ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

The Consumer Consent Provision in Section 101(c)(1)(C)(ii)

FEDERAL TRADE COMMISSION
Bureau of Consumer Protection

DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration

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Table of Contents

Executive Summary

On June 30, 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act[1] ("ESIGN" or "the Act"), 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. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1)(C)(ii) of the Act requires businesses to obtain from consumers electronic consent or confirmation to receive information electronically that a law requires to be in writing. The Act went into effect in October 2000.

In Section 105(b) of the Act, Congress directed the Department of Commerce (Commerce) and the Federal Trade Commission (FTC) to issue a report on the impact of the consumer consent provision of Section 101(c)(1)(C)(ii). Specifically, Congress asked Commerce and the FTC to report on the benefits of that consumer consent provision to consumers; the burdens that the provision imposes on electronic commerce ("e-commerce"); whether the benefits outweigh the burdens; the effect of the consent provision in preventing fraud; and whether any statutory changes are necessary.

To evaluate these issues, Commerce and the FTC conducted extensive outreach to the on-line business community, technology developers, consumer groups, law enforcement and academia. To solicit public comments from these groups and the general public, the agencies issued a Notice in the *Federal Register*. The agencies also conducted a Public Workshop to explore issues raised in the comments and outreach efforts. The record consists of written comments and public workshop discussion, as well as anecdotal evidence, expert opinion, and independent research. There was consensus among the participants and commenters that not enough 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 of implementation outweigh the burdens; and c) determine whether the lack of the type of procedure required by the consumer consent provision would lead to an increase in deception and fraud against consumers.

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the consumer consent provision of ESIGN 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 consumer consent provision in ESIGN 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 recommend that Congress take no action at this time to amend the statute.

I. Growth of E-Commerce

E-commerce represents a small but vital segment of business-to-consumer transactions. The Census Bureau (Census) estimates that U.S. e-commerce sales by retail establishments for the first quarter 2001 were $7.0 billion, up 33.5 percent from the first quarter of 2000. The first quarter 2001 e-commerce results accounted for 0.91 percent of total retail sales, up from 0.70 percent in the first quarter of 2000, though down from 1.01 percent in the fourth quarter of 2000. Retail e-commerce sales of $25.8 billion in 2000 accounted for 0.8 percent of total retail sales.[(2)]

E-commerce plays a notable role in other sectors where business-to-consumer transactions are important. According to Census estimates for 1999 (the most recent year available), e-commerce revenues for the securities brokerage industry were $3.8 billion, or 1.9 percent of total revenues of $203.7 billion. E-commerce revenues for theon-line information services industry were $1 billion, which equates to 5.1 percent of total revenues of $20.1 billion; and e-commerce revenues for the travel services sector were$5.3 billion, or over 21 percent of total revenues of $25 billion.[(3)]

The benefits of e-commerce extend beyond the dollar values that are placed on business activity: it gives consumers access to an unlimited marketplace of goods and services ranging from music and stocks to on-line books and shopping services at their fingertips. To continue enjoying the fruits of this technology, businesses and consumers - domestic and international - must have confidence in the integrity and credibility of this emerging electronic marketplace. Congress intended ESIGN to have a positive impact on the continued growth of e-commerce and consumer confidence.

II. Congressional Mandate: Study of Section 101(c)(1)(C)(ii)

A. ESIGN's Consumer Consent Provision

On June 30, 2000, Congress enacted ESIGN 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. Careful to preserve the underlying consumer protection laws governing consumers' rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions. Section 101(c)(1) of the Act provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically[(4)]*and* the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.[(5)]

Moreover, 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."[(6)] 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 with the underlying statutory or regulatory requirement to provide written information to consumers electronically - 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. The FTC/Commerce Study

In addition to including the consumer consent provision in Section 101(c)(1)(C)(ii), Congress sought an analysis of the impact of the provision on both consumers and businesses. 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.

The National Telecommunications and Information Administration (NTIA), on behalf of the Department of Commerce, and the FTC conducted the study required by Section 105(b). Based on the narrow mandate in Section 105(b), the agencies have focused their study and this Report on Section 101(c)(1)(C)(ii), and did not evaluate any other consumer protection provisions of the Act.

1. *Outreach Efforts*

To evaluate the technology available to employ the consumer consent provision, and to learn how companies are implementing Section 101(c)(1)(C)(ii), the agencies conducted extensive outreach to the on-line business community, technology developers, consumer groups, law enforcement, and academia. 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. All interested parties were encouraged to submit papers and comments on the benefits and burdens of the requirement, and staff did 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.

2. *Federal Register Notice*

To comply with Section 105(b)'s mandate to solicit comment from the general public, consumer representatives, and electronic commerce businesses, NTIA 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.[(7)] 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 by e-mail to several hundred contacts who had previously expressed interest in issues affecting electronic commerce.[(8)]

In response to the Notice, NTIA and the FTC received 32 comments from consumer organizations, software and computer companies, banks, members of the financial services industry and academics.[(9)] Many of the commenters responded electronically to a special e-mail box. In addition, four commenters submitted supplemental statements after the workshop. NTIA and the FTC posted all written comments on their websites to facilitate public access.

3. *Public Forum*

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 thorough basis for analysis and conclusions.[(10)] The agenda included a discussion of legal issues, technology issues, benefits and burdens, and best practices for complying with the consumer consent provision of Section 101(c)(1)(C)(ii), as well as a session for public participation.[(11)] A total of 21 individuals and organizations participated in the roundtable discussions and several more made comments during the public session of the workshop.[(12)]

The following sections of this Report provide an analysis of the comments and information received in response to the Federal Register Notice and outreach activities, during the workshop discussion and after the workshop. Specifically, Section III provides an overview of the issues raised by the comments and the workshop discussion. Section IV analyzes the benefits and burdens of the consumer consent provision in Section 101(c)(1)(C)(ii), and evaluates the effect of the consumer consent provision in preventing fraud. Section V states the agencies' conclusions.

III. Summary of Public Comments And Workshop

In general, consumer advocates and state law enforcement agencies expressed strong support for the consumer consent provision in Section 101(c)(1)(C)(ii) as an effective tool to prevent fraud and increase consumer confidence in the electronic marketplace. In their responses to the Federal Register Notice and their comments at the workshop, consumer groups and state law enforcement agencies said the benefits of Section 101(c)(1)(C)(ii) to consumers and e-commerce businesses outweigh the burdens associated with adapting business systems to comply with the provision.

Some commenters maintained that the provision adds an unnecessary extra step that at best would delay the consummation of the transaction, and at worst could cause confusion that could lead consumers to forgo the use of electronic records.[(13)] While a number of the commenters representing e-commerce businesses expressed some concern about the costs and uncertainties of the implementation and interpretation of Section 101(c)(1)(C)(ii), they nevertheless agreed that the enactment of ESIGN provided overall net benefits.[(14)] Most agreed, however, that because of industry's limited experience with the requirement, it is premature to recommend changes.[(15)]

A. Benefits to Consumers

The consumer advocates who submitted comments and those who participated in the workshop identified a number of benefits that the consumer consent provision in Section 101(c)(1)(C)(ii) provides.

1. *Ensures access to documents and promotes awareness*

Section 101(c)(1)(C)(ii) requires that the e-commerce business determine whether the consumer has the ability to receive an electronic notice before transmitting the legally required notices to the consumer.[(16)] According to several commenters, the provision ensures that the consumer has access to a computer and to the Internet; ensures that the consumer has access to the software necessary to open the documents that are to be transmitted electronically; and raises the consumer's awareness of the importance of the documents received and the importance of receiving the documents electronically.[(17)] One commenter suggested that increased awareness is particularly beneficial to those consumers who ordinarily are not concerned about receiving information that is required by law to be in writing and can now be made available electronically, or who do not fully consider the implications of receiving this information electronically.[(18)] Other commenters noted that putting notices in an electronic form that can be easily accessed is likely to lead to the development of a common format. This was cited as an additional benefit for consumers and will also help on-line merchants meet other provisions of ESIGN, such as Section 101(d), the document retention provision.[(19)]

2. *Provides a "bright line" to identify legitimate businesses*

The commenters stated that Section 101(c)(1)(C)(ii) also reassures consumers about the legitimacy of an on-line merchant. "Good businesses," the commenters noted, would ensure receipt of documents and make certain that the consumer is comfortable dealing with an electronic format.[(20)] Discussion at the workshop suggested that compliance with the ESIGN consumer consent provision can provide a "bright line" by which businesses can signal their legitimacy to consumers and differentiate themselves from unscrupulous operators, and as a result, enhance consumer confidence in on-line transactions.[(21)]

3. *Helps prevent deception and fraud*

Some commenters suggested that Section 101(c)(1)(C)(ii) protects consumers from e-commerce businesses that might misuse the provision of electronic records to circumvent laws requiring that consumers receive certain disclosures, information and other documents. This could include such documents as a confirmation of their transaction, a statement of the terms and conditions of the transaction, a copy of their contract to use in court if a dispute arises, or information about any right to cancel a transaction within a "cooling-off" period.[(22)]

Several consumer advocates stated that a significant benefit of the consumer consent provision in Section 101(c)(1)(C)(ii) is the prevention of consumer fraud.[(23)] Most anti-fraud laws provide remedies after the fraud has been committed and proved. ESIGN attempts to prevent fraud *before* it occurs. Both consumer and industry representatives gave specific examples of how Section 101(c)(1)(C)(ii) protects against fraud, noting that the provision:

- discourages the use of electronic records to provide information to a consumer without Internet access;[24]
- reduces the ability of businesses to use product price unfairly to persuade consumers to accept electronic records instead of paper;[25]
- deters companies from fraudulently changing the terms of contracts in cases where consumers electronically sign an agreement and consent to receive electronic disclosures;[26]
- ensures the ability of consumers to access or retain important electronic records;[27]
- provides a way to gauge the consumer's ability to use electronic equipment;[28] and
- gives the consumer a chance to reflect on what he or she is agreeing to before confirming consent electronically, in a transaction that originates in a face-to-face setting.[29]

B. Benefits and Burdens to Electronic Commerce

Section 105(b) asks whether Section 101(c)(1)(C)(ii) imposes burdens on e-commerce. While the participants in our study identified some burdens on e-commerce, they also identified several benefits. The commenters identified the following benefits and burdens for e-commerce businesses.

1. *Legal certainty and protection*

Some commenters noted that the consumer consent provision in Section 101(c)(1)(C)(ii) provides legal certainty in on-line business transactions, and may act as a "safe-harbor" for e-commerce businesses that follow the parameters in the Act.[30] Businesses that implement procedures for complying with Section 101(c)(1)(C)(ii) have some assurance that they have obtained consent and provided electronic documents in a manner sufficient to make the electronic transactions legally valid.[31] In addition, they obtain information to show that the record they provided could be accessed by the consumer.[32] As a result, the consumer consent provision may protect e-commerce businesses from baseless legal claims by providing an electronic or paper document trail of the transaction when disclosures or other records are provided electronically to consumers.

2. *Technological neutrality*

Most commenters agreed that Section 101(c)(1)(C)(ii) is technology-neutral, providing businesses the flexibility to design computer applications that fit their unique needs,[33] and allowing the technology and electronic commerce marketplace to decide which technologies will be most appropriate.[34] Many on-line businesses praised the technology-neutral language, and said that technology, rather than legislation, can solve future problems concerning technical compatibility.[35]

The commenters also noted that, because ESIGN contains broad parameters for obtaining or structuring consumer consent (including demonstrating ability to access the information), businesses have greater flexibility when implementing new practices and procedures to conduct electronic transactions or comply electronically with federal or state laws and regulations. Thus, brick-and-mortar businesses may be more willing to adopt electronic methods to attract new customers and transact business electronically.[(36)]

However, the commenters expressed some concern that Section 101(c)(1)(C)(ii) would cause firms to favor certain technologies over others that might actually be better for providing notices to consumers.[(37)] There also was concern that the consumer consent procedure - while it might benefit consumers by encouraging the development of a common format - would lead firms to stay with existing technologies rather than shift to new technologies because of the need to repeat the process of obtaining consumer consent for any new technology.[(38)]

3. ***Loss of potential customers***

According to some commenters, Section 101(c)(1)(C)(ii) could result in a loss of business because of the extra steps consumers have to take to agree to receive electronic versions of written documents, particularly for transactions that begin in a face-to-face setting.[(39)] Several commenters believed that the consumer consent procedures might create frustration and confusion for consumers, which, in turn, could discourage them from completing electronic transactions.[(40)] For example, in a face-to-face meeting in a business office, it is up to the consumer to later confirm the request to receive information in an electronic form from his or her home computer, if the transaction is to meet the requirements of Section 101(c)(1)(C)(ii).[(41)] Some e-commerce businesses consider this procedure unduly intrusive and confusing for the consumer and burdensome on e-commerce.[(42)]

Several commenters stated that the additional step is not necessarily burdensome for businesses.[(43)] One participant noted that her company already incorporates consent with other documentation that must be legally executed at the start of the relationship (*e.g.*, on-line brokerage agreements that include electronic disclosures).[(44)] Another workshop participant (an FTC economist) wondered why the on-line industry could not satisfy this additional step by sending the consumer e-mail to initiate the relationship, and continue with the electronic transaction to obtain consent for the receipt of other electronic documents.[(45)]

4. ***Underlying laws sufficient***

According to some e-commerce businesses, including some on-line financial services companies, the consumer consent provision in Section 101(c)(1)(C)(ii) is unnecessary because existing anti-fraud and unfair trade statutes require businesses to make disclosures to consumers and adequately address any of the on-line problems that may arise.[(46)]

IV. 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 the participants and commenters that not enough 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 of implementation outweigh the burdens; and c) determine whether the lack of the type of procedure required by the consumer consent provision would lead to an increase in deception and fraud against consumers. Nonetheless, based on industry experience; anecdotal evidence, expert opinion and other information collected through outreach activities with consumer advocates and members of the e-commerce community; independent research; written comments submitted in response to the Federal Register Notice; and discussion during the workshop, it is reasonable to conclude that, thus far, the benefits provided to consumers by the procedures in the provision outweigh the burdens imposed on electronic commerce.

A. Benefits vs. Burdens

Consumer advocates suggest that Section 101(c)(1)(C)(ii) may prevent deception and fraud before it occurs 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 protection from liability, increased revenues resulting from increased consumer confidence, and the opportunity to engage in additional dialogue with consumers about the transactions.

Although the record indicates that Section 101(c)(1)(C)(ii) causes some burdens, a number of commenters stated that the added step to obtain the consumer's consent is not significantly burdensome. To the degree they identified burdens, there is insufficient data to quantitatively assess their likelihood or severity, or their impact on consumers and e-commerce businesses. In addition, the record suggests that some burdens, such as the added step created by the consumer consent provision in Section 101(c)(1)(C)(ii), 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. In addition, given the pace of technological development, there is reason to believe that some issues, such as technical incompatibility in file formats, will be resolved by existing or future technology.

Similarly, instances of consumer frustration or confusion and the potential for loss of business may be solved by the creative structuring of the consent provision. For example, solutions may include incorporating the consent procedure of Section 101(c)(1)(C)(ii) in documents that must be legally executed at the beginning of the relationship (such as an on-line brokerage agreement) or initiating the relationship with a consumer using electronic mail that requires a response. The technology-neutral language of the provision encourages creativity in the structure of business systems that interface with consumers, and provides an opportunity for the business and the consumer to choose the form of communication for the transaction. Moreover, as allowed under Section 104 of the Act, federal regulatory agencies and states can issue regulations to provide guidance about the implementation of ESIGN in specific industries.(47) These regulations may resolve many of the issues that have surfaced since ESIGN was enacted.

B. Prevention of Deception and Fraud

Section 105(b) also requires Commerce and the FTC to address the issue of whether the absence of Section 101(c)(1)(C)(ii) would cause an increase in consumer fraud. While it is difficult to measure whether the lack of a provision would produce a certain result, we believe that the presence of the provision will help prevent deception and fraud. ESIGN's consumer consent provision ensures that consumer protections that exist in traditional commercial transactions extend to business-to-consumer electronic transactions. ESIGN overlays, rather than preempts, state and federal laws that provide for consumers to receive certain information "in writing" in connection with a transaction, thereby preserving consumers' rights under those laws in the world of e-commerce transactions.

ESIGN's consumer consent provision in Section 101(c)(1)(C)(ii) provides a framework for how businesses can meet the "in writing" requirements of existing state and federal laws and regulations when providing information to consumers electronically. 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. The consumer consent provision in Section 101(c)(1)(C)(ii) provides substantial benefits as a preventive measure against deceptive and fraudulent practices in the electronic marketplace.[(48)]

The consumer safeguards adopted by Congress in ESIGN are consistent with well-established principles of consumer protection law. A keystone of consumer protection law is to ensure that the consumer can receive accurate information necessary to decide whether to enter into a particular transaction. The information must be delivered in a way that is timely and clear and conspicuous. That is, it must be presented at a time and in a way that the consumer is likely to notice and understand.

As enacted, ESIGN gives appropriate consideration to the threat that fraud and deception on the Internet pose to the growth and public acceptance of electronic commerce. It establishes safeguards that can avert many of the abusive practices that marked earlier technological innovations in the marketplace. Most laws protecting consumers against fraud and deception are implemented after fraud has been committed and documented. ESIGN attempts to address fraud before it occurs. Nothing is more likely to undermine consumer confidence in the electronic marketplace than exploitation by unscrupulous marketers, who would take advantage of electronic records and signatures as yet another way to deceive consumers. ESIGN 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. Section 101(c)(1)(C)(ii) protects consumers who wish to receive electronic records by ensuring that they have access to the same information and protections as consumers who choose to use traditional paper-based transactions.

Section 101(c)(1)(C)(ii)'s consumer consent provision plays an integral role in achieving the goal of ESIGN: to facilitate e-commerce and the use of electronic records and signatures, and to ensure that consumers can access information businesses send electronically, which an underlying law requires to be in writing.

V. Conclusion

Although participants expressed a range of views, it is reasonable to conclude that, thus far, the benefits of the consumer consent provision of ESIGN 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 consumer consent provision 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 recommend that Congress take no action at this time to amend the statute.

Appendix A: Federal Register Notice

Appendix B: List of Contacts

Academia

Becker, Shirley A., Florida Institute of Technology, Department of Engineering, Computer Science Program
Braucher, Jean, University of Arizona College of Law,
Clifford, Donald F., Jr., University of North Carolina School of Law
Effross, Walter, American University College of Law
Hillman, Robert A., Cornell University School of Law
Kobayashi, Bruce, George Mason University Law School
Koopman, Philip, Carnegie Melon University
McManis, Charles, Washington University Law School
Perritt, Henry H., Dean, Chicago Kent College of Law
Pierce, Richard, George Washington University
Post, David, Temple Law School
Rachlinski, Jeffrey, Cornell University School of Law
Reichman, Jerome H., Duke University School of Law
Reidenberg, Joel R., Fordham University
Reitz, Curtis R., University of Pennsylvania Law School
Ribstein, Lawrence, George Mason University Law School
Rice, David, Roger Williams University School of Law,
Schmidt, Jim, San Jose State University
Wheeler, Michael, Harvard Business School
Winn, Jane Kaufman, Southern Methodist University School of Law

Government

Federal:

Federal Communications Commission, Wireless Telecommunications Bureau
Federal Reserve System, Board of Governors, Division of Consumer & Community Affairs

State:

Connecticut, Office of Attorney General
Maryland, House of Delegates
Maryland, Office of Attorney General
New York, Office of Attorney General
North Carolina, Office of Attorney General
Washington, Office of Attorney General, Consumer Protection Division, Internet Bureau

State groups:

National Association of Attorneys General
National Conference of Commissioners on Uniform State Law

Legal Profession

American Bar Association, Subcommittee on Electronic Commerce

Law Firms:

Akin, Gump, Strauss, Hauer & Feld
Arent, Fox, Kintner, Plotkin & Kahn
Bingham Dena, LLP
Callister, Nebeker & McCullough
Clifford, Chance, Rogers & Wells
Collier, Shannon, Scott
Fried, Frank, Harris, Shriver & Jacobson
Goodwin, Procter & Hoar
Hall, Dickler, Kent, Goldstein & Wood
Hogan & Hartson
Holland & Knight
Keller & Heckman
Morrison & Foerster
Pillsbury Winthrop
Piper, Marbury, Rudnick & Wolfe
Shook, Hardy & Bacon
Wiley, Rein & Fielding
Wilmer Cutler & Pickering

Individual Attorneys:

Chow, Steven Y., Esq.
Dayanim, Benjamin, Esq.
Kunze, Carol A., Esq.
Sarna, Shirley, Esq.

Consumer groups/Non-Profits

AARP
CATO Institute
Center for Democracy and Technology
Center For Media Education
Consumer Action
Consumer Alert
Consumer Federation of America
Consumers International

Consumer Project on Technology
Consumers Union
Council of Better Business Bureaus
BBB Online Privacy
National Advertising Division
Electronic Privacy Information Center
Global Public Policy
Global Telecommunications Policy
Internet Consumers Organization
Internet Education Foundation
Internet Law & Policy Forum
Internet Public Policy Network
National Association of Consumer Agency Administrators
National Consumer Law Center
National Consumers League
National Consumer Coalition
Privacy Foundation
Privacy Right, Inc.
U.S. Public Interest Research Group
World Wide Web Consortium

Trade Associations

American Advertising Federation
American Association of Advertising Agencies
American Bankers Association
American Council of Life Insurers
American Electronics Association
Association of National Advertisers
Business Software Alliance
Cellular Telecommunications Industry Association
Commercial Internet eXchange Association
Direct Marketing Association, Inc
Direct Selling Association.
Electronic Financial Services Council
Electronic Retailing Association
Grocery Manufacturers of America
Information Technology Industry Council
Interactive Digital Software Association
ITAA
Investment Company Institute
National Auto Dealers Association
North American Securities Administrators Association
Promotion Marketing Association, Inc.
Software & Information Industry Association
U.S. Chamber of Commerce (eCommerce & Internet Technology)
U.S. Council for International Business
U.S. Telecom Association
Wireless Advertising Association
Wireless Location Industry Association (AdForce Everywhere)

Businesses

24/7 Media, Inc.
Adforce Everywhere

AlphaTrust
American Express
America Online, Inc.
American Telecast Corporation
AT&T Labs
AT&T Wireless Services, Inc.
Aether Systems, Inc., Software Product Division
Banc One Corporation
Bankers Roundtable
bizrate.com
Blitz! Media, Inc. (The Upsell Experts)
Cable & Wireless
CACI
California Digital Library
Capital One Services, Inc.
CertifiedMail.com
ClickaDeal.com
Clicksure
Columbia House
Compaq
Price Waterhouse
CommerceNet
Compaq Computer
Crosswalk.com
Darden Communications
Disney
Diversinet
Edventure Holdings
E-Lock Technologies, Inc.
Entrust Technologies
Expedia.com
Fannie Mae
Fiderus Strategic Security and Privacy Services
FitnessQuest
Forrester Research, Inc.
Gateway, Inc.
Grey Matter, LLC
Hewlett Packard
IBM, Pervasive Computing Division
IDCide
IDQualified.com
Ignition
iLumin Corporation
Infotech Strategies
Intel Corporation, Security Technology Lab
Invertix Corporation
Leo Burnett Company
Leslie Harris & Associates
Lot21, Inc.
Lucent Technologies
MARS, Inc.
MEconomy, Inc.
Metricomn
Microsoft Corporation
Mitretek Systems, Inc.
NationsBank Corporation

Network Solutions
Nextel Communications, Inc.
Nortel
One Accord Technologies
PenOp, Inc.
Persona, Inc.
Podesta.com
PricewaterhouseCoopers, LLP
Proctor & Gamble
Prudential Securities
PSINet
QUALCOMM, Inc.
QVC
SAFEcertified.com, Inc.
Sallie Mae
Samsung Electronics
Charles Schwab & Associates
Security Software Systems
Silver Platter Information, Inc.
Simon Strategies
Sprint PCS
Square Trade
State Farm Insurance
Stewart & Stewart
Sun Microsystems Computer Corp.
Terra Lycos
Time Warner, Inc.
True Position, Inc.
TRUSTe
ValiCert
Van Scoyoc Associates, Inc.
VeriSign
Verizon
Verizon Wireless
Vindigo Company
Visa U.S.A., Inc.
Warner Lambert
WindWire
Wireless Internet and Mobile Computing
World Wide Marketing - iXL
Xypoint Corporation
Yahoo!
Zero-Knowledge Systems, Inc.

Media

Privacy Times
The Wall Street Journal

Appendix C: List of Commenters and Acronyms

Acronym   Commenter

ACLI American Council of Life Insurers
AIA American Insurance Association
Baker & McKenzie Baker & McKenzie
b4bpartner b4bpartner Inc.
CT AG Richard Blumenthal, Connecticut Attorney General
California California Department of Consumer Affairs
Crocker Thomas E. Crocker
CU Consumers Union
CF Customers Forever, LLC
Dayanim Behnam Dayanim
DST Digital Signature Trust Co.
EFSC** Electronic Financial Services Council
E*Trade E*Trade Bank
Fidelity Fidelity Investments
GAO U.S. General Accounting Office
Greenfield Michael M. Greenfield
Household Household Bank (Nevada), N.A., et al.
iLumin iLumin Corporation
ICI Investment Company Institute
Mandy David Mandy, for Authentidate
NACAA National Association of Consumer Agency Administrators
NCLC** National Consumer Law Center
NewRiver NewRiver, Inc.
Notaries Pennsylvania Association of Notaries
SIA Securities Industry Association
Selwood Selwood Research
Silanis Silanis Technology, Inc.
SIIA Software & Information Industry Association
VeriSign VeriSign Corporation
Visa Visa U.S.A., Inc.
Wachovia Wachovia Corporation, etal.
Winn Jane Kaufman Winn
Yen** Elizabeth C. Yen, Esq.
Yuroka Yuroka

** Denotes that commenter also submitted a supplemental comment after the Public Workshop. References in the Report to supplemental comments will be cited as [Acronym] Supp. at [page].

Appendix D: Workshop Agenda

Federal Trade Commission

Federal Trade Commission and National Telecommunications and Information Administration, Department of Commerce

Esign Public Workshop
April 3, 2001

FTC Headquarters, Room 432, 600 Pennsylvania Ave., Washington D.C.

This workshop is part of the Federal Trade Commission ("FTC") and the National Telecommunications and Information Administration's ("NTIA") effort to gather information to report to Congress on the benefits and burdens of § 101(c)(1)(C)(ii) of the Electronic Signatures in Global and National Commerce Act ("ESIGN") which authorizes the use of an electronic record to send legally required information to consumers if the consumer consents or confirms consent "in a manner that reasonably demonstrates that they can access the information." Congress mandated this report under § 105(b) of ESIGN and required the submission of this study by June 30, 2001.

Through this workshop we hope to advance our understanding of the benefits and burdens to businesses and consumers resulting from the consumer consent provision of § 101(c)(1)(C)(ii). The workshop will consist of moderated round table discussions with representatives from industry, government, consumer advocate groups and other interested parties. We hope to foster discussion about best practices in obtaining electronic consent and to allow workshop participants to demonstrate their best practices, and the technologies that are available for companies to obtain consumer consent.

Technology Exhibits: Starting at 12:00p.m. and continuing until the end of the day, attendees may visit technology exhibits in Room 532.

The forum is open to the public, and there is no formal registration process for those wishing to attend.

AGENDA

8:30 - 9:00 **Registration**

9:00 - 9:05 **Opening remarks**
Jodie Bernstein, Director, Bureau of Consumer Protection, *Federal Trade Commission*

9:05 - 9:30 **Setting the Stage: What are the Issues?**
Moderator:
Eileen Harrington, Associate Director, Bureau of Consumer Protection, *Federal Trade Commission*

This session will identify the relevant issues regarding § 101(c)(1)(C)(ii) of ESIGN, explore the areas of consensus, controversy and disagreement, and set the stage for the rest of the day's discussion.

Panelists:
Margot Saunders, *National Consumer Law Center* (NCLC)
Jerry Buckley, Counsel for *Electronic Financial Services Council* (EFSC)
Benham Dayanim, *Paul, Hastings, Janofsky & Walker, LLP*

9:30 - 10:30 Legal Issues

Moderator:
April Major, Attorney, Bureau of Consumer Protection, *Federal Trade Commission*

A moderated roundtable discussion to explore the legal issues that face all parties when implementing the consumer consent provision found in § 101(c)(1)(C)(ii) of ESIGN.

Panelists:
Margot Saunders, *National Consumer Law Center*
Jerry Buckley, Counsel for *Electronic Financial Services Council*
Benham Dayanim, *Paul, Hastings, Janofsky & Walker, LLP*

Elizabeth Yen, *Hudson Cook*
Robert A. Wittie, Counsel for *Investment Company Institute* (ICI)
Jane Stafford, *Wachovia Bank*
Mark MacCarthy, *Visa Payments Systems*
Jeff Wood, *Household Bank*

10:30 - 10:45 **Break**

10:45 - 11:45 **Technology Issues**

Moderator:
Fran Nielson, PhD, Senior Computer Scientist, *National Institute of Science and Technology, U.S. Department of Commerce*

Technical Expert:
William Burr, Manager, Security Technologies Group, Computer Security Division, *NIST, U.S. Department of Commerce*

This moderated roundtable discussion will explore the technology issues and the available software and computer technologies that enable companies to employ the consumer consent provision.

Panelists:
Christopher Smithies, *Selwood Research*
Michael Laurie, *Silanis Technology*
Mark Bohannon, *SIIA*
Thomas Wells, *b4bpartner*
Virgina Gobats, *NewRiver*
James Brandt, *VeriSign*
Jane Winn, Professor of Law, *SMU*
Dr. Bruce E. Brown, *iLumin*
Thomas Greco, *Digital Signature Trust*
Margot Saunders, *NCLC*

11:45 - 1:00 **Lunch**

1:00 - 3:00 **Benefits and Burdens**

Moderator:
Kathy Smith, Chief Counsel, *National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce*

Economists:
Keith Anderson, Bureau of Economics, *Federal Trade Commission*
Lee Price, Deputy Under-Secretary for Economic Affairs, *Economics and Statistics Administration, U.S. Department of Commerce*

This moderated roundtable discussion will focus on the benefits and burdens to consumers and businesses of ESIGN's consumer consent requirement, set forth in § 101(c)(1)(C)(ii). The workshop will also explore whether the benefits outweigh the burdens.

Panelists:
Mark MacCarthy, *Visa Payments System*
Michael Laurie, *Silanis Technology*

Paul Gallagher, *Fidelity*
Elizabeth Yen, *Hudson Cook*
Jane Winn, Professor of Law, *SMU*
Gail Hillebrand, *Consumers Union*
Behnam Dayanim, *Paul, Hastings, Janofsky & Walker, LLP*
Thomas Wells, *b4bpartner*
John Buchman, *E*Trade Bank*
Jeremy Newman, *Selwood Research*
Margot Saunders, *NCLC*
Wendy Weinberg, *NACAA*
Jerry Buckley, *EFSC*

3:00 - 3:15 **Break**

3:15 - 4:15 **Best Practices**

Moderator:
Eileen Harrington, Associate Director, Bureau of Consumer Protection, *Federal Trade Commission*

This will be a moderated roundtable discussion from the standpoint of both businesses and consumers. We will also explore whether similar best practices apply to all industries or whether some are industry-specific.

Panelists:
Virginia Gobats, *NewRiver*
Gail Hillebrand, *Consumers Union*
Margot Saunders, *NCLC*
Robert A. Wittie, Counsel for *ICI*
Mark Bohannon, *SIIA*
Jeff Wood, *Household Bank*
Jane Stafford, *Wachovia Bank*
Dr. Bruce E. Brown, *iLumin*
Wendy Weinberg, *NACAA*
Paul Gallagher, *Fidelity*

4:15 - 4:55 **Public Participation**

Public attendees will have an opportunity to ask questions and offer insight on the day's dialogue.

4:55 - 5:00 **Closing: What's next?**

U.S. Department of Commerce

Appendix E: Workshop Participants

1. b4bpartner, Inc. (Thomas Wells)
2. Consumers Union (Gail Hillebrand)
3. Behnam Dayanim, Esq.
4. Digital Signature Trust (Thomas Greco)
5. Electronic Financial Services Council (Jerry Buckley)
6. E*Trade Bank (John Buchman)
7. Fidelity Investments (Paul Gallagher)

8. Household Bank (Jeff Wood)
9. Investment Company Institute (Robert A. Wittie)
10. iLumin Corporation (Dr. Bruce E. Brown)
11. National Association of Consumer Agency Administrators (Wendy Weinberg)
12. National Consumer Law Center (Margot Saunders)
13. NewRiver, Inc. (Virginia Gobats)
14. Selwood Research (Christopher Smithies, Jeremy Newman)
15. Software & Information Industry Association (Mark Bohannon)
16. Silanis Technology, Inc. (Michael Laurie)
17. VeriSign Corporation (James Brandt)
18. Visa (Mark MacCarthy)
19. Wachovia Corporation (Jane Stafford)
20. Jane Kaufman Winn, Professor of Law
21. Elizabeth C. Yen, Esq.

ENDNOTES:

1. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001 *et seq*.).

2. Estimated U.S. retail e-commerce sales for the first quarter of 2001 are from the U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce release CB01-83, May 16, 2001. They are based on the Standard Industrial Classification (SIC). Estimated U.S. retail e-commerce sales for 2000 are from the U.S. Census Bureau, Economics and Statistics Administration, U.S. Department of Commerce release CB01-28, February 16, 2001. Note that these estimates are not seasonally adjusted. For more information see the Census web site at http://www.census.gov/mrts/www/mrts.html.

3. Estimated e-commerce revenues for selected services sectors for 1999 are from *E-Stats*, Mar. 7, 2001, Table 3, U.S. Census Bureau, Economics and Statistics Administration, and are based on the North American Industry Classification System (NAICS).

4. Section 101(c)(1)(A).

5. Section 101(c)(1)(B). The disclosures include: (1) whether the consumer may request to receive the information in non-electronic or paper form; (2) the consumer's right to withdraw consent to electronic records and the consequences - including possible termination of the relationship - that will result from such withdrawal; (3) the transaction(s) or categories of records to which the consent applies; (4) the procedures for withdrawing consent and updating the information needed to contact the consumer electronically; and (5) how the consumer may request a paper copy of the electronic record as well as what fees, if any, will be charged for the copy. Section 101(c)(1)(B)(i)-(iv). In addition, businesses must provide the consumer with a statement of the hardware and software needed to access and retain the electronic record. Section 101(c)(1)(C)(i).

6. In this Report, we refer to the provision as the "consumer consent provision in Section 101(c)(1)(C)(ii)," to distinguish it from the broader consumer consent provision (Section 101(c)), and the affirmative consumer consent requirement in Section 101(c)(1)(A).

7. 66 Fed. Reg. 10011 (February 13, 2001). A copy of the Notice is attached to this Report as Appendix A.

8. A list of the individuals and organizations we contacted is attached to this Report as Appendix B.

9. All comments are available on the FTC website at: http://www.ftc.gov/bcp/workshops/esign/comments/index.htm and on the NTIA website at: http://www.ntia.doc.gov/ntiahome/ntiageneral/ESIGN/esignpage.html. A list of

commenters and the acronym used to refer to each commenter in this Report is attached as Appendix C. The first reference to each comment will include the full name of the organization, its acronym, and the page number. Subsequent references will be cited as "[Acronym] at [page]."

10. The agenda for the Public Workshop is attached to this Report as Appendix D. The transcript of the workshop was placed on the public record and was also posted on the FTC website at http://www.ftc.gov/bcp/workshops/esign/comments/index.htm and on the NTIA website at http://www.ntia.doc.gov/ntiahome/ntiageneral/ESIGN/esignpage.html. References to the transcript will include the name of the workshop participant, the acronym of the organization represented and the page number (*e.g.*, "[Participant]/[Acronym of organization], tr. at [page]").

11. Several participants also provided demonstrations of the technology that has been or could be used by companies to obtain consumer consent for the provision of electronic documents.

12. The Workshop Participant List is attached to this Report as Appendix E.

13. Gallagher/Fidelity, tr. at 125-126; AIA at 1; EFSC at 3-4; Wachovia at 3.

14. The e-commerce businesses noted that the national scope of ESIGN provides guidance to e-commerce businesses regarding interstate electronic transactions by eliminating the problems created by attempts to comply with different state laws. *E.g*., Gallagher/Fidelity, tr. at 124. The fact that many businesses already are providing (or moving towards providing) information electronically, pursuant to ESIGN's consumer consent provision, suggests that any costs or uncertainties created by Section 101(c)(1)(C)(ii) are unlikely to inhibit this process.

15. One commenter noted that Congress should refrain from revising the consumer consent provision of Section 101(c)(1)(C)(ii) when the United Nations Commission on International Trade (UNCITRAL) Working Group on E-Commerce is expected to complete its work on the development of an electronic signatures law by year end. Baker & McKenzie at 3.

16. Consumers Union (CU) at 3-4; National Consumer Law Center (NCLC) at 2, 3-4; Richard Blumenthal, Connecticut Attorney General (CT AG) at 2, 3-4.

17. Weinberg/NACAA, tr. at 156-57; National Consumer Law Center Supplementary Comments (NCLC Supp.) at 1; MacCarthy/Visa, tr. at 156; Grant/NCL, tr. at 259-60 (public session remark); CT AG at 1-2; CU at 1.

18. Weinberg/NACAA, tr. at 156-57; Saunders/NCLC, tr. at 157.

19. Silanis Technology (Silanis) at 1-2.

20. Weinberg/NACAA, tr. at 147; *see also* Dayanim, tr. at 135-36.

21. *Id.*

22. Saunders/NCLC, tr. at 11-12; Yen/Hudson Cook, tr. at 23-24. For example, the FTC's Door-to-Door Sales Rule requires that sellers give consumers three business days to change their mind regarding any purchase that is covered by the rule. *See* 16 C.F.R. § 429.

23. Hillebrand/CU, tr. at 120; CT AG at 2-3.

24. NCLC at 5-6.

25. *Id*. at 6.

26. *Id*. at 7.

27. *Id*. at 2.

28. MacCarthy/Visa, tr. at 156.

29. NCLC at 6.

30. Dayanim, tr. at 136, 145-46; Buckley/EFSC, tr. at 196; *see also* Benham Dayanim (Dayanim) at 5.

31. Dayanim, tr. at 136, 145-46; Buckley/EFSC, tr. at 196.

32. Wittie/ICI, tr. at 56.

33. MacCarthy/Visa, tr. at 103, 132; Gallagher/Fidelity, tr. at 124; Winn, tr. at 159.

34. Software & Information Industry Association (SIIA) at 7 & n.4; Selwood Research (Selwood) at 1.

35. Dayanim at 10; MacCarthy/Visa, tr. at 131-32; Gallagher/Fidelity, tr. at 208.

36.

See Wells/b4bpartner, tr. at 127-28.

37. For example, one participant at the workshop suggested that technological difficulties in transferring between a secure website and a file in an Adobe™ PDF format might encourage firms to shy away from using PDF files for the provision of notices, even though such files might be otherwise preferable because they make it more difficult for anyone to tamper with the contents of the file. Yen/Hudson Cook, tr. at 60-61. *See also* Wood/Household Bank, tr. at 61.

38. *See, e.g.*, Yen Supp. at 2-3. *See also*, Wachovia Corporation (Wachovia) at 4; SIIA at 5 (para. 3); Investment Company Institute (ICI) at 4 (the consumer consent procedure might cause merchants to migrate to the most common formats and those (such as HTML) that are the easiest for demonstrating a consumer's ability to access documents, thus chilling alternative models and inhibiting technological innovation).

39. Gallagher/Fidelity, tr. at 125-27, 140-43; *see also* Wachovia at 3-4; ICI at 3; E*Trade Bank (E*Trade) at 2-3; Yen at 2.

40. *Id*.

41. Gallagher/Fidelity, tr. at 125-26; *see also* ICI at 3; E*Trade at 2-3; Wachovia at 3-4.

42. ICI at 3; E*Trade at 2-3.

43. Gallagher/Fidelity, tr. at 142-43.

44. Stafford/Wachovia, tr. at 220.

45. Anderson/FTC, tr. at 139.

46. Buchman/E*Trade, tr. at 170.

47. *See e.g.,* Truth in Lending, Interim Rule and Request for Comments, Federal Reserve System, 66 Fed.Reg. 17329 (March 30, 2001).

48. The electronic marketplace has not been immune from the types of deceptive and fraudulent practices that have plagued the traditional marketplace. The rapid rise in the number of consumer complaints related to on-line fraud and deception bears this out: in 1997, the FTC received fewer than 1,000 Internet fraud complaints through its complaint database, Consumer Sentinel. A year later, the number had increased eight-fold. In 2000, over 25,000 complaints - about 26 percent of all fraud complaints logged into Consumer Sentinel that year - related to on-line fraud and deception. *See* Prepared Statement of Eileen Harrington, Associate Director of the Division of Marketing Practices of the Bureau of Consumer Protection, FTC, on "Internet Fraud," before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives, May 23, 2001, available at the FTC's website at: http://www.ftc.gov/os/2001/05/internetfraudttmy.htm.