

**Prepared Statement of
the Federal Trade Commission on**

The Electronic Signatures in Global and National Commerce Act

Before the

**Committee on Financial Services
United States House of Representatives**

Washington, D.C.

June 28, 2001

Mr. Chairman, I am Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection.⁽¹⁾ Thank you for the opportunity to discuss the "reasonable demonstration" requirement of the consumer consent provision of the Electronic Signatures in Global and National Commerce Act (ESIGN). (A copy of the joint report submitted to Congress pursuant to Section 105(b) of ESIGN by the FTC and the Department of Commerce is attached as Appendix A.)

I. The FTC's Law Enforcement Authority and Experience

As the federal government's principal consumer protection agency, the FTC's mission is to promote the efficient functioning of the marketplace by taking action against unfair or deceptive acts or practices, and increasing consumer choice by promoting vigorous competition. To fulfill this mission, the Commission enforces the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.⁽²⁾ This experience provided useful grounding for the agency in fulfilling its mandate under Section 105(b) of ESIGN.

**II. The Electronic Signatures in
Global and National Commerce Act (ESIGN)**

***A. The Reasonable Demonstration Requirement of the Consumer Consent Provision:
Section 101(c)(1)(C)(ii).***

On June 30, 2000, the President signed ESIGN into law.⁽³⁾ The Act's purpose is to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. In enacting this legislation, however, Congress was careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing; thus, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of ESIGN provides that information required by

law to be in writing can be made available electronically to a consumer only if the consumer affirmatively consents to receive the information electronically *and* the business clearly and conspicuously discloses specified information to the consumer before obtaining the consumer's consent.

Section 101(c)(1)(C)(ii) states that a consumer's consent to receive electronic records is valid only if the consumer "consents electronically or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent." Section 101(c)(1)(C)(ii) overlays existing state and federal laws requiring that certain information be provided to consumers in writing. It also provides a framework for how businesses can comply electronically with the underlying statutory or regulatory requirement to provide written information to consumers - whether the information is a disclosure, a notice, or a statement of rights and obligations - within the context of a business-to-consumer transaction.

B. FTC and Commerce Mandate under ESIGN Section 105(b)

In Section 105(b) of ESIGN, Congress directed the U.S. Department of Commerce (Commerce) and the FTC to issue a report on the impact on electronic commerce ("e-commerce") and consumers of the reasonable demonstration requirement of the consumer consent provision in Section 101(c)(1)(C)(ii). Specifically, Congress asked Commerce and the FTC to report on the benefits of that provision to consumers; the burdens that the provision imposes on e-commerce; whether the benefits outweigh the burdens; the effect of the provision in preventing fraud; and whether any statutory changes would be appropriate.⁽⁴⁾ Our testimony today will be limited to discussing these issues, which were the focus of our review and the Commerce and FTC report.

C. Collection of Information for the Report

To fulfill the mandate set out in Section 105(b), the two agencies conducted outreach efforts, issued a notice in the Federal Register, and conducted a Public Workshop.

1. Outreach Efforts

The agencies conducted extensive outreach to evaluate the technology available to reasonably demonstrate compliance with ESIGN's consumer consent provision, and to learn how companies are implementing the reasonable demonstration requirement. Our contacts included the online business community, technology developers, consumer groups, law enforcement officials, and academics. The industry contacts included high-tech companies involved in infrastructure development for electronic contracting and electronic payment systems, as well as business entities that use, or plan to use, electronic records in consumer transactions. Staff also did its own research to identify the types of businesses that are using the Section 101(c)(1)(C)(ii) consumer consent procedures for providing information "in writing" to consumers in electronic formats, by searching online for sites that were providing required disclosures or other written information to consumers using ESIGN's

procedures.⁽⁵⁾

2. Solicitation of Comment

To comply with Section 105(b)'s mandate to solicit comment from the general public, consumer representatives, and electronic commerce businesses, Commerce and the FTC published a notice in the *Federal Register* on February 13, 2001. The notice requested comments on the benefits and burdens of the consumer consent provision in Section 101(c)(1)(C)(ii), and announced a Public Workshop to discuss the issues raised in the notice.⁽⁶⁾ To increase awareness of the study and the workshop, each agency issued a press release announcing the Federal Register notice, and placed the notice on a special "ESIGN Study" portion of its website. Staff at both agencies also sent copies of the notice to several hundred contacts who had previously expressed interest in issues affecting electronic commerce. In response to the notice, Commerce and the FTC received 32 comments from consumer organizations, software and computer companies, banks, members of the financial services industry and academics.

3. Public Workshop

On April 3, 2001, the agencies hosted a Public Workshop to explore issues raised in the comments and the outreach efforts, to discuss new issues, and to develop a basis for analysis and conclusions.⁽⁷⁾ The agenda included a discussion of legal and technological issues, benefits and burdens, and best practices for complying with the reasonable demonstration requirement of the consumer consent provision in Section 101(c)(1)(C)(ii). There was also an "open mike" session for public participation. Several participants provided demonstrations of the technology that has been or could be used by companies to demonstrate the consumer's consent to receive electronic documents.

D. Analysis of the Issues

Although a number of e-commerce businesses, principally in the financial services industry, have implemented the procedures in Section 101(c)(1)(C)(ii), there was consensus among participants and commenters that insufficient time has passed since the law took effect to: (a) allow consumers or businesses to experience the full effect of the provision; (b) develop sufficient empirical data to evaluate quantitatively whether the benefits outweigh the burdens; or (c) determine whether the absence of procedures required by the consumer consent provision would lead to an increase in deception and fraud against consumers.

1. Benefits vs. Burdens of Section 101(c)(1)(C)(ii)

In general, consumer advocates and state law enforcement agencies expressed strong support for the reasonable demonstration requirement of the consumer consent provision as an effective tool to promote e-commerce by increasing consumer confidence in the electronic marketplace. They stated that the benefits of this requirement to consumers and e-commerce businesses outweigh the burdens associated with adapting business systems to comply with the provision. Consumer advocates also suggested that the reasonable

demonstration requirement may prevent deception and fraud from occurring by giving consumers more information about the legitimacy of the business they are dealing with and alerting them to the importance of receiving electronic documents. Businesses that have implemented Section 101(c)(1)(C)(ii) also report benefits, including increased protection from liability, increased consumer confidence, and the opportunity to engage in additional dialogue with consumers about transactions.

Some industry commenters indicated that the reasonable demonstration requirement may be burdensome because it adds an extra step that could delay the consummation of the transaction, and may cause confusion that could lead consumers to forgo the use of electronic records. Although some commenters identified burdens, there is insufficient data to assess the likelihood or severity of these burdens quantitatively, or their impact on consumers and e-commerce businesses. In addition, the record suggests that some burdens, such as the additional step entailed to satisfy the reasonable demonstration requirement, may be resolved or minimized over time as businesses and consumers adjust to the consent procedure and gain experience sending and receiving documents in an electronic form. Similarly, instances of consumer frustration or confusion and the potential for loss of business may be reduced or eliminated by the refining of the consent procedures.

2. Prevention of Deception and Fraud

Although measuring the consequences of omitting a provision like Section 101(c)(1)(C)(ii) is difficult, we believe that the inclusion of this provision helps prevent deception and fraud. The provision ensures that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions. Moreover, this provision reduces the risk that consumers will accept electronic disclosures or other records if they are not actually able to access those documents electronically. As a result, it diminishes the threat that electronic records will be used to circumvent state and federal laws that contain a "writing" requirement.

As enacted, E-SIGN gives appropriate consideration to the threat that fraud and deception on the Internet pose to the growth and public acceptance of electronic commerce. Most laws protecting consumers against fraud and deception come into play after fraud has been committed and documented. E-SIGN attempts to discourage fraud before it takes hold. E-SIGN incorporates basic consumer protection principles that will help maintain the integrity and credibility of the electronic marketplace, bolster confidence among consumers that electronic records and signatures are safe and secure, and ensure that consumers continue to receive comprehensible written disclosures required by state or federal law.

E. Report Conclusions

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the reasonable demonstration requirement of E-SIGN's consumer consent provision outweigh the burdens of its implementation on electronic commerce. The provision facilitates e-commerce and the use of electronic records and signatures while enhancing consumer confidence. It preserves the right of consumers to receive written

information required by state and federal law. The provision also discourages deception and fraud by those who might fail to provide consumers with information the law requires that they receive.

The reasonable demonstration requirement in Section 101(c)(1)(C)(ii) appears to be working satisfactorily at this stage of the Act's implementation. Almost all participants in the study recommended that, for the foreseeable future, implementation issues should be worked out in the marketplace and through state and federal regulations. Therefore, Commerce and the FTC in their joint report recommend that Congress take no action at this time to amend the statute.

IV. Conclusion

The Commission greatly appreciates the opportunity to describe its efforts to assess the impact of E-SIGN Section 101(c)(1)(C)(ii), particularly its positive effect on preventing deception and fraud in the electronic marketplace.

Endnotes:

1. The views expressed in this statement represent the views of the Commission. My oral statement and responses to questions you may have are my own and are not necessarily those of the Commission or any Commissioner.
2. 15 U.S.C. § 45(a).
3. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq.*). The majority of the statute became effective on October 1, 2000; the remainder went into effect this year.
4. Specifically, Section 105(b) of the Act requires that: "Within 12 months after the date of the enactment of this Act, the Secretary of Commerce and the Federal Trade Commission shall submit a report to Congress evaluating any benefits provided to consumers by the procedure required by section 101(c)(1)(C)(ii); any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses."
5. Printouts of a few examples, primarily on banking and other financial services sites, are attached as Appendix B.
6. 66 Fed. Reg. 10011 (February 13, 2001). A copy of the notice is attached to the Report in Appendix A.
7. The agenda for the Public Workshop is attached to the Report, Appendix A. All of the information relating to the Section 105(b) Report, including the Federal Register notice, the comments received in response to the notice, the Public Workshop Agenda and transcript, is available on the FTC website at <http://www.ftc.gov/bcp/workshops/esign/comments/index.htm>.