disclosures are posted must be sent by e-mail (or to a postal address, at the creditor's option). Section 202.17(d)(2)(i) requires that the alert notice identify the account involved and the address or other location where the disclosure is available. Comment 17(d)(2)–1 provides guidance on the level of detail required in identifying the account.

As proposed, under § 202.17(d)(2)(ii) of the interim rule, disclosures provided at an Internet web site must remain available for at least 90 days. The requirement seeks to ensure that applicants have adequate time to access and retain a disclosure under a variety of circumstances, such as when an applicant may not be able for an extended period of time to access the information due to computer malfunctions, travel, or illness. The 90-day period is uniform for all disclosures, for ease of compliance. Comment 17(d)(2)–2 is added to provide that during this period, the actual disclosures must be available to the applicant, but the creditor has discretion to determine whether they should be available at the same location for the entire period.

Some industry commenters believed the 90-day time period is reasonable and feasible. About an equal number of commenters believed it was too burdensome and costly; some of these commenters suggested periods that ranged from 30 to 60 days.

The Regulation B proposal provided that after the 90-day time period, disclosures would be available upon applicants' request, for 25 months, in the same format as initially provided to

the applicant. The 25-month period is consistent with a creditor's duty to retain records that evidence their compliance. Consumer advocates supported the proposed retention period; some recommended that disclosures should be available upon request for the length of the contractual relationship with the applicant.

Industry commenters strongly opposed the 25-month period. Many believed that keeping copies of electronic disclosures actually provided to applicants for that period of time would be costly and burdensome. Moreover, industry commenters believed that once an applicant has accessed the disclosures, the applicant rather than the creditor should have the duty to retain them for future reference. They also noted that under existing record retention requirements applicable to paper disclosures, a creditor need only demonstrate compliance with the rules, but need not retain copies of the actual disclosures provided to applicants.

The requirement for creditors to provide duplicate disclosures upon request for 25 months has not been adopted. A creditor's duty to retain evidence of compliance for 25 months remains unchanged.

17(d)(3) Exceptions

Section 202.17(d)(3) is added to make clear that the requirements of paragraphs (i) and (ii) of § 202.17(d)(2) do not apply to the disclosure required under § 202.13(a).

17(e) Redelivery

Industry commenters on the 1998 proposal asked for clarification that sending the electronic disclosures complies with the regulation, and that institutions are not required to confirm that the consumer actually received them. Consumer advocates asked that institutions be required to verify the delivery of disclosures by return receipt, in the case of e-mail. In the 1999 proposals, the Board solicited comment on the need for and the feasibility of such a requirement.

Consumer advocates believe that e-mail systems are not yet sufficiently reliable, and that safeguards are necessary to ensure that consumers actually receive disclosures. Industry commenters stated that a return receipt requirement would be costly and burdensome, and would require creditors to monitor return receipts in every case to determine that individual consumers received the disclosures.

Section 101(c) of the E-Sign Act requires that consumers consent electronically, or confirm their consent

electronically, in a manner that reasonably demonstrates that the consumer can access the information that the creditor will be providing. This requirement seeks to verify at the outset that the consumer is actually capable of receiving the information in the electronic format being used by the creditor. After the consumer consents, the E-Sign Act also requires creditors to notify consumers of changes that materially affect consumers' ability to access electronic disclosures.

The interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of disclosures would not be warranted. When electronic disclosures are returned undelivered, however, § 202.17(e) imposes a duty to attempt redelivery (either electronically or to a postal address) based on address information in the creditor's own files. Unlike paper disclosures delivered by postal service, there generally is no commonly-accepted mechanism for reporting a change in electronic address or for forwarding e-mail. Where a creditor actually knows that the delivery of an electronic disclosure did not take place, the creditor should take reasonable steps to effectuate delivery in some way. For example, if an e-mail message to the applicant (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if the creditor sends the disclosure to a different e-mail address or postal address that the creditor has on file. Sending the disclosures a second time to the same electronic address would not be sufficient if the creditor has a different address for the applicant on file. Comment 17(e)-1 provides this guidance.

This redelivery requirement is limited to situations where the electronic communication cannot be delivered and does not apply to situations where the disclosure is delivered but, for example, cannot be read by the applicant due to technical problems with the applicant's software. A creditor's duty to redeliver a disclosure under § 202.17(e) does not affect the timeliness of the disclosure. Creditors comply with the timing requirements of the regulation when a disclosure is initially sent in a timely manner, even though the disclosure is returned undelivered and the creditor is required under § 202.17(e) to take reasonable steps to attempt redelivery.

17(f) Electronic Signatures

The E-Sign Act provides that electronic signatures have the same validity as handwritten signatures. Section 106 of the act defines an

electronic signature. Section 202.17(f) is added to incorporate the E-Sign Act's definition of electronic signature into the regulation. To comply with the E-Sign Act, an electronic signature must be executed or adopted by an applicant with the intent to sign the record. Accordingly, regardless of the technology used to meet this requirement, the process must evidence the applicant's identity. Comment 17(f)-1 provides this guidance.

Additional Issues

Document Integrity

The interim rule does not impose document integrity standards. Consumer advocates and others expressed concerns that electronic documents can be altered more easily than paper documents. They say that consumers' ability to enforce rights under the consumer protection laws could be impaired, in some cases, if the authenticity of disclosures they retain cannot be demonstrated.

Institutions are generally required to retain evidence of compliance with the Board's consumer regulations. Accordingly, the Board requested comment on the feasibility of requiring institutions to have systems in place capable of detecting whether or not information has been altered, or to use independent certification authorities to verify disclosure documents.

Consumer advocates strongly supported document integrity requirements (including the use of certification authorities) that would apply to all-electronic disclosures. Signatures, notary seals, and verification procedures such as recordation are used to protect against alterations for transactions memorialized in paper form. Consumer advocates believe that comparable verification procedures are needed for electronic disclosures as well.

Industry commenters opposed mandatory document integrity standards for electronic disclosures. Because the technology in this area is still evolving, they believe that mandatory standards would be premature. Others believe that imposing document integrity standards or requiring the use of certification authorities would be costly to implement.

The Board recognizes the concerns about document integrity, but believes it is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Effective methods may be too costly. Other less costly methods

may deter alterations in some cases, but would not necessarily ensure document integrity.

Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the consumer protection laws administered by the Board. Section 104(b)(3) of the E-Sign Act authorizes federal or state regulatory agencies to specify performance standards to assure the accuracy, record integrity, and accessibility of records that are required to be retained, but prohibits the agencies from requiring the use of a particular type of software or hardware in order to comply with record retention requirements. Technology is likely to develop to protect electronic contracts and other legal documents. Thus, it seems premature for the Board to specify any particular standards or methods for consumer disclosure at this time.

V. Form of Comment Letters

Comment letters should refer to Docket No. R-1040, and, when possible, should use a standard typeface with a font size of 10 or 12. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch computer diskettes in any IBM-compatible DOS- or Windows-based format.

VI. Regulatory Flexibility Analysis

The Board has reviewed these interim amendments to Regulation B, in accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 604). Two of the three requirements of a final regulatory flexibility analysis under the Act are (1) a succinct statement of the need for and the objectives of the rule and (2) a summary of the issues raised by the public comments, the agency's assessment of those issues, and a statement of the changes made in the final rule in response to the comments. These two areas are discussed above.

The third requirement of the analysis is a description of significant alternatives to the rule that would minimize the rule's economic impact on small entities and reasons why the alternatives were rejected. This interim final rule is designed to provide creditors with an alternative method of providing disclosures; the rule will relieve compliance burden by giving creditors flexibility in providing disclosures required by the regulation.

Overall, the costs of providing electronic disclosures are not expected to have significant impact on small entities. The expectation is that providing electronic disclosures may ultimately reduce the costs associated with providing disclosures.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0201.

The collection of information that is revised by this rulemaking is found in 12 CFR Part 202. This information is mandatory (15 U.S.C. 1691 *et seq.*) to evidence compliance with the requirements of Regulation B and the Equal Credit Opportunity Act (ECOA). The respondents/recordkeepers are creditors. Creditors are required to retain records for twenty-five months (12 months for business credit). This regulation applies to all types of creditors, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The revisions provide that creditors may deliver disclosures electronically upon obtaining applicants' affirmative consent in accordance with the E-Sign Act. The revisions also provide guidance to creditors on the timing and delivery of electronic disclosures, to ensure that applicants have adequate opportunity to access and retain the information.

With respect to state member banks, it is estimated that there are 1000 respondent/recordkeepers and an average frequency of 4,767 responses per respondent each year. The current annual burden is estimated to be 125,678 hours. No comments specifically addressing the burden estimate were received, therefore, the numbers remain unchanged. There is estimated to be no additional cost burden and no capital or start up cost associated with the interim final rule.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of

confidentiality arises under the Freedom of Information Act.

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503.

VIII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comment on whether the interim rule is clearly stated and effectively organized, and how the Board might make the rule easier to understand.

List of Subjects in 12 CFR Part 202

Aged, Banks, banking, Civil rights, Credit, Federal Reserve System, Marital status discrimination, Penalties, Religious discrimination, Reporting and recordkeeping requirements, Sex discrimination.

For the reasons set forth in the preamble, the Board amends Regulation B, 12 CFR part 202, as set forth below:

PART 202—EQUAL CREDIT OPPORTUNITY (REGULATION B)

1. The authority citation for part 202 continues to read as follows:

Authority: 15 U.S.C. 1691-1691f.

2. Section 202.4 is revised as follows:

§ 202.4 General rules.

(a) *Rule prohibiting discrimination.* A creditor shall not discriminate against an applicant on a prohibited basis regarding any aspect of a credit transaction.

(b) *Foreign language disclosures.* Disclosures may be made in languages other than English, provided they are available in English upon request.

3. Section 202.9 is amended by adding a new paragraph (h) to read as follows:

§ 202.9 Notifications.

* * * * *

(h) *Duties of third parties.* A third party may use electronic communication in accordance with the requirements of § 202.17, as applicable,

to comply with the requirements of paragraph (g) of this section on behalf of a creditor.

§ 202.16 [Added and reserved]

4. Add and reserve § 202.16.
5. Add a new § 202.17 to read as follows:

§ 202.17 Requirements for electronic communication.

(a) *Definition.* *Electronic communication* means a message transmitted electronically between a creditor and an applicant in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) *General rule.* In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 *et seq.*) and the rules of this part, a creditor may provide by electronic communication any disclosure required by this part to be in writing. Disclosures provided by electronic communication must be provided in a clear and conspicuous manner and in a form the applicant may retain.

(c) *When consent is required.* For disclosures required by this part to be in writing, a creditor shall obtain an applicant's affirmative consent in accordance with the requirements of the E-Sign Act. Disclosures under §§ 202.5a(a)(2)(i), 202.9(a)(3)(i)(B), and 202.13(a) are not subject to this requirement if provided on or with the application.

(d) *Address or location to receive electronic communication.* A creditor that uses electronic communication to provide disclosures required by this part shall:

(1) Send the disclosure to the applicant's electronic address; or
(2) Make the disclosure available at another location such as an Internet web site; and

(i) Alert the applicant of the disclosure's availability by sending a notice to the applicant's electronic address (or to a postal address, at the creditor's option). The notice shall identify the account involved and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the applicant of the disclosure, whichever comes later.

(3) *Exceptions.* A creditor need not comply with paragraph (d)(2)(i) and (ii) of this section for the disclosure required by § 202.13(a).

(e) *Redelivery*. When a disclosure provided by electronic communication is returned to a creditor undelivered, the creditor shall take reasonable steps to attempt redelivery using information in its files.

(f) *Electronic signatures*. An electronic signature as defined under the E-Sign Act satisfies any requirement under this part for an applicant's signature or initials.

6. In Supplement I to Part 202, a new *Section 202.16* is added and reserved and a new *Section 202.17* is added to read as follows:

* * * * *

Supplement I to Part 202—Official Staff Interpretations

* * * * *

Section 202.16—[Reserved]

Section 202.17—Electronic Communication

(b) General Rule

1. *Relationship to the E-Sign Act*. The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a provision that requires disclosures to be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and conspicuous standard. For example, to satisfy the clear and conspicuous standard for disclosures, electronic disclosures must use visual text. The clear and conspicuous and retainability requirements apply to all disclosures provided electronically—those expressly required by the act and regulation to be in writing, and those provided in writing where the creditor has the option to give the disclosure orally or in writing.

2. *Clear and conspicuous standard*. A creditor must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act:

- i. The creditor must disclose the requirements for accessing and retaining disclosures in that format;
- ii. The applicant must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and
- iii. The creditor must provide the disclosures in accordance with the specified requirements.

3. *Timing and effective delivery*.

i. *When an applicant applies for credit on-line*. When a creditor permits an applicant to apply for credit on-line, the applicant must be required to access the disclosures required at application before submitting the application. A link to the disclosures satisfies the timing rule if the applicant cannot bypass the disclosures before submitting the application. Or the disclosures must automatically appear on the screen, even if multiple screens are required to view all of the information. The creditor is not required to confirm that the applicant has read the disclosures.

ii. *Appraisals and adverse action*.

Disclosures provided by e-mail are timely based on when the disclosures are sent. Disclosures posted at an Internet web site, such as adverse action notices or copies of appraisals, are timely when the creditor has both made the disclosures available and sent a notice alerting the applicant that the disclosures have been posted. For example, under § 202.9, a creditor must provide a notice of action taken within 30 days of receiving a completed application. For an adverse action notice posted on the Internet, a creditor must post the notice and notify the applicant of its availability within 30 days of receiving the applicant's completed application.

4. *Retainability of disclosures*. Creditors satisfy the requirement that disclosures be in a form that the applicant may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be consistent with the information required to be provided under section 101(c)(1)(C)(i) of the E-Sign Act (15 U.S.C. 7001(c)(1)(C)(i)) about the hardware and software requirements for accessing and retaining electronic disclosures.

5. *Disclosures provided on creditor's equipment*. A creditor that controls the equipment providing electronic disclosures to applicants (for example, a computer terminal in a creditor's lobby or an automated loan machine at a public kiosk) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the applicant may keep. For example, if disclosures are required at the time of an on-line application, the disclosures must be sent to the applicant's e-mail address or must be made available at another location such as the creditor's Internet web site, unless the creditor provides a printer that automatically prints the disclosures.

17(d) Address or Location To Receive Electronic Communication

Paragraph 17(d)(1)

1. *Electronic address*. An applicant's electronic address is an e-mail address that is not limited to receiving communication transmitted solely by the creditor.

Paragraph 17(d)(2)

1. *Identifying account involved*. A creditor may identify a specific account in a variety of ways and is not required to identify an account by reference to the account number. For example, where the applicant has only one credit card account, and no confusion would result, the creditor may refer to "your credit card account." If the applicant has two credit card accounts, the creditor may, for example, differentiate accounts based on the card program or by using a truncated account number.

2. *90-day rule*. The actual disclosures provided to an applicant must be available for at least 90 days, but the creditor has discretion to determine whether they should be available at the same location for the entire period.

17(e) Redelivery

1. *E-mail returned as undeliverable*. If an e-mail to the applicant (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the creditor sends the disclosure to a different e-mail address or postal address that the creditor has on file for the applicant. Sending the disclosures a second time to the same electronic address is not sufficient if the creditor has a different address for the applicant on file.

17(f) Electronic Signatures

1. *Relationship to the E-Sign Act*. The E-Sign Act provides that electronic signatures have the same validity as handwritten signatures. Section 106 of the E-Sign Act (15 U.S.C. 7006) defines an electronic signature. To comply with the E-Sign Act, an electronic signature must be executed or adopted by an applicant with the intent to sign the record. Accordingly, regardless of the technology used to meet this requirement, the process must evidence the applicant's identity.

By order of the Board of Governors of the Federal Reserve System, March 29, 2001.

Robert deV. Frierson,

Associate Secretary of the Board.

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FEDERAL RESERVE SYSTEM

12 CFR Part 205

[Regulation E; Docket No. R-1041]

Electronic Fund Transfers

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim Rule; request for comments.

SUMMARY: The Board is adopting an interim final rule amending Regulation E, which implements the Electronic Fund Transfer Act, to establish uniform standards for the electronic delivery of disclosures required by the act and regulation. The rule provides guidance on the timing and delivery of electronic disclosures to ensure consumers have adequate opportunity to access and retain information when shopping for electronic fund transfer services. (Similar rules are being adopted under other consumer financial services and fair lending regulations administered by the Board.) Under the rule, financial institutions may deliver disclosures electronically if they obtain consumers' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act. Consistent with that act, an interim rule issued previously, regarding the electronic delivery of disclosures upon consumers' agreement, is withdrawn. In addition, the regulation is revised to allow

financial institutions to provide disclosures in foreign languages, and to make technical changes to the model error resolution notices. The rule is being adopted as an interim rule to allow for additional public comment.

DATES: This rule is effective March 30, 2001; however, to allow time for any necessary operational changes, the mandatory compliance date is October 1, 2001. Comments must be received by June 1, 2001.

ADDRESSES: Comments, which should refer to Docket No. R-1041, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, and to the security control room at all other times. The mail room and the security control room, both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments may be inspected in room MP-500 in the Board's Martin Building between 9:00 a.m. and 5:00 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.

FOR FURTHER INFORMATION CONTACT: John C. Wood, Counsel, or Natalie E. Taylor, Counsel, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667.

SUPPLEMENTARY INFORMATION:

I. Background

The Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.*, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems. The Board's Regulation E (12 CFR part 205) implements the act. Types of transfers covered by the act and regulation include transfers initiated through an automated teller machine (ATM), point-of-sale terminal, automated clearinghouse, telephone bill-payment plan, or remote banking program. The act and regulation require disclosure of terms and conditions of an EFT service; documentation of EFTs by means of terminal receipts and periodic account statements; limitations on consumer liability for unauthorized transfers; procedures for error resolution; and certain rights related to preauthorized EFTs.

EFTA and Regulation E require a number of disclosures to be provided in

writing, presuming that financial institutions provide paper documents. Under the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 *et seq.*), however, electronic documents and signatures have the same validity as paper documents and handwritten signatures.

Board Proposals Regarding Electronic Disclosures

Over the past few years, the Board has published several interim rules and proposals regarding the electronic delivery of disclosures. In 1996, after a comprehensive review of Regulation E (Electronic Fund Transfers), the Board proposed to amend the regulation to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696, May 2, 1996). Based on comments received on the 1996 proposal, on March 25, 1998, the Board published an interim rule under Regulation E permitting the electronic delivery of disclosures (63 FR 14528) and similar proposals under Regulation Z (63 FR 14548) and other financial services and fair lending regulations administered by the Board. The 1998 interim rule and proposed rules were similar to the 1996 proposed rule under Regulation E.

The 1998 proposals and interim rule allowed depository institutions, financial institutions, creditors, lessors, and others to provide disclosures electronically if the consumer agrees, with few other requirements. (For ease of reference, this background section uses the terms "institutions" and "consumers.")

Industry commenters generally supported the Board's 1998 proposals and interim rule, but many of them sought specific revisions and additional guidance on how to comply with the disclosure requirements in certain transactions and circumstances. In particular, they expressed concern that the rule did not specify a uniform method for establishing that an "agreement" was reached for sending disclosures electronically. Consumer advocates, on the other hand, generally opposed the 1998 proposals and the interim rule. They believed that consumer protections in the proposals were inadequate, especially in connection with transactions that are typically consummated in person (such as automobile loans and leases, home-secured loans, and door-to-door credit sales).

September 1999 Proposals

In response to comments received on the 1998 proposals and interim rule, the

Board published revised regulatory proposals in September 1999 under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999) (collectively, the "1999 proposals"), and an interim rule under Regulation DD (64 FR 49846). The interim rule under Regulation DD allowed depository institutions to deliver disclosures on periodic statements electronically if the consumer agrees.

Generally, the 1999 proposals required institutions to use a standardized form containing specific information about the electronic delivery of disclosures so that consumers could make informed decisions about whether to receive disclosures electronically. If the consumer affirmatively consented, most disclosures could be provided electronically. To address concerns about potential abuses, the 1999 proposals generally would have required disclosures to be given in paper form when consumers transacted business in person. The proposals contained rules for disclosures that are made available to consumers at an institution's Internet web site (governing, for example, how long disclosures must remain posted at a web site).

Comments on the September 1999 proposals—The Board received letters representing 115 commenters expressing views on the revised proposals. Industry commenters generally supported the Board's approach of establishing federal rules for a uniform method of obtaining consumers' consent to the receipt of electronic disclosures instead of deferring to state law. Still, many sought specific additional guidance and in some cases wanted more flexibility. They were concerned about the length of time the proposals would have required electronic disclosures to remain available to a consumer at an institution's Internet web site or upon request. In addition, they believed the proposed rule requiring paper disclosures for in-person transactions was not sufficiently flexible. Consumer advocates believed the 1999 proposals addressed many of their concerns about the 1998 proposals. Nevertheless, they urged the Board to incorporate greater protections for consumers, such as restricting the delivery of electronic disclosures to only those consumers who initiate transactions electronically.

The Board also obtained views through four focus groups with individual consumers, conducted in the Washington-Baltimore metropolitan area. Participants reviewed and

commented on the format and content of the proposed sample consent forms, as well as on alternative revised forms.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed the E-Sign Act, which was enacted to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that electronic documents and signatures have the same validity as paper documents and handwritten signatures. The act contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in electronic form only if the consumer affirmatively consents after receiving certain information specified in the statute.

The Board and other government agencies are permitted to interpret the E-Sign Act's consumer consent requirements within prescribed limits, but may not impose additional requirements for consumer consent. In addition, agencies generally may not reimpose a requirement for using paper disclosures in particular transactions, such as those conducted in person.

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to use electronic disclosures under Regulations B, E, M, Z and DD if the consumer affirmatively consents in the manner required by section 101(c) of the E-Sign Act. Under section 101(c)(5) of the E-Sign Act, consumers who consented prior to the effective date of the act to receive electronic disclosures as permitted by any law or regulation are not subject to the consent requirements.

II. The Interim Rule

The Board is adopting an interim final rule to establish uniform standards for the electronic delivery of disclosures required under Regulation E. Consistent with the requirements of the E-Sign Act, financial institutions generally must obtain consumers' affirmative consent to provide disclosures electronically.

The interim rules also establish uniform requirements for the timing and delivery of electronic disclosures. Disclosures may be sent by e-mail to an electronic address designated by the consumer, or they may be made available at another location, such as an Internet web site. If the disclosures are not sent by e-mail, consumers must receive a notice alerting them to the availability of the disclosures.

Disclosures posted on a web site must be available for at least 90 days, to allow consumers adequate time to access and retain the information. With regard to the timing of electronic disclosures, for disclosures that must be provided at the time the consumer contracts for an electronic fund transfer service (or before the first transfer), consumers are required to access the disclosures before contracting or making the first transfer. Under the interim rule, institutions must make a good faith attempt to redeliver electronic disclosures that are returned undelivered, using the address information available in their files. Similar rules are being adopted under Regulations B, M, Z, and DD.

III. Request for Comment

Interim Rules

The interim rules include most of the revisions that were part of the 1999 proposals and were not affected by the E-Sign Act. The Board is adopting these rules with some minor changes discussed below. The rules are adopted as interim rules, to allow commenters to present new information or views not previously considered in the context of the 1998 and 1999 proposals. Since the Board's 1999 proposals were issued, more institutions have gained experience in offering financial services electronically. The Board believes that additional comments, beyond those previously considered in connection with the Board's earlier proposals, might inform the Board whether any developments in technology or industry practices have occurred that warrant further changes in the rules. The comment period ends on June 1, 2001. The Board expects to adopt final rules on a permanent basis prior to October 1, 2001.

Interpreting E-Sign Provisions

Under section 104(b) of the E-Sign Act, the Board and other government agencies are permitted to interpret the act, within prescribed limits. The Board may issue rules that interpret how the E-Sign Act's consumer consent requirements apply for purposes of the laws administered by the Board. Also, the Board may, by regulation, exempt a particular category of disclosures from the E-Sign Act's consumer consent requirements if it will eliminate a substantial burden on electronic commerce without creating material risk for consumers.

The Board requests comment on whether the Board should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provisions or other provisions

of the act, as they affect the Board's consumer protection regulations. Comment is requested on whether the statutory provisions relating to consumer consent are sufficient, or whether additional guidance is needed. For example, is interpretative guidance needed concerning the statutory requirement that consumers confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the financial institution? Is clarification needed on the effect of consumers' withdrawing their consent, or on requesting paper copies of electronic disclosures? Institutions must also inform consumers of changes in hardware or software requirements if the change creates a material risk that the consumer will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk" for purposes of Regulation E and other financial services and fair lending laws administered by the Board, and if so what standards should apply.

Under section 104(d) of the E-Sign Act, the Board is authorized to exempt specific disclosures from the consumer consent requirements of section 101(c) of the E-Sign Act, if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. The Board requests comment on whether it should consider exercising this exemption authority.

Study on Adapting Requirements to Online Banking and Lending

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures. The Board requests comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

As an example, under Regulations E, Z, and DD, periodic statements inform consumers about their account activity over a period of time, typically monthly. The beginning and ending dates of the cycle determine account balances and other information that must be disclosed. In addition, transmittal of the periodic statement triggers important consumer protections such as error resolution procedures. Online banking, however, can provide consumers with up-to-date information about their accounts on a continuing basis. Such information is a helpful supplement to—but does not comply as a substitute for—periodic statements. Should the

rules for periodic statements be modified for online banking, and if so, how could the rules be crafted to maintain for consumers (1) a perspective of the activity of an account over time, and (2) protections for resolving errors or liability for unauthorized transactions?

The comments may assist the Board in future efforts to update the regulations. The comments may also be used in connection with a study required under the Gramm-Leach-Bliley Act of 1999. That act requires the federal bank supervisory agencies to conduct a study of banking regulations that affect the electronic delivery of financial services and to submit to the Congress a report recommending any legislative changes that are needed to facilitate online banking and lending.

IV. Section-by-Section Analysis

Pursuant to its authority under section 904 of the EFTA, the Board amends Regulation E to establish uniform standards for the use of electronic communication to provide disclosures required by this regulation. Electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. To the extent that a financial institution may make electronic disclosures available at its Internet web site instead of providing the disclosures directly to the consumer, the Board finds that such an exception is warranted, acting pursuant to its authority under section 904(c) of the EFTA. Below is a section-by-section analysis of the rules for providing disclosures by electronic communication, including references to changes in the official staff commentary.

Section 205.4 General Disclosure Requirements; Jointly Offered Services

4(a) Form of Disclosures

4(a)(2) Foreign Language Disclosures

To provide consistency among the regulations, the guidance currently contained in comment 4(a)-2, permitting financial institutions to provide disclosures in languages other than English (as long as disclosures in English are available to consumers who request them) is set forth in new § 205.4(a)(2).

4(c) Electronic Communication

Section 205.4(c) was adopted by the Board in March 1998 as an interim rule allowing the electronic delivery of disclosures required under Regulation E, if the consumer agrees. The 1998 interim rule did not specify the manner

or form of consumers' consent to electronic statements.

Effective October 1, 2000, the E-Sign Act permits institutions to provide disclosures to consumers using electronic communication, if the institution complies with Section 101(c) of that act. Section 101(c) of the E-Sign Act requires institutions to provide specific information about the electronic delivery of disclosures and obtain the consumer's affirmative consent to receive electronic disclosures. As discussed below, § 205.17 is being adopted to set forth the general rule that institutions subject to Regulation E may provide disclosures electronically only if the institution complies with Section 101(c) of the E-Sign Act. The 1998 interim rule is withdrawn accordingly, and § 205.4(c) is amended to provide a cross reference to new § 205.17, to ease compliance.

Section 205.17 Requirements for Electronic Communication

17(a) Definition

As adopted, the definition of the term "electronic communication" remains substantially unchanged from the 1999 proposals. Section 205.17(a) limits the term to a message transmitted electronically that can be displayed on equipment as visual text; an example is a message displayed on a personal computer monitor screen. Thus, audio- and voice-response telephone systems are not included. Because the rule permits the use of electronic communication to satisfy the statutory requirement for written disclosures that must be clear and readily understandable, the Board believes visual text is an essential element of the definition. Institutions that accommodate vision-impaired consumers by providing disclosures that do not use visual text must also provide disclosures using visual text.

Some commenters asked for clarification that the definition was not intended to preclude the use of devices other than personal computers, which also can display visual text. The equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the "clear and readily understandable" format requirement, discussed below.

17(b) General Rule

Effective October 1, 2000, the E-Sign Act permits financial institutions to provide disclosures using electronic communication, if the financial institution complies with the consumer consent requirements in Section 101(c).

Under section 101(c) of the E-Sign Act, financial institutions must provide specific information about the electronic delivery of disclosures before obtaining the consumer's affirmative consent to receive electronic disclosures. The consent requirements in the E-Sign Act are similar but not identical to the Board's 1999 proposal. Accordingly, § 205.17(b) sets forth the general rule that financial institutions subject to Regulation E may provide disclosures electronically if the financial institution complies with section 101(c) of the E-Sign Act.

The E-Sign Act authorizes the use of electronic disclosures. The act does not affect any requirement imposed under EFTA other than a provision that requires disclosures to be in paper form, and the act does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing and retainability rules and the clear and readily understandable standard. Comment 17(b)-1 contains this guidance.

Presenting Disclosures in a Clear and Readily Understandable Format

Electronic disclosures must be clear and readily understandable, as is the case for all written disclosures under EFTA and Regulation E. See § 205.4(a). A financial institution must provide electronic disclosures using a clear and readily understandable format. Also, in accordance with the E-Sign Act: (1) The institution must disclose the requirements for accessing and retaining disclosures in that format; (2) the consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and (3) the institution must provide the disclosures in accordance with the specified requirements. Comment 17(b)-2 contains this guidance.

Commenters posed a few questions about the applicability of the clear and readily understandable standard to particular situations. Some asked whether electronic advertisements or other unrelated promotional information may appear on the same screen as mandatory disclosures that are posted on an Internet web site. Except to the extent required by the regulation, disclosures do not have to be provided separately from other information. Advertisements should not be integrated into the text of the disclosure in a manner that violates the clear and readily understandable standard.

Commenters also had questions about the use of navigational tools with electronic disclosures. For example,

some believed that such tools might be helpful in directing consumers to related information that explains the terminology used in the disclosures. Many Internet web sites use navigational tools that are conspicuous through the use of bold text, larger fonts, different colors, underlining, or other methods of highlighting. Such tools are not per se prohibited so long as they are not used in a manner that would violate the clear and readily understandable standard.

Providing Timely Disclosures

Disclosures delivered electronically must comply with existing timing requirements under EFTA and Regulation E. See, for example, §§ 205.7(a), 205.8(a)(1), and 205.9(b). Commenters on the Board's 1999 proposals requested specific guidance that an electronic disclosure would be considered timely based on the time it is sent by e-mail or posted on an Internet web site, regardless of when the consumer receives or reads the disclosure.

Under the final rule, consistent with rules for disclosures that are sent by postal mail, disclosures provided by e-mail are timely when they are sent by the required time. Disclosures posted periodically at an Internet web site are timely if, by the required time, the financial institution both makes the disclosures available at that location and, in accordance with § 205.17(c)(2), sends a notice alerting the consumer that the disclosures have been posted. For example, under § 205.8(a), financial institutions offering accounts with EFT services must provide a change-in-terms notice at least 21 days in advance of certain changes. For a change-in-terms notice posted on the Internet, an institution must both post the notice and notify consumers of its availability at least 21 days in advance of the change. Comment 17(b)-4 contains this guidance.

Certain disclosures must be provided before the consumer contracts for an EFT service, or before the first electronic fund transfer. Because the disclosures are not required to be segregated and may be interspersed into the text of another document, the institution may satisfy the requirement to provide the disclosures if the document appears automatically or via a nonbypassable link. For example, when the financial institution permits the consumer to open an account on-line and initiate an EFT transaction immediately thereafter, the consumer must be required to access the disclosures (or the document containing the disclosures such as a checking account agreement) required

under § 205.7 before the first transaction. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before contracting or making the first transfer. Or, the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Comment 17(b)-3 contains this guidance.

Some industry commenters believed that requiring disclosures to automatically appear or be accessed by the consumer is cumbersome and unnecessary. Some commenters suggested that the Board allow the required disclosures to be accessible via a clearly marked navigational tool; they believe that once the tool is provided, the disclosure should be deemed to have been provided to the consumer.

EFTA and Regulation E require that financial institutions provide, send, or deliver disclosures to consumers. It is not sufficient for institutions to provide a bypassable navigational tool that merely gives consumers the option of receiving the disclosures. Such an approach reduces the likelihood that consumers will notice and receive the disclosures. The final rule ensures that consumers actually see disclosures provided electronically so that they have the opportunity to read them before entering into an agreement for EFT services.

Commenters requested guidance regarding the financial institution's duty in cases where an institution cannot provide timely disclosures because an electronic terminal or other automated equipment controlled by the institution malfunctions or otherwise fails to operate properly. Where the institution controls the equipment and disclosures are required at that time, an institution might not be liable for failing to provide timely disclosures if the defense in section 915(c) of EFTA is available.

Providing Disclosures in a Form the Consumer May Keep

Under EFTA and Regulation E, many of the disclosures required to be in writing must be in a form the consumer can retain. Electronic disclosures are subject to this requirement. Comment 17(b)-5 contains this guidance on this requirement.

Consumers may communicate electronically with financial institutions through a variety of means and from various locations. Depending on the location (at home, at work, in a public place such as a library), a consumer may not have the ability at a given time to preserve EFTA disclosures presented on-screen. To ensure that consumers have an adequate opportunity to access

and retain the disclosures, the financial institution also must send them to the consumer's designated e-mail address or make them available at another location, for example, on the financial institution's Internet web site, where the information may be retrieved at a later date.

Where the financial institution controls the equipment providing the electronic disclosures (for example, an automated teller machine or computer terminal located in the financial institution's lobby), the financial institution must ensure that the consumer has the opportunity to retain the required information. Comment 17(b)-6 contains guidance on this requirement.

17(c) Address or Location To Receive Electronic Communication

Consistent with the 1999 proposals, the interim rule provides that financial institutions may deliver electronic disclosures by sending them to a consumer's e-mail address. Alternatively, the rule provides that financial institutions may make the disclosures available at another location such as an Internet web site. If the financial institution makes a disclosure available at such a location, the financial institution effectively delivers the disclosure by sending a notice alerting the consumer when the disclosure can be accessed, and making the disclosure available for at least 90 days. The time period for keeping disclosures available at a location such as an institution's Internet web site under the interim rule differs from the 1999 proposals, based on commenters' concerns as discussed below.

17(c)(1)

For purposes of § 205.17(c), a consumer's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the financial institution, as proposed. This guidance is contained in comment 17(c)(1)-1. An electronic address would not include systems that permit communication only between the consumer and the financial institution, for example, home-banking programs that allow consumers to communicate directly with a financial institution on-line with the use of a computer and modem. These systems, like a financial institution's web site accessed via the Internet, give consumers access to information about their accounts at a location controlled by the institution. In both cases, the institution determines how long account information will be available to the consumer. Consumers who receive

disclosures at their e-mail address, however, may choose when to review, and for how long to retain, account information. Consumers who receive disclosures by contacting a financial institution's site need to be alerted when the information is first available in order to ensure that they have the opportunity to access the information before it is removed. Thus, disclosures provided using systems such as home-banking programs are treated in the same manner as disclosures made available at an Internet web site, and a notice alerting the consumer when disclosures are posted must be sent, by e-mail or to a postal address, at the financial institution's option.

17(c)(2)

Under § 205.17(c)(2)(i) of the interim rule, for disclosures made available at an Internet web site, a notice alerting the consumer when disclosures are posted must be sent by e-mail (or to a postal address, at the institution's option). Section 205.17(c)(2)(i) requires that the alert notice identify the account involved and the address or other location where the disclosure is available. Comment 17(c)(2)-1 provides guidance on the level of detail required in identifying the account.

As proposed, under § 205.17(c)(2)(ii) of the interim rule, disclosures provided at an Internet web site must remain available for at least 90 days. The requirement seeks to ensure that consumers have adequate time to access and retain a disclosure under a variety of circumstances, such as when a consumer may not be able for an extended period of time to access the information due to computer malfunctions, travel, or illness. Making the periodic statement disclosure available for 90 days also ensures that it will be available a sufficient time in most cases to allow alleged errors to be resolved under the procedures in Regulation E. The 90-day period is uniform for all disclosures, for ease of compliance. Comment 17(c)(2)-2 is added to provide that during this period, the actual disclosures must be available to the consumer, but the financial institution has discretion to determine whether they should be available at the same location for the entire period.

Some industry commenters believed the 90-day time period was reasonable and feasible. About an equal number of commenters believed it was too burdensome and costly; some of these commenters suggested periods that ranged from 30 to 60 days.

The 1999 proposals provided that after the 90-day time period, disclosures

would be available upon consumers' request, generally for 24 months, in the same format as initially provided to the consumer. The 24-month period is consistent with a financial institution's duty to retain records that evidence compliance. Consumer advocates supported the proposed retention period; some recommended that disclosures should be available upon request for the length of the contractual relationship with the consumer.

Industry commenters strongly opposed the 24-month period. Many believed that keeping copies of electronic disclosures actually provided to consumers for that period of time would be costly and burdensome. Moreover, industry commenters believed that once a consumer has accessed the disclosures, the consumer rather than the financial institution should have the duty to retain them for future reference. They also noted that under existing record retention requirements applicable to paper disclosures, a financial institution need only demonstrate compliance with the rules, but need not retain copies of the actual disclosures provided to consumers.

The requirement for financial institutions to provide duplicate disclosures upon request for 24 months has not been adopted. A financial institution's duty to retain evidence of compliance for 24 months remains unchanged.

17(d) Redelivery

Industry commenters on the 1998 proposal asked for clarification that sending the electronic disclosures complies with the regulation, and that institutions are not required to confirm that the consumer actually received them. Consumer advocates asked that institutions be required to verify the delivery of disclosures by return receipt, in the case of e-mail. In the 1999 proposals, the Board solicited comment on the need for and the feasibility of such a requirement.

Consumer advocates believe that e-mail systems are not yet sufficiently reliable, and that safeguards are necessary to ensure that consumers actually receive disclosures. Industry commenters stated that a return receipt requirement would be costly and burdensome, and would require financial institutions to monitor return receipts in every case to determine that individual consumers received the disclosures.

Section 101(c) of the E-Sign Act requires that consumers consent electronically, or confirm their consents electronically, in a manner that

reasonably demonstrates they can access the information that the financial institution will be providing. This requirement seeks to verify at the outset that the consumer is actually capable of receiving the information in the electronic format being used by the institution. After the consumer consents, the E-Sign Act also requires institutions to notify consumers of changes that materially affect consumers' ability to access electronic disclosures.

The interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of all disclosures would not be warranted. When electronic disclosures are returned undelivered, however, § 205.17(d) imposes a duty to attempt redelivery (either electronically or to a postal address) based on address information in the institution's own files. Unlike paper disclosures delivered by the postal service, there generally is no commonly-accepted mechanism for reporting a change in electronic address or for forwarding e-mail. Where an institution actually knows that the delivery of an electronic disclosure did not take place, the institution should take reasonable steps to effectuate delivery in some way. For example, if an e-mail message to the consumer (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if the institution sends the disclosure to a different e-mail address or postal address that the institution has on file. Sending the disclosures a second time to the same electronic address would not be sufficient if the institution has a different address for the consumer on file. Comment 17(d)-1 provides this guidance.

This redelivery requirement is limited to situations where the electronic communication cannot be delivered and does not apply to situations where the disclosure is delivered but, for example, cannot be read by the consumer due to technical problems with the consumer's software. A financial institution's duty to redeliver a disclosure under § 205.17(d) does not affect the timeliness of the disclosure. Financial institutions comply with the timing requirements of the regulation when a disclosure is initially sent in a timely manner, even though the disclosure is returned undelivered and the financial institution is required under § 205.17(d) to take reasonable steps to attempt redelivery.

17(e) Persons Other Than Financial Institutions

Certain provisions of Regulation E apply to entities that are not financial institutions. For example, where preauthorized electronic fund transfers from a consumer's account are recurring but will vary in amount each time, advance written notice is required; the notice may be given by the designated payee instead of the financial institution. The rule clarifies that entities other than a financial institution that are required to comply with Regulation E may use electronic communication to do so, provided the requirements of § 205.17(b) are satisfied. See § 205.17(e) and comment 17(e)-1.

Additional Issues

1. Document Integrity

The interim rule does not impose document integrity standards. Consumer advocates and others expressed concerns that electronic documents can be altered more easily than paper documents. They say that consumers' ability to enforce rights under the consumer protection laws could be impaired, in some cases, if the authenticity of disclosures they retain cannot be demonstrated.

Institutions are generally required to retain evidence of compliance with the Board's consumer regulations. Accordingly, the Board requested comment on the feasibility of requiring institutions to have systems in place capable of detecting whether or not information has been altered, or to use independent certification authorities to verify disclosure documents.

Consumer advocates strongly supported document integrity requirements (including the use of certification authorities) that would apply to all-electronic disclosures. Signatures, notary seals, and verification procedures such as recordation are used to protect against alterations for transactions memorialized in paper form. Consumer advocates believe that comparable verification procedures are needed for electronic disclosures as well.

Industry commenters opposed mandatory document integrity standards for electronic disclosures. Because the technology in this area is still evolving, they believe that mandatory standards would be premature. Others believe that imposing document integrity standards or requiring the use of certification authorities would be costly to implement.

The Board recognizes the concerns about document integrity, but believes it

is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Effective methods may be too costly. Other less costly methods may deter alterations in some cases, but would not necessarily ensure document integrity.

Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the consumer protection laws administered by the Board. Section 104(b)(3) of the E-Sign Act authorizes federal or state regulatory agencies to specify performance standards to assure the accuracy, record integrity, and accessibility of records that are required to be retained, but prohibits the agencies from requiring the use of a particular type of software or hardware in order to comply with record retention requirements. Technology is likely to develop to protect electronic contracts and other legal documents. Thus, it seems premature for the Board to specify any particular standards or methods for consumer disclosure at this time.

2. Technical Amendments to Error Resolution Notices

Model error resolution notices contained in Appendix A (Forms A-3 and A-5) have been revised to conform with amendments to § 205.11 addressing time periods for investigating alleged errors involving new accounts and point-of-sale and foreign-initiated transactions (63 FR 52115, September 29, 1998), and to make other technical changes.

V. Form of Comment Letters

Comment letters should refer to Docket No. R-1041, and, when possible, should use a standard typeface with a font size of 10 or 12. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch computer diskettes in any IBM-compatible DOS- or Windows-based format.

VI. Regulatory Flexibility Analysis

The Board has reviewed these interim amendments to Regulation E, in accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. 604). Two of the three requirements of a final regulatory flexibility analysis under the Act are (1) a succinct

statement of the need for and the objectives of the rule and (2) a summary of the issues raised by the public comments, the agency's assessment of those issues, and a statement of the changes made in the final rule in response to the comments. These two areas are discussed above.

The third requirement of the analysis is a description of significant alternatives to the rule that would minimize the rule's economic impact on small entities and reasons why the alternatives were rejected. This interim final rule is designed to provide financial institutions with an alternative method of providing disclosures; the rule will relieve compliance burden by giving financial institutions flexibility in providing disclosures required by the regulation. Overall, the costs of providing electronic disclosures are not expected to have significant impact on small entities. The expectation is that providing electronic disclosures may ultimately reduce the costs associated with providing disclosures.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0200.

The collection of information that is revised by this rulemaking is found in 12 CFR Part 205 and in Appendix A. This information is mandatory (15 U.S.C. 1693 *et seq.*) to evidence compliance with the requirements of the Regulation E and the Electronic Fund Transfer Act (EFTA). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for twenty-four months. This regulation applies to all types of financial institutions, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The revisions provide that financial institutions may deliver disclosures electronically upon obtaining consumers' affirmative consent in accordance with the E-Sign Act. The

revisions provide guidance to institutions on the timing and delivery of electronic disclosures, to ensure that consumers have adequate opportunity to access and retain the information.

With respect to state member banks, it is estimated that there are 954 respondent/recordkeepers and an average frequency of 85,808 responses per respondent each year. The current annual burden is estimated to be 518,857 hours. No comments specifically addressing the burden estimate were received, therefore, the numbers remain unchanged. There is estimated to be no additional cost burden and no capital or start up cost associated with the interim final rule.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality arises under the Freedom of Information Act.

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0200), Washington, DC 20503.

VIII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the interim rule is clearly stated and effectively organized, and how the Board might make the rule easier to understand.

List of Subjects in 12 CFR Part 205

Banks, banking, Consumer protection, Electronic fund transfers, Reporting and record keeping requirements.

For the reasons set forth in the preamble, the Board amends Regulation E, 12 CFR part 205, as set forth below:

PART 205 ELECTRONIC FUND TRANSFERS (REGULATION E)

1. The authority citation for part 205 continues to read as follows:

Authority: 15 U.S.C. 1693-1693r.

2. Section 205.4 is amended by redesignating paragraph (a) as paragraph (a)(1), adding a new paragraph (a)(2), and revising paragraph (c), as follows:

§ 205.4 General disclosure requirements; jointly offered services.

(a)(1) *Form of disclosures.* * * *

(2) *Foreign language disclosures.*

Disclosures required under this part may be made in a language other than English, provided that the disclosures are made available in English upon the consumer's request.

* * * * *

(c) *Electronic communication.* For rules governing the electronic delivery of disclosures, including the definition of electronic communication, see § 205.17.

* * * * *

3. Add a new § 205.17 to read as follows:

§ 205.17 Requirements for electronic communication.

(a) *Definition. Electronic communication* means a message transmitted electronically between a financial institution and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) *General rule.* In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 15 U.S.C. 7001 *et seq.*, and the rules of this part, a financial institution may provide by electronic communication any disclosure required by this part to be in writing.

(c) *Address or location to receive electronic communication.* A financial institution that uses electronic communication to provide disclosures required by this part shall:

(1) Send the disclosure to the consumer's electronic address; or
(2) Make the disclosure available at another location such as an Internet web site; and

(i) Alert the consumer of the disclosure's availability by sending a notice to the consumer's electronic address (or to a postal address, at the financial institution's option). The notice shall identify the account involved and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the consumer of the disclosure, whichever comes later.

(d) *Redelivery.* When a disclosure provided by electronic communication is returned to a financial institution undelivered, the financial institution shall take reasonable steps to attempt redelivery using information in its files.

(e) *Persons other than financial institutions.* Persons other than a

financial institution that are required to comply with this part may use electronic communication in accordance with the requirements of § 205.17, as applicable.

4. Appendix A to Part 205 is amended by revising Model Forms A-3 and A-5, to read as follows:

Appendix A To Part 205—Model Disclosure Clauses and Forms

* * * * *

A-3—Model Forms for Error Resolution Notice (§§ 205.7(b)(10) and 205.8(b))

(a) *Initial and annual error resolution notice (§§ 205.7(b)(10) and 205.8(b)).*

In Case of Errors or Questions About Your Electronic Transfers Telephone us at [insert telephone number] Write us at [insert address] [or E-mail us at [insert electronic mail address]] as soon as you can, if you think your statement or receipt is wrong or if you need more information about a transfer listed on the statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the problem or error appeared.

(1) Tell us your name and account number (if any).

(2) Describe the error or the transfer you are unsure about, and explain as clearly as you can why you believe it is an error or why you need more information.

(3) Tell us the dollar amount of the suspected error.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

For errors involving new accounts, point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

(b) *Error resolution notice on periodic statements (§ 205.8(b)).*

* * * * *

A-5—Model Forms for Government Agencies (§ 205.15(d)(1) and (2))

(a) *Disclosure by government agencies of information about obtaining account*

balances and account histories
(§ 205.15(d)(1)(i) and (ii)).

You may obtain information about the amount of benefits you have remaining by calling [telephone number]. That information is also available [on the receipt you get when you make a transfer with your card at (an ATM)(a POS terminal)][when you make a balance inquiry at an ATM][when you make a balance inquiry at specified locations].

You also have the right to receive a written summary of transactions for the 60 days preceding your request by calling [telephone number]. [Optional: Or you may request the summary by contacting your caseworker.]

(b) *Disclosure of error resolution procedures for government agencies that do not provide periodic statements*
(§ 205.15(d)(1)(iii) and (d)(2)).

In Case of Errors or Questions About Your Electronic Transfers Telephone us at [telephone number] Write us at [insert address] [or E-mail us at [insert electronic mail address]] as soon as you can, if you think an error has occurred in your [EBT][agency's name for program] account. We must hear from you no later than 60 days after you learn of the error. You will need to tell us:

- Your name and [case] [file] number.
- Why you believe there is an error, and the dollar amount involved.
- Approximately when the error took place.

If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days.

We will determine whether an error occurred within 10 business days after we hear from you and will correct any error promptly. If we need more time, however, we may take up to 45 days to investigate your complaint or question. If we decide to do this, we will credit your account within 10 business days for the amount you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may not credit your account.

For errors involving new accounts, point-of-sale, or foreign-initiated transactions, we may take up to 90 days to investigate your complaint or question. For new accounts, we may take up to 20 business days to credit your account for the amount you think is in error.

We will tell you the results within three business days after completing our investigation. If we decide that there was no error, we will send you a written explanation. You may ask for copies of the documents that we used in our investigation.

If you need more information about our error resolution procedures, call us at [telephone number][the telephone number shown above].

5. In Supplement I to Part 205, a new Section 205.17 is added, to read as follows:

Supplement I to Part 205—Official Staff Interpretations

* * * * *

Section 205.17—Requirements for Electronic Communication

17(b) General Rule

1. *Relationship to the E-Sign Act.* The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a provision that requires disclosures to be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing, and retainability rules and the clear and readily understandable standard. For example, to satisfy the clear and readily understandable standard for disclosures, electronic disclosures must use visual text.

2. *Clear and readily understandable standard.* A financial institution must provide electronic disclosures using a clear and readily understandable format. Also, in accordance with the E-Sign Act:

- i. The institution must disclose the requirements for accessing and retaining disclosures in that format;
- ii. The consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and
- iii. The institution must provide the disclosures in accordance with the specified requirements.

3. *Timing and effective delivery when a consumer signs up for an EFT service on-line.* When a consumer contracts for an EFT service on the Internet and will be able immediately to initiate a fund transfer, a financial institution satisfies the timing requirements under this part if, at the time the consumer contracts for the service or before the first transfer is made, the disclosures automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Or a financial institution may provide a link to electronic disclosures, as long as consumers cannot bypass the link and they are required to access the disclosures before initiating the first transfer. The institution is not required to confirm that the consumer has read the disclosures.

4. *Timing and effective delivery for disclosures provided periodically.* Disclosures provided by e-mail are timely based on when the disclosures are sent. Disclosures posted at an Internet web site, such as periodic statements or change-in-terms and other notices, are timely when the financial institution has both made the disclosures available and sent a notice alerting the consumer that the disclosures have been posted. For example, under § 205.8(a), institution offering accounts with EFT services must provide a change-in-terms notice to consumers at least 21 days in advance of certain changes. For a change-in-terms notice posted on the Internet, an institution must both post the notice and notify consumers of its availability at least 21 days in advance of the change.

5. *Retainability of disclosures.* Financial institutions satisfy the requirement that disclosures be in a form that the consumer may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be

consistent with the information required to be provided under section 101(c)(1)(C)(i) of the E-Sign Act (15 U.S.C. 7001(c)(1)(C)(i)) about the hardware and software requirements for accessing and retaining electronic disclosures.

6. *Disclosures provided on financial institution's equipment.* A financial institution that controls the equipment providing electronic disclosures to consumers (for example, an ATM or computer terminal in a financial institution's lobby) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and readily understandable format and in a form that the consumer may keep. For example, if disclosures are required at the time of an on-line transaction, the disclosures must be sent to the consumer's e-mail address or must be made available at another location such as the financial institution's Internet web site, unless the financial institution provides a printer that automatically prints the disclosures.

17(c) Address or Location To Receive Electronic Communication

Paragraph 17(c)(1)

1. *Electronic address.* A consumer's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the financial institution.

Paragraph 17(c)(2)

1. *Identifying account involved.* A financial institution may identify a specific account in a variety of ways and is not required to identify an account by reference to the account number. For example, where the consumer has only one checking account, and no confusion would result, the institution may refer to "your checking account." If the consumer has two checking accounts, the institution may, for example, differentiate accounts based on names for different checking account programs or by using a truncated account number.

2. *90-day rule.* The actual disclosures provided to the consumer must be available for at least 90 days, but the financial institution has discretion to determine whether they should be available at the same location for the entire period.

17(d) Redelivery

1. *E-mail returned as undeliverable.* If an e-mail to the consumer (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the institution sends the disclosure to a different e-mail address or postal address that the institution has on file for the consumer. Sending the disclosure a second time to the same electronic address is not sufficient if the institution has a different address for the consumer on file.

17(e) Persons Other Than Financial Institutions

1. *Electronic disclosures.* Entities other than financial institutions, such as merchants, are subject to certain provisions of Regulation E, including §§ 205.10(b) and (d). These entities too may use electronic communication to provide disclosures required to be in writing.

By order of the Board of Governors of the Federal Reserve System, March 27, 2001.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 01-8151 Filed 4-3-01; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

12 CFR Part 230

[Regulation DD; Docket No. R-1044]

Truth in Savings

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim rule; request for comments.

SUMMARY: The Board is adopting an interim final rule amending Regulation DD, which implements the Truth in Savings Act, to establish uniform standards for the electronic delivery of disclosures required by the act and regulation. The rule provides guidance on the timing and delivery of electronic disclosures to ensure consumers have adequate opportunity to access and retain the information. (Similar rules are being adopted under other consumer financial services and fair lending regulations administered by the Board.) Under the rule, depository institutions may deliver disclosures electronically if they obtain consumers' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act (E-Sign Act). Amendments are also adopted that address electronic advertisements. The rule is being adopted as an interim rule to obtain additional public comment. An interim rule published in 1999, before enactment of the E-Sign Act, is withdrawn.

DATES: The interim rule is effective March 30, 2001; however, to allow time for any necessary operational changes, the mandatory compliance date is October 1, 2001. Comments must be received by June 1, 2001.

ADDRESSES: Comments, which should refer to Docket No. R-1044, may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551 or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson may also be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. weekdays, and to the security control room at all other times. The mail room and the security control room,

both in the Board's Eccles Building, are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments may be inspected in room MP-500 in the Board's Martin Building between 9:00 a.m. and 5:00 p.m., pursuant to the Board's Rules Regarding the Availability of Information, 12 CFR part 261.

FOR FURTHER INFORMATION CONTACT: Jane E. Ahrens, Senior Counsel, and Deborah J. Stipick, Attorney, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667.

SUPPLEMENTARY INFORMATION:

I. Background

The Truth in Savings Act (TISA), 12 U.S.C. 4301 *et seq.*, requires depository institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, when changes in terms occur, and in periodic statements. It also includes rules about advertising for deposit accounts. The Board's Regulation DD (12 CFR part 230) implements the act. Credit unions are governed by a substantially similar regulation issued by the National Credit Union Administration.

TISA and Regulation DD require a number of disclosures to be provided in writing, presuming that depository institutions provide paper documents. Under the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*), however, electronic documents and signatures have the same validity as paper documents and handwritten signatures.

Board Proposals Regarding Electronic Disclosures

Over the past few years, the Board has published several interim rules and proposals regarding the electronic delivery of disclosures. In 1996, after a comprehensive review of Regulation E (Electronic Fund Transfers), the Board proposed to amend the regulation to permit financial institutions to provide disclosures by sending them electronically. (61 FR 19696, May 2, 1996.) Based on comments received on the 1996 proposal, on March 25, 1998, the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14528) and similar proposals under Regulation DD (63 FR 14533), and other financial services and fair lending regulations administered by the Board. The 1998 interim rule and proposed rules were similar to the 1996 proposed rule under Regulation E.

The 1998 proposals and interim rule allowed creditors, depository

institutions, lessors, and others to provide disclosures electronically if the consumer agreed, with few other requirements. For ease of reference, this background section uses the terms "institutions" and "consumers."

Industry commenters generally supported the Board's 1998 proposals and interim rule, but many of them sought specific revisions and additional guidance on how to comply with the disclosure requirements in certain transactions and circumstances. In particular, they expressed concern that the rule did not specify a uniform method for establishing that an "agreement" was reached for sending disclosures electronically. Consumer advocates, on the other hand, generally opposed the 1998 proposals and the interim rule. They believed that consumer protections in the proposals were inadequate, especially in connection with transactions that are typically consummated in person (such as automobile loans and leases, home-secured loans, and door-to-door credit sales).

September 1999 Proposals

In response to comments received on the 1998 proposals, the Board published revised regulatory proposals in September 1999 under Regulations B, E, M, Z, and DD, (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999) (collectively, the "1999 proposals"), and an interim rule under Regulation DD (64 FR 49846). The interim rule under Regulation DD allowed depository institutions to deliver disclosures on periodic statements electronically if the consumer agrees.

Generally, the 1999 proposals required institutions to use a standardized form containing specific information about the electronic delivery of disclosures so that consumers could make informed decisions about whether to receive disclosures electronically. If the consumer affirmatively consented, most disclosures could be provided electronically. To address concerns about potential abuses, the 1999 proposals generally would have required disclosures to be given in paper form when consumers transacted business in person. The proposals contained rules for disclosures that are made available to consumers at an institution's Internet web site (governing, for example, how long disclosures must remain posted at a web site).

Comments on the September 1999 proposals—The Board received letters representing 115 commenters

expressing views on the revised proposals. Industry commenters generally supported the Board's approach establishing federal rules for a uniform method of obtaining consumers' consents to the receipt of electronic disclosures instead of deferring to state law. Still, many sought specific additional guidance and in some cases wanted more flexibility. They were concerned about the length of time the proposals would have required electronic disclosures to remain available to a consumer at an institution's Internet web site or upon request. In addition, they believed the proposed rule requiring paper disclosures for transactions conducted in person was not sufficiently flexible. Consumer advocates believed the 1999 proposals addressed many of their concerns about the 1998 proposals. Nevertheless, they urged the Board to incorporate greater protections for consumers, such as restricting the delivery of electronic disclosures to only those consumers who initiate transactions electronically.

The Board also obtained views through four focus groups with individual consumers, conducted in the Washington-Baltimore metropolitan area. Participants reviewed and commented on the format and content of the proposed sample consent forms, as well as on alternative revised forms.

Federal Legislation Addressing Electronic Commerce

On June 30, 2000, the President signed the E-Sign Act, which was enacted to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that electronic documents and signatures have the same validity as paper documents and handwritten signatures. The act contains special rules for the use of electronic disclosures in consumer transactions. Consumer disclosures may be provided in electronic form only if the consumer affirmatively consents after receiving certain information specified in the statute.

The Board and other government agencies are permitted to interpret the E-Sign Act's consumer consent requirements within prescribed limits, but may not impose additional requirements for consumer consent. In addition, agencies generally may not reimpose a requirement for using paper disclosures in particular transactions, such as those conducted in person.

The consumer consent provisions in the E-Sign Act became effective October 1, 2000, and did not require implementing regulations. Thus,

financial institutions are currently permitted to use electronic disclosures under Regulations B, E, M, Z and DD if the consumer affirmatively consents in the manner required by the E-Sign Act. Under section 101(c)(5) of the E-Sign Act, consumers who consented prior to the effective date of the act to receive electronic disclosures as permitted by any law or regulation, are not subject to the consent requirements.

II. The Interim Rule

The Board is adopting an interim final rule to establish uniform standards for the electronic delivery of disclosures required under Regulation DD. Consistent with the requirements of the E-Sign Act, depository institutions generally must obtain consumers' affirmative consent to provide disclosures electronically. The interim rule published in 1999, before enactment of the E-Sign Act, is withdrawn.

The interim rules also establish uniform requirements for the timing and delivery of electronic disclosures. Disclosures may be sent by electronic mail (e-mail) to an electronic address designated by the consumer, or they may be made available at another location, such as an Internet web site. If the disclosures are not sent by e-mail, consumers must receive a notice alerting them to the availability of the disclosures. Disclosures posted on a web site must be available for at least 90 days, to allow consumers adequate time to access and retain the information. With regard to the timing of electronic disclosures, for disclosures that must be provided before the consumer opens an account, consumers are required to access the electronic disclosures before the account is opened. Under the interim rule, institutions must make a good faith attempt to redeliver electronic disclosures that are returned undelivered, using the address information available in their files. Similar rules are being adopted under Regulations B, E, M and Z.

III. Request for Comment

Interim Rules

The interim rules include most of the revisions that were part of the 1999 proposals and were not affected by the E-Sign Act. The Board is adopting these rules with some minor changes discussed below. The rules are adopted as interim rules, to allow commenters to present new information or views not previously considered in the context of the 1998 and 1999 proposals. Since the Board's 1999 proposals were issued, more institutions have gained

experience in offering financial services electronically. The Board believes that additional comments, beyond those previously considered in connection with the Board's earlier proposals, might inform the Board whether any developments in technology or industry practices have occurred that warrant further changes in the rules. The comment period ends on June 1, 2001. The Board expects to adopt final rules on a permanent basis prior to October 1, 2001.

Interpreting E-Sign Provisions

Under section 104(b) of the E-Sign Act, the Board and other government agencies are permitted to interpret the act, within prescribed limits. The Board may issue rules that interpret how the E-Sign Act's consumer consent requirements apply for purposes of the laws administered by the Board. Also, the Board may, by regulation, exempt a particular category of disclosures from the E-Sign Act's consumer consent requirements if it will eliminate a substantial burden on electronic commerce without creating material risk for consumers.

The Board requests comment on whether the Board should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provisions or other provisions of the act, as they affect the Board's consumer protection regulations. Comment is requested on whether the statutory provisions relating to consumer consent are sufficient, or whether additional guidance is needed. For example, is interpretative guidance needed concerning the statutory requirement that consumers confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the depository institution? Is clarification needed on the effect of consumers' withdrawing their consent, or on requesting paper copies of electronic disclosures? Institutions must also inform consumers of changes in hardware or software requirements if the change creates a material risk that the consumer will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk" for purposes of Regulation DD and other financial services and fair lending laws administered by the Board, and if so what standards should apply.

Under section 104(d) of the E-Sign Act, the Board is authorized to exempt specific disclosures from the consumer consent requirements of section 101(c) of the E-Sign Act, if the exemption is

necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. The Board requests comment on whether it should consider exercising this exemption authority.

Study on Adapting Requirements to Online Banking and Lending

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures, the Board requests comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

As an example, under Regulations Z and DD, periodic statements inform consumers about their account activity over a period of time, typically monthly. The beginning and ending dates of the cycle determine costs and other information that must be disclosed. In addition, transmittal of the periodic statement triggers important consumer protections such as billing error resolution procedures. Online banking, however, can provide consumers with up-to-date information about their accounts on a continuing basis. Such information is a helpful supplement to—but does not comply as a substitute for—periodic statements. Should the rules for periodic statements be modified for online banking, and if so, how could the rules be crafted to maintain for consumers (1) a perspective of the cost and activity of an account over time, and (2) protections for resolving errors or liability for unauthorized transactions.

The comments may assist the Board in future efforts to update the regulations. The comments may also be used in connection with a study required under the Gramm-Leach-Bliley Act of 1999. That act requires the federal bank supervisory agencies to conduct a study of banking regulations that affect the electronic delivery of financial services and to submit to the Congress a report recommending any legislative changes that are needed to facilitate online banking and lending.

IV. Section-by-Section Analysis

Pursuant to its authority under section 269 of TISA, the Board amends Regulation DD to establish uniform standards for the use of electronic communication to provide disclosures required by this regulation. Electronic disclosures can effectively reduce compliance costs without adversely affecting consumer protections. The purpose of Regulation DD disclosures is to ensure that consumers have

meaningful information about account terms so that consumers can compare savings and investment products. The use of electronic communication may allow institutions to provide Regulation DD disclosures to the consumer more efficiently. To the extent that a depository institution may make electronic disclosures available at its web site instead of providing the disclosures directly to the consumer, the Board finds that such an exception is warranted pursuant to its authority under section 269(a)(3) of TISA. Below is a section-by-section analysis of the rules for providing disclosures by electronic communication, including references to changes in the official staff commentary.

Section 230.3 General Disclosure Requirements

3(a) Form

Section 230.3(a) has been revised to reflect that the disclosures provided under § 230.10 for electronic communications are subject to the same requirements as other disclosures provided under Regulation DD.

3(g) Electronic Communication

Section 230.3(g) is added to provide a cross reference to rules governing the electronic delivery of disclosures in § 230.10.

Section 230.4 Account Disclosures

4(a) Delivery of Account Disclosures

Depository institutions generally must provide account-opening disclosures to consumers before an account is opened or a service is provided. Currently, depository institutions may delay delivering TISA disclosures if the consumer is not present at the institution when the account is opened (or service is provided). The rationale underlying the ten-day delay is that the institution cannot provide written disclosures in such cases, for example, when an account is opened by telephone. Section 230.4(a) provides that in such cases, account-opening disclosures must be mailed or delivered within ten business days.

Under the 1999 proposal, the delayed timing rule under § 230.4(a) did not apply to depository institutions opening accounts by “electronic communication” (for example, those offered on the Internet). Some commenters agreed that the ten-day delay should not apply in such cases. Others expressed concern about providing accurate disclosures if a consumer “opens” an account electronically after normal business

hours, and account terms change when the institution next opens for business.

The interim final rule, as in the 1999 proposal, provides that depository institutions opening accounts by “electronic communication” (for example, those offered on the Internet) may not delay providing disclosures under § 230.4(a). This rule is adopted pursuant to the Board’s exception authority under Section 269(a)(3) of TISA, to carry out the purposes of the statute. The difficulties in providing disclosures for accounts opened by mail or telephone are not present for requests to open accounts received by electronic communication using visual text. Thus, specific disclosures must be provided before accounts are opened using electronic communication. TISA and Regulation DD do not define when an account is deemed to be opened; thus, institutions may establish policies and procedures to address after-hours requests to open accounts, to ensure that accurate disclosures are provided before the account is deemed by the institution to be “opened.”

Depository institutions must also provide account disclosures to a consumer upon request. Section 230.4(a)(2)(i) provides that if a consumer is not present at the institution when a request for account disclosures is made, the institution must mail or deliver the disclosures within a reasonable time after the institution receives the request; ten days is deemed to be a reasonable time. The 1999 proposal extended the rule to requests for disclosures made by electronic communication. Most commenters agreed that a ten-day period was reasonable for responding to electronic requests for disclosures. Some stated that having one uniform time period would aid compliance. The interim final rule provides that ten days is a reasonable time for responding to request for account disclosures made by electronic communication. Comment 4(a)(2)(i)-3 has been revised to include this guidance.

Section 230.4(a)(2)(i) is revised to require institutions to mail or deliver disclosures in paper form or electronically to consumers who are not present at the institution when a request is made. To provide disclosures electronically, the institution must send the disclosures to the consumer’s e-mail address, or send a notice alerting the consumer to the location of the disclosures, such as on the institution’s Internet web site. Posting disclosures on a depository institution’s web site does not relieve the institution’s duty to provide the disclosures upon request.

Comment 4(a)(2)(i)–4 is added to contain this advice.

Section 230.6 Periodic Statement Disclosures

6(c) Electronic Communication

Section 230.6(c) was adopted by the Board in 1999 as an interim rule allowing the electronic delivery of periodic statements, if the consumer agreed. (64 FR 49846, September 14, 1999.) The electronic delivery of periodic statements for consumer asset accounts was already permissible under an interim rule to Regulation E issued in March 1998. The 1999 interim rule allowed institutions to deliver electronically a single statement that complied with Regulation E and Regulation DD. The interim rule did not specify the manner or form of consumers' consent to electronic statements.

Effective October 1, 2000, the E-Sign Act permits depository institutions to provide disclosures to consumers using electronic communication, if the depository institution complies with Section 101(c) of that act. Section 101(c) of the E-Sign Act requires depository institutions to provide specific information about the electronic delivery of disclosures and obtain the consumer's affirmative consent to receive electronic disclosures. As discussed below, § 226.10(b) is being adopted to set forth the general rule that depository institutions subject to Regulation DD may provide disclosures electronically only if the institution complies with Section 101(c) of the E-Sign Act. This requirement applies to disclosures on periodic statements that are provided electronically, and § 230.6(c) is withdrawn accordingly.

Section 230.8 Advertising

8(a) Misleading or Inaccurate Advertisements

Stating certain account terms in an advertisement for a deposit account triggers the disclosure of additional terms. Although Regulation DD does not currently address multiple-page advertisements, Regulations Z (Truth in Lending) and M (Consumer Leasing) permit creditors and lessors to provide required advertising disclosures on more than one page, if certain conditions are met. In September 1999, the Board proposed consistent approaches under Regulations Z, M, and DD for complying with the regulations' advertising requirements in the context of electronic advertising. Under the proposal, a depository institution that advertises using electronic communication can comply with the

regulation's advertising requirements if the required terms are disclosed in more than one location, under certain conditions. Most commenters addressing the issue agreed with the proposed approach.

Comment 8(a)–9 is adopted as proposed, with technical amendments for clarity. If an advertisement using electronic communication displays a triggering term (such as a bonus or annual percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may be accompanied by a link in close proximity, that directly takes the consumer to the additional information.

8(b) Permissible Rates

Section 230.8(b) permits depository institutions to state an interest rate in addition to the APY, as long as the rate is stated in conjunction with, but not more conspicuously than, the APY. As proposed, both rates must appear at the same location so the consumer can view both rates simultaneously. An advertised interest rate with a link to another location that contains the related APY would not comply with the requirements of § 230.8(b); the interest rate would be the only rate readily visible to consumers, and therefore would be more conspicuous. Commenters generally agreed with this requirement. Comment 8(b)–4 is adopted as proposed.

8(e) Exemption for Certain Advertisements

8(e)(1) Certain Media

Section 230.8(e) exempts from some requirements advertisements made through broadcast or electronic media, such as television and radio or outdoor billboards. Proposed comment 8(e)(1)(i)–1 provided that this exemption would not apply to electronic advertisements using electronic communication, such as Internet advertisements, which do not have the same time and space constraints as radio or television advertisements.

Views were mixed on whether advertisements using electronic communication should be subject to the broadcast or media exception. Many commenters noted that a frequent form of advertisement on the Internet is the "banner" advertisement and these are often priced based on size. Similarly, they noted that space limitations may exist, especially on third-party web sites. Accordingly, these commenters

requested that the Board consider extending a similar exception to Internet advertisements that currently exists for television and billboards. However, other commenters agreed with the Board's position that these types of advertisements (for example Internet advertisements with link capability) do not possess the same time and space limitations as those that are currently exempted.

The Board believes that space constraints for advertisements on Internet web sites are not significantly different than those for a print advertisement (a newspaper, for example). Thus, requiring advertisements provided by electronic communication to comply with the regulation's advertising requirements is not overly burdensome. Accordingly, advertisements made via electronic communication, such as advertisements posted on the Internet, are subject to Regulation DD's general advertising rules. Comment 8(e)(1)(i)–1 is adopted as proposed.

Section 230.10 Electronic Communication

10(a) Definition

As adopted, the definition of the term "electronic communication" remains substantially unchanged from the 1999 proposals. Section 230.10(a) limits the term to a message transmitted electronically that can be displayed on equipment as visual text; an example is a message displayed on a personal computer monitor screen. Thus, audio and voice response telephone systems are not included. Because the rule permits the use of electronic communication to satisfy the statutory requirement for written disclosures that must be clear and conspicuous, the Board believes visual text is an essential element of the definition. Institutions that accommodate vision-impaired consumers by providing disclosures that do not use visual text must also provide disclosures using visual text.

Some commenters asked for clarification that the definition was not intended to preclude the use of devices other than personal computers, which also can display visual text. The equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the "clear and conspicuous" format requirement, discussed below.

10(b) General Rule

Effective October 1, 2000, the E-Sign Act permits depository institutions to provide disclosures using electronic

communication, if the depository institution complies with the consumer consent requirements in Section 101(c). Under section 101(c) of the E-Sign Act, depository institutions must provide specific information about the electronic delivery of disclosures before obtaining the consumer's affirmative consent to receive electronic disclosures. The consent requirements in the E-Sign Act are similar but not identical to the Board's 1999 proposal. Accordingly, § 230.10(b) sets forth the general rule that depository institutions subject to Regulation DD may provide disclosures electronically if the institution complies with section 101(c) of the E-Sign Act.

The E-Sign Act authorizes the use of electronic disclosures. The act does not affect any requirement imposed under TISA other than a provision that requires disclosures to be in paper form, and the act does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation's format, timing and retainability rules and the clear and conspicuous standard. Comment 10(b)-1 contains this guidance.

Presenting Disclosures in a Clear and Conspicuous Format

Electronic disclosures must be clear and conspicuous, as is the case for all written disclosures under TISA and the Regulation DD. See §§ 230.3(a). An institution must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act: (1) The institution must disclose the requirements for accessing and retaining disclosures in that format; (2) the consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and (3) the institution must provide the disclosures in accordance with the specified requirements. Comment 10(b)-2 contains this guidance.

Comments posed a few questions about the applicability of the clear and conspicuous standard to particular situations. Some asked whether electronic advertisements or other unrelated promotional information may appear on the same screen as mandatory disclosures that are posted on an Internet web site. Except to the extent required by the regulation, disclosures do not have to be provided separately from other information. Advertisements should not be integrated into the text of the disclosure in a manner that violates the clear and conspicuous standard.

Commenters also had questions about the use of navigational tools with electronic disclosures. For example,

some believed that such tools might be helpful in directing consumers to related information that explains the terminology used in the disclosures. Many Internet web sites use navigational tools that are conspicuous through the use of bold text, larger fonts, different colors, underlining, or other methods of highlighting. Such tools are not per se prohibited so long as they are not used in a manner that would violate the clear and conspicuous standard.

Providing Timely Disclosures

Disclosures delivered electronically must comply with existing timing requirements under TISA and Regulation DD. See § 230.4(a). Commenters on the Board's 1999 proposals requested specific guidance that an electronic disclosure would be considered timely based on the time it is sent by e-mail or posted on an Internet web site, regardless of when the consumer receives or reads the disclosure.

Under the final rule, consistent with rules for disclosures that are sent by postal mail, disclosures provided by e-mail are timely when they are sent by the required time. Disclosures posted periodically at an Internet web site are timely if, by the required time, the depository institution both makes the disclosures available at that location and, in accordance with § 230.10(d)(2), sends a notice alerting the consumer that the disclosures have been posted. For example, under § 230.5, institutions must give advance notice to affected customers at least 30 calendar days in advance of certain changes. For a change in terms notice posted on the Internet, an institution must both post the notice and notify consumers of its availability at least 30 days in advance of the change. Comment 10(b)-3(ii) contains this guidance.

Certain disclosures must be provided before the consumer opens an account or a service is provided. When a depository institution permits the consumer to open an account on-line, the consumer must be required to access the disclosures required under § 230.4 before the account is opened. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosure before opening the account. Or, the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. Comment 10(b)-3(i) contains this guidance, as proposed.

Some industry commenters believed that requiring disclosures to automatically appear or be accessed by the consumer is cumbersome and

unnecessary. Some commenters suggested that the Board allow the required disclosures to be accessible via a clearly marked navigational tool; they believe that once the tool is provided, the disclosure should be deemed to have been provided to the consumer.

TISA and Regulation DD require that depository institutions provide or send disclosures to consumers. It is not sufficient for institutions to provide a bypassable navigational tool that merely gives consumers the option of receiving disclosures. Such an approach reduces the likelihood that consumers actually receive the disclosures. The interim final rule ensures that consumers actually see the disclosures provided electronically so that they have the opportunity to read them before opening an account.

Commenters on the various proposals requested guidance on the depository institution's duty in cases where an automated teller machine (ATM) or other automated equipment controlled by the depository institution malfunctions or otherwise fails to operate properly and cannot provide timely disclosures. Where the depository institution controls the equipment and disclosures are required at that time, an institution might not be liable for failing to provide timely disclosures if the defense in section 271(c) of TISA is available.

Providing Disclosures in a Form the Consumer May Keep

Under TISA and Regulation DD, disclosures required to be in writing also must be in a form the consumer can retain. (See § 230.3(a)) Electronic disclosures are subject to this requirement. Comment 10(b)-4 contains guidance on this requirement.

Consumers may communicate electronically with depository institutions through a variety of means and from various locations. Depending on the location (at home, at work, in a public place such as a library), a consumer may not have the ability at a given time to preserve TISA disclosures presented on-screen. To ensure that consumers have an adequate opportunity to access and retain the disclosures, the depository institution also must send them to the consumer's designated e-mail address or make them available at another location, for example, on the depository institution's Internet web site, where the information may be retrieved at a later date.

Where the depository institution controls the equipment providing the electronic disclosures (for example, an ATM or computer terminal located in the depository institution's lobby), the

depository institution must ensure that the consumer has the opportunity to retain the required information. Comment 10(b)–5 contains this guidance.

10(c) When Consent Is Required

Under the E-Sign Act, consumers must affirmatively consent before they receive electronic disclosures “relating to a transaction” if the disclosures are required by law or regulation to be in writing. Section 230.10(c) is added to provide that certain disclosures are not deemed to be related to a transaction for purposes of the E-Sign Act’s consumer consent provision. These include disclosures in connection with advertisements (§ 230.8) and disclosures about deposit accounts that are provided upon request (§ 230.4(a)(2)). Advertising disclosures are available to the general public. Consumers receiving disclosures on request may not open an account; those that do open an account will ultimately receive account opening disclosures subject to the consent requirements.

10(d) Address or Location To Receive Electronic Communication

Consistent with the 1999 proposals, the interim rule provides that depository institutions may deliver electronic disclosures by sending them to a consumer’s e-mail address. Alternatively, the rule provides that depository institutions may make the disclosures available at another location such as an Internet web site. If the depository institution makes a disclosure available at such a location, the depository institution effectively delivers the disclosure by sending a notice alerting the consumer when the disclosure can be accessed and making the disclosure available for at least 90 days. The time period for keeping disclosures available at a location such as a depository institution’s Internet web site under the interim rule differs from the 1999 proposals, based on commenters’ concerns as discussed below.

10(d)(1)

For purposes of § 226.10(d), a consumer’s electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the depository institution, as proposed. This guidance is contained in comment 10(d)(1)–1.

An electronic address would not include systems that permit communication only between the consumer and the depository institution, for example, home-banking programs that allow consumers to

communicate directly with a depository institution on-line with the use of a computer and modem. These systems, like a depository institution’s web site accessed via the Internet, give consumers access to information about their accounts at a location controlled by the depository institution. In both cases, the depository institution determines how long disclosures will be available to the consumer. Consumers who receive disclosures at their e-mail address may choose when to review, and for how long to retain, account information. Consumers who receive disclosures by contacting a depository institution’s site, however, need to be alerted when the information is first available in order to ensure that they have the opportunity to access the information before it is removed. Thus, disclosures provided using systems such as home-banking programs are treated in the same manner as disclosures made available at an Internet web site, and a notice alerting the consumer when disclosures are posted must be sent, by e-mail or to a postal address, at the depository institution’s option.

10(d)(2)

Under § 230.10(d)(2)(i) of the interim rule, for disclosures made available at an Internet web site, a notice alerting the consumer when disclosures are posted must be sent, by e-mail (or to a postal address, at the depository institution’s option). Section 230.10(d)(2)(i) requires that the alert notice identify the account involved and the address or other location where the disclosure is available. Comment 10(d)(2)–1 provides guidance on the level of detail required in identifying the account.

As proposed, under § 230.10(d)(2)(ii) the interim rule, disclosures provided at an Internet web site must remain available for at least 90 days. The requirement seeks to ensure that consumers have adequate time to access and retain a disclosure under a variety of circumstances, such as when a consumer may not be able for an extended period of time to access the information due to computer malfunctions, travel, or illness. The 90-day period is uniform for all disclosures, for ease of compliance. Comment 10(d)(2)–2 is added to provide that during this period, the actual disclosures must be available to the consumer, but the institution has discretion to determine whether they should be available at the same location for the entire period.

Some industry commenters believed the 90-day time period is reasonable and

feasible. About an equal number of commenters believed it was too burdensome and costly; some of these commenters suggested periods that ranged from 30 to 60 days.

The 1999 proposals provided that after the 90-day time period, disclosures would be available upon consumers’ request, generally for 24 months, in the same format as initially provided to the consumer. The 24-month period is consistent with a depository institution’s duty to retain records that evidence their compliance. Consumer advocates supported the proposed retention period; some recommended that disclosures should be available upon request for the length of the contractual relationship with the consumer.

Industry commenters strongly opposed the 24-month period. Many believed that keeping copies of electronic disclosures actually provided to consumers for that period of time would be costly and burdensome. Moreover, industry commenters believed that once a consumer has accessed the disclosures, the consumer rather than the depository institution should have the duty to retain them for future reference. They also noted that under existing record retention requirements applicable to paper disclosures, a depository institution need only demonstrate compliance with the rules, but need not retain copies of the actual disclosures provided to consumers.

The requirement for depository institutions to retain the disclosures in the format provided duplicate disclosures upon request for 24 months has not been adopted. A depository institution’s duty to retain evidence of compliance for 24 months remains unchanged.

10(d)(3) Exceptions

Section 230.10(d)(3) is added to make clear that the requirements of paragraphs (i) and (ii) of § 230.10(d)(2) do not apply to disclosures in certain advertisements (§ 230.8), and that paragraph (ii) of § 230.10(d)(2) does not apply to disclosures made available upon a consumer’s request (§ 230.4(a)).

10(e) Redelivery

Industry commenters on the 1998 proposal asked for clarification that sending the electronic disclosures complies with the regulation, and that institutions are not required to confirm that the consumer actually received them. Consumer advocates asked that institutions be required to verify the delivery of disclosures by return receipt, in the case of e-mail. In the 1999

proposals, the Board solicited comment on the need for and the feasibility of such a requirement.

Consumer advocates believe that e-mail systems are not yet sufficiently reliable and that safeguards are necessary to ensure that consumers actually receive disclosures. Industry commenters stated that a return receipt requirement would be costly and burdensome, and would require depository institutions to monitor return receipts in every case to determine that individual consumers received the disclosures.

Section 101(c) of the E-Sign Act requires that consumers consent electronically, or confirm their consents electronically, in a manner that reasonably demonstrates that the consumer can access the information that the institution will be providing. This requirement seeks to verify at the outset that the consumer is actually capable of receiving the information in the electronic format being used by the institution. After the consumer consents, the E-Sign Act also requires the institution to notify consumers of changes that materially affect consumers' ability to access electronic disclosures.

The interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of all disclosures would not be warranted. When electronic disclosures are returned undelivered, however, § 230.10(e) imposes a duty to attempt redelivery (either electronically or to a postal address) based on information in the institution's own files. Unlike paper disclosures delivered by the postal service, there generally is no commonly-accepted mechanism for reporting a change in electronic address or for forwarding e-mail. Where a depository institution actually knows that the delivery of an electronic disclosure did not take place, the institution should take reasonable steps to effectuate delivery in some way. For example, if an e-mail message to the consumer (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if the institution sends the disclosure to a different e-mail address or postal address that the institution has on file. Sending the disclosures a second time to the same electronic address would not be sufficient if the institution has a different address for the consumer on file. Comment 10(e)-1 provides this guidance.

This redelivery requirement is limited to situations where the electronic communication cannot be delivered and

does not apply to situations where the disclosure is delivered but, for example, cannot be read by the consumer due to technical problems with the consumer's software. A depository institution's duty to redeliver a disclosure under § 230.10(e) does not affect the timeliness of the disclosure. Depository institutions comply with the timing requirements of the regulation when a disclosure is initially sent in a timely manner, even though the disclosure is returned undelivered and the depository institution is required under § 230.10(e) to take reasonable steps to attempt redelivery.

10(f) Entities Other Than a Depository Institution

The requirements of § 230.8 apply to advertisements by deposit brokers. Section 230.10(f) is added to clarify that deposit brokers who are required to comply with Regulation DD may use electronic communication to do so, provided the requirements of § 230.10 are satisfied.

Additional Issues

Document Integrity

The interim rule does not impose document integrity standards. Consumer advocates and others have expressed concerns that electronic documents can be altered more easily than paper documents. They say that consumers' ability to enforce rights under the consumer protection laws could be impaired, in some cases, if the authenticity of disclosures they retain cannot be demonstrated.

Institutions are generally required to retain evidence of compliance with the Board's consumer regulations. Accordingly, the Board requested comment on the feasibility of requiring institutions to have systems in place capable of detecting whether or not information has been altered, or to use independent certification authorities to verify disclosure documents.

Consumer advocates strongly supported document integrity requirements (including the use of certification authorities) that would apply to all-electronic disclosures. Signatures, notary seals, and verification procedures such as recordation are used to protect against alterations for transactions memorialized in paper form. Consumer advocates believe that comparable verification procedures are needed for electronic disclosures as well.

Industry commenters opposed mandatory document integrity standards for electronic disclosures. Because the technology in this area is

still evolving, they believed that mandatory standards would be premature. Others believed that imposing document integrity standards or requiring the use of certification authorities would be costly to implement.

The Board recognizes the concerns about document integrity, but believes it is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Effective methods may be too costly. Other less costly methods may deter alterations in some cases, but would not necessarily ensure document integrity.

Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the consumer protection laws administered by the Board. Section 104(b)(3) of the E-Sign Act authorizes federal or state regulatory agencies to specify performance standards to assure the accuracy, record integrity, and accessibility of records that are required to be retained, but prohibits the agencies from requiring the use of a particular type of software or hardware in order to comply with record retention requirements. Technology is likely to develop to protect electronic contracts and other legal documents. Thus, it seems premature for the Board to specify any particular standards or methods for consumer disclosure at this time.

V. Form of Comment Letters

Comment letters should refer to Docket No. R-1044, and, when possible, should use a standard typeface with a font size of 10 or 12. This will enable the Board to convert the text to machine-readable form through electronic scanning, and will facilitate automated retrieval of comments for review. Also, if accompanied by an original document in paper form, comments may be submitted on 3½ inch computer diskettes in any IBM-compatible DOS-or Windows-based format.

VI. Regulatory Flexibility Analysis

The Board has reviewed these interim amendments to Regulation DD in accordance with section 3(a) of the Regulatory Flexibility Act (5 U.S.C. § 604), the Board has reviewed these interim amendments to Regulation DD. Two of the three requirements of a final regulatory flexibility analysis under the Act are (1) a succinct statement of the need for and the objectives of the rule and (2) a summary of the issues raised

by the public comments, the agency's assessment of those issues, and a statement of the changes made in the final rule in response to the comments. These two areas are discussed above.

The third requirement of the analysis is a description of significant alternatives to the rule that would minimize the rule's economic impact on small entities and reasons why the alternatives were rejected. This interim final rule is designed to provide depository institutions with an alternative method of providing disclosures; the rule will relieve compliance burden by giving depository institutions flexibility in providing disclosures required by the regulation. Overall, the costs of providing electronic disclosures are not expected to have significant impact on small entities. The expectation is that providing electronic disclosures may ultimately reduce the costs associated with providing disclosures.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0271.

The collection of information that is revised by this rulemaking is found in 12 CFR part 230 and in Appendix B. This information is mandatory (15 U.S.C. 4301 *et seq.*) to evidence compliance with the requirements of the Regulation DD and the Truth in Savings Act (TISA). The respondents/recordkeepers are for-profit financial institutions, including small businesses. Institutions are required to retain records for twenty-four months. This regulation applies to all types of depository institutions, not just state member banks. However, under Paperwork Reduction Act regulations, the Federal Reserve accounts for the burden of the paperwork associated with the regulation only for state member banks. Other agencies account for the paperwork burden on their respective constituencies under this regulation.

The revisions provide that depository institutions may deliver disclosures electronically upon obtaining consumers affirmative consent in accordance with the E-Sign Act. The revisions provide guidance to institutions on the timing and delivery

of electronic disclosures, to ensure that consumers have adequate opportunity to access and retain the information. With respect to state member banks, it is estimated that there are 1,000 respondent/recordkeepers and an average frequency of 87,071 responses per respondent each year. Current annual burden is estimated to be 1,482,000 hours. No comments specifically addressing the burden estimate were received, therefore, the numbers remain unchanged. There is estimated to be no additional cost burden and no capital or start up cost associated with the interim rule.

Because the records would be maintained at state member banks and the notices are not provided to the Federal Reserve, no issue of confidentiality arises under the Freedom of Information Act.

The Board has a continuing interest in the public's opinions of the Federal Reserve's collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0271), Washington, DC 20503.

VIII. Solicitation of Comments Regarding the Use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use "plain language" in all proposed and final rules published after January 1, 2000. The Board invites comments on whether the interim rule is clearly stated and effectively organized, and how the Board might make the rule easier to understand.

List of Subjects in 12 CFR Part 230

Advertising, Banks, banking, Consumer protection, Federal Reserve System, Reporting and record keeping requirements, Truth in Savings.

For the reasons set forth in the preamble, the Board amends Regulation DD, 12 CFR part 230, as set forth below:

PART 230—TRUTH IN SAVINGS (REGULATION DD)

1. The authority citation for part 230 continues to read as follows:

Authority: 12 U.S.C. 4301 *et seq.*

2. Section 230.3 is amended by revising paragraph (a) and adding a new paragraph (g) as follows:

§ 230.3 General disclosure requirements.

(a) *Form.* Depository institutions shall make the disclosures required by §§ 230.4 through 230.6 and § 230.10 of this part, as applicable, clearly and conspicuously, in writing, and in a form the consumer may keep. Disclosures for each account offered by an institution may be presented separately or combined with disclosures for the institution's other accounts, as long as it is clear which disclosures are applicable to the consumer's account.

* * * * *

(g) *Electronic communication.* For rules governing the electronic delivery of disclosures, including the definition of electronic communication, see § 230.10.0

3. Section 230.4 is amended by revising paragraph (a)(1) and paragraph (a)(2)(i) to read as follows:

§ 230.4 Account disclosures.

(a) *Delivery of account disclosures.* (1) *Account opening.* (i) *General.* A depository institution shall provide account disclosures to a consumer before an account is opened or a service is provided, whichever is earlier. An institution is deemed to have provided a service when a fee required to be disclosed is assessed. Except as provided in paragraph (a)(1)(ii) of this section, if the consumer is not present at the institution when the account is opened or the service is provided and has not already received the disclosures, the institution shall mail or deliver the disclosures no later than 10 business days after the account is opened or the service is provided, whichever is earlier.

(ii) *Electronic communication.* If a consumer who is not present at the institution uses electronic communication (as defined in § 230.10) to open an account or request a service, the disclosures required under paragraph (a)(1) of this section must be provided before an account is opened or a service is provided.

(2) *Requests.* (i) A depository institution shall provide account disclosures to a consumer upon request. If a consumer who is not present at the institution makes a request, the institution shall mail or deliver the disclosures within a reasonable time after it receives the request and may provide the disclosures in paper form, or electronically if the consumer provides an electronic mail address.

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§ 230.6 [Amended]

4. Section 230.6 is amended by removing paragraph (c).

5. Add a new § 230.10 to read as follows:

§ 230.10 Electronic communication.

(a) *Definition.* “Electronic communication” means a message transmitted electronically between a depository institution and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor.

(b) *General rule.* In accordance with the Electronic Signatures in Global and National Commerce Act (the E-Sign Act) (15 U.S.C. 7001 *et seq.*) and the rules of this part, a depository institution may provide by electronic communication any disclosure required by this part to be in writing.

(c) *When consent is required.* Under the E-Sign Act, a depository institution is required to obtain a consumer’s affirmative consent when providing disclosures related to a transaction. For purposes of this requirement, the disclosures required under §§ 230.4(a)(2) and 230.8 are deemed not to be related to a transaction.

(d) *Address or location to receive electronic communication.* A depository institution that uses electronic communication to provide disclosures required by this part shall:

- (1) Send the disclosure to the consumer’s electronic address; or
- (2) Make the disclosure available at another location such as an Internet web site; and

(i) Alert the consumer of the disclosure’s availability by sending a notice to the consumer’s electronic address (or to a postal address, at the depository institution’s option). The notice shall identify the account involved (if applicable) and the address of the Internet web site or other location where the disclosure is available; and

(ii) Make the disclosure available for at least 90 days from the date the disclosure first becomes available or from the date of the notice alerting the consumer of the disclosure, whichever comes later.

(3) *Exceptions.* A depository institution need not comply with paragraph (d)(2)(ii) of this section for disclosures required under § 230.4(a)(2), and need not comply with paragraphs (d)(2)(i) and (ii) of this section for disclosures required under § 230.8.

(e) *Redelivery.* When a disclosure provided by electronic communication is returned to a depository institution undelivered, the depository institution shall take reasonable steps to attempt redelivery using information in its files.

(f) *Entities other than a depository institution.* A person other than a depository institution that is required to

comply with this part may use electronic communication in accordance with the requirements of this section, as applicable.

6. In Supplement I to Part 230, the following amendments are made:

a. Under Section 230.2 Definitions, under (q) *Periodic statement*, paragraph ii. is removed and paragraph iii. is redesignated as paragraph ii.

b. Under Section 230.4 Account disclosures, under (a)(2) *Requests*, under (a)(2)(i), paragraph 3. is revised and a new paragraph 4. is added.

c. Under Section 230.8 Advertising, under (a) *Misleading or inaccurate advertisements*, a new paragraph 9. is added.

d. Under Section 230.8 Advertising, under (b) *Permissible rates*, a new paragraph 4. is added.

e. Under Section 230.8 Advertising, under (e)(1) *Certain media*, a new heading (e)(1)(i), and a new paragraph 1. are added.

f. A new Section 230.10 Requirements for electronic communication is added at the end of Supplement I.

The amendments read as follows:

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Supplement I to Part 230—Official Staff Interpretations

* * * * *

Section 230.4 Account Disclosures

(a) Delivery of Account Disclosures

* * * * *

(a)(2) Requests

(a)(2)(i)

* * * * *

3. *Timing for response.* Ten business days is a reasonable time for responding to requests for account information that consumers do not make in person, including requests made by electronic communication.

4. *Requests by electronic communication.* Posting disclosures on a depository institution’s web site generally does not relieve the institution’s duty to provide disclosures upon request. If the consumer provides an e-mail address, the institution may provide the disclosures electronically, but the institution must either send the disclosures by e-mail or send a notice to the consumer’s e-mail address pursuant to § 230.10(d)(2)(i) to inform the consumer where the disclosures are posted.

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Section 230.8 Advertising

(a) Misleading or Inaccurate Advertisements

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9. *Electronic advertising.* If an advertisement using electronic communication displays a triggering term (such as a bonus or annual percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a

bonus or annual percentage yield may be accompanied by a link that directly takes the consumer to the additional information.

(b) Permissible Rates

* * * * *

4. *Electronic communication.* An interest rate may be stated only if it is provided in conjunction with, but not more conspicuously than, the annual percentage yield to which it relates. In an advertisement using electronic communication, the consumer must be able to view both rates simultaneously. This requirement is not satisfied if the consumer can view the annual percentage yield only by use of a link that connects the consumer to information appearing at another location.

* * * * *

(e)(1) Certain Media

(e)(1)(i)

1. *Internet advertisements.* The exemption for advertisements made through broadcast or electronic media does not extend to advertisements made by electronic communication, such as advertisements posted on the Internet or sent by e-mail.

* * * * *

Section 230.10 Electronic Communication

(b) General Rule

1. *Relationship to the E-Sign Act.* The E-Sign Act authorizes the use of electronic disclosures. It does not affect any requirement imposed under this part other than a provision that requires disclosures to be in paper form, and it does not affect the content or timing of disclosures. Electronic disclosures are subject to the regulation’s format, timing, and retainability rules and the clear and conspicuous standard. For example, to satisfy the clear and conspicuous standard for disclosures, electronic disclosures must use visual text.

2. *Clear and conspicuous standard.* An institution must provide electronic disclosures using a clear and conspicuous format. Also, in accordance with the E-Sign Act:

- i. The institution must disclose the requirements for accessing and retaining disclosures in that format;
- ii. The consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and
- iii. The institution must provide the disclosures in accordance with the specified requirements.

3. *Timing and effective delivery.* i. *When a consumer opens an account on-line.* When a consumer opens an account on-line, the consumer must be required to access the disclosures required under § 230.4 before the account is opened or a service is provided, whichever is earlier. A link to the disclosures satisfies the timing rule if the consumer cannot bypass the disclosures before opening the account. Or the disclosures in this example must automatically appear on the screen, even if multiple screens are required to view the entire disclosure. The institution is not required to confirm that the consumer has read the disclosure.

ii. *For disclosures provided periodically.*

Disclosures provided by mail are timely based on when the disclosures are sent. Disclosures posted at an Internet web site, such as periodic statements or change-in-terms and other notices, are timely when the institution has both made the disclosures available and sent a notice alerting consumer that the disclosures have been posted. For example, under § 230.5, institutions must give advance notice to affected customers at least 30 calendar days in advance of certain changes. For a change in terms notice posted on the Internet, an institution must both post the notice and notify consumers of its availability at least 30 days in advance of the change.

4. *Retainability of disclosures.* Depository institutions satisfy the requirement that disclosures be in a form that the consumer may keep if electronic disclosures are delivered in a format that is capable of being retained (such as by printing or storing electronically). The format must also be consistent with the information required to be provided under 101(c)(1)(C)(i) of the E-Sign Act 15 U.S.C. 7001(c)(1)(C)(i)) about the hardware and software requirements for accessing and retaining electronic disclosures.

5. *Disclosures provided on depository institution's equipment.* A depository institution that controls the equipment providing electronic disclosures to consumers (for example, a computer terminal located in a depository institution's lobby or at a public kiosk) must ensure that the equipment satisfies the regulation's requirements to provide timely disclosures in a clear and conspicuous format and in a form that the consumer may keep. For example, if disclosures are required at the time of an on-line transaction, the disclosures must be sent to the consumer's e-mail address or must be posted at another location such as the institution's Internet web site, unless the institution provides a printer that automatically prints the disclosures.

(d) Address or Location To Receive Electronic Communication

(d)(1)

1. *Electronic address.* A consumer's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the depository institution.

(d)(2)

1. *Identifying account involved.* A depository institution may identify a specific account in a variety of ways and is not required to identify an account by reference to the account number. For example, where the consumer has only one deposit account, and no confusion would result, the depository institution may refer to "your deposit account." If the consumer has two accounts, the depository institution may, for example, differentiate accounts by using terms such as "primary account" and "secondary account" or by using a truncated account number.

2. *90-day rule.* The actual disclosures provided to consumer must be available for at least 90 days, but the institution has

discretion to determine whether they should be available at the same location for the entire period.

(e) Redelivery

1. *E-mail returned as undeliverable.* If an e-mail to the consumer (containing an alert notice or other disclosure) is returned as undeliverable, the redelivery requirement is satisfied if, for example, the depository institution sends the disclosure to a different e-mail address or postal address that the depository institution has on file for the consumer. Sending the disclosures a second time to the same electronic is not sufficient if the depository institution has a different address for the consumer on file.

By order of the Board of Governors of the Federal Reserve System, March 27, 2001.

Robert deV. Frierson,

Associate Secretary of the Board.

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