I. Electronic Records and Signatures in Commerce

The e-signature act was enacted in 2000. It provides that any signature, contract, or other record relating to such transactions will not be denied legal effect if it is in electronic form. Similarly, a contract is still valid in every way even if an electronic signature or record is used in its formation.[1] Generally, the act protects electronic transactions from challenges as to their legal effect because there is no signature on the paper.[2] The Act does not impose any substantive requirements nor does it require anyone to use or agree to accept any electronic records or signatures. It preempts all contrary state law.

a. Consumer Disclosures 15 U.S.C. § 7001 (c)

Under the e-sign act, any document that is valid in writing, is valid electronically. This applies also to required disclosures, as evidenced by the recent proposals to Reg. B, E, M, Z and DD. Required disclosures may be made to the consumer electronically provided the consent requirements of the e-sign act are met. The consent requirement is not always necessary as long as the substantive regulation allows disclosure using electronic means. This is discussed later.

An electronic record can be used for any contract or disclosure as long as the requirements of 15 U.S.C. § 7001 is met. Electronic consumer disclosure requirements are valid if:

1. The consumer gives his affirmative consent and does not withdraw it.
2. The consumer is provided with a clear and conspicuous statement that informs the consumer of four things:
    a. The consumer's right to receive the disclosure in writing and withdraw consent to electronic disclosure. Any conditions, fees or consequences associated with withdrawing consent must also be disclosed.
    b. Whether the consent applies to the present transaction only or to future transactions.
    c. Must describe the procedures for withdrawing consent and instructions for updating contact information.
    d. Must inform the consumer how a paper copy of the record can be obtained.
3. Companies must provide consumers with system hardware and software requirements for accessing and retaining the electronic records
4. Companies must provide the customer with a statement of any change in system requirements if the change creates a material risk that the consumer will not be able to access the record that was the subject of the consent and provide an additional notice of the right to withdraw consent with imposing additional fees, conditions or consequences.

The E-Sign Act does not affect the timing or content of any required disclosure in other statutes. However, electronic disclosures and documents may be used any time by virtue of the act itself. No one is required to accept electronic records, but companies can not be prevented from using electronic documents or making electronic disclosures with those who consent. Further, § 7001 (3) provides that the failure to obtain consent does not automatically make a contract in electronic form or an electronic disclosure invalid.

b. Retention of Records 15 U.S.C. § 7001 (d)

When records must be retained, the requirement is met by retaining an electronic record of the information. The electronic record must accurately reflect the information in the other contract or record and be accessible to persons who are entitled to view it. If an original is required by statute, the statute is satisfied if an electronic version is stored that accurately reflects the information in the contract or disclosure.

c. Exceptions 15 U.S.C. § 7003

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[1] 15 U.S.C § 7001(a) (1) and (2)

[2] Hall, Chandel Gauthreaux, A Cursory Look At the E-Sign Act, 48 LA Bar Jnl. 452.

The Act does not apply to testamentary documents like wills, codicils or trusts. It also does not apply to statues governing any issue in family law. The Act also does not apply to contracts governed by the UCC. However, articles 2 and 2A do not apply. There is no purpose to the act if it does not apply to written contracts of sale and leases. Other exceptions to the Act include: Court orders or documents; notice of cancellation or termination of utility service; default, foreclosure, right to cure, etc. under a credit agreement, or rental agreement, secured by a primary dwelling of a person; the cancellation of insurance or benefits; the recall or material failure of a product that risks endangering health; and any document required to accompany any hazardous materials. Other than the UCC exception and possibly the product defect exception, none of these apply to BMW FS.

II. E-Contracting and Financial Institutions

Federal law, or state law, determines the form, content and timing of disclosures. Substantive law. The only purpose of the E-Sign Act and the UETA is to allow the parties to conduct business electronically and give validity to electronic signatures. The Act creates ground rules for conducting business electronically without getting in the way of substantive law.[3] The substantive law will impact banks and financial institutions more than the Act itself. Disclosures that had to be in writing no long have to be provided the customer consents, which most customers of BMW's demographic will.

There are not many negative implications for e-contracting or leasing. What the Act does, is make e-contracting less cumbersome. Nearly every required disclosure can be made electronically provided the consumer consents. This requirement is logistically difficult for a large finance company or bank to meet. However, the benefits of electronic disclosure make it necessary to begin planning the method of getting consumer consent.

Below are the proposed changes to Regulation B, M, Z, E, DD. These changes to the interim final rules allow banks and financial institutions to make required advertising and application disclosures under each regulation electronically without getting prior consent from the consumer. The reason, according to the Board of Governors of the Federal Reserve System (the "Board"), is that consumers who choose to apply for credit on-line would be unduly burdened if they had to consent according to the E-Sign Act to access the application forms or view advertisements. However, with respect to disclosures for adverse action notices, appraisal reports or other periodic statements consent according to the E-Sign Act is required.

PROPOSED CHANGES TO REGULATIONS B, E, M, Z AND D.

The proposed amendments to the Regulation B, E, M, Z and DD interim final rules address the portions of the regulations dealing with required disclosures in electronic advertising and on-line applications. Applicable parts removed either incorporate or cross reference the E-Sign Act. The Board views them as no longer needed or as imposing an undue burden on electronic banking and commerce and not needed for consumer protection.

Under the proposed amendments, certain required disclosures may be made without obtaining consent provided that the consumer accesses the material electronically. When a consumer accesses an application electronically, the disclosures required *must be* provided electronically on or with the application. In this situation, the consent requirements of the E-Sign Act do not have to be met. Similarly, when a written application or advertisement is used, written disclosures must be provided. Electronic disclosures will not satisfy the disclosure requirements of the banking regulations.

REGULATION B—EQUAL CREDIT OPPORTUNITY

The following includes the changes proposed for Reg. B. The Board is proposing to amend 202.4 (d) to provide that each required disclosure *must* be made electronically either on or with the application if the consumer accesses the application in electronic form. However, if the

[3] Rojc and Eidukas, *The Electronic Approach to Motor Vehicle Financing*, 57 Bus. Law. 1175

consumer uses a written application, electronic disclosure does *not* meet the requirements of Regulation B.

202.9 (a) requires notification of adverse action if an application is submitted, no credit is granted and adverse action is taken by the creditor. The creditor is allowed to use a third party to give notice. The section is amended to provide that the third party may use electronic disclosures to give notice of the adverse action.

202.16 has the requirements for electronic communication. The Board proposes to remove the section from Reg. B. The section deals with timing and delivery requirements of electronic disclosures. The Board finds that this section is no longer needed. Deleting it will not change the application of the E-Sign Act. Also removed are requirements to send disclosures to an applicant's e-mail address, the requirement to redeliver returned electronic disclosures and the requirement that creditors maintain the disclosures on their website for at least 90 days. Nevertheless, the general requirements of Reg. B apply to electronic disclosures. Therefore, creditors still have to provide certain disclosures at certain times in a form the consumer may keep.

REGULATION E—ELECTRONIC FUND TRANSFER

The changes made to Regulation E are the same general changes as those to B. The Board proposes to withdraw the rules that incorporate or cross reference the E-Sign Act or impose an undue burden on banking and commerce or consumers. The provisions added are intended to provide guidance on how to interpret the E-Sign Act as it pertains to Reg. E.

205.4 is revised to provide that institutions may provide required disclosures in electronic format as long as they comply with the E-Sign Act's provisions. If the required disclosures are made in paper and electronic, the requirement is met without regard to the consumer's consent.

205.17 is the same as 205.16 in Regulation B. Accordingly, the deletion of 205.17 will not change the applicable requirements under the E-Sign Act.

REGULATION M—CONSUMER LEASING

The Board is proposing to withdraw portions of the interim final rule like it did with Regulation E and B. Furthermore, the Board is proposing to amend Reg. M to provide that disclosures must be made wither on or with an application when a consumer accesses an advertisement in electronic form. Consent is not required under the E-Sign Act in these circumstances. With the amendments, the Board proposes to specify the circumstances when an institution can make required disclosures to a lessee electronically without obtaining the consumer's consent.

Section 213.3 and 213.6 have the same proposed changes that the regulations above have. 213.3 is revised to allow for electronic disclosures and requires electronic disclosures if the consumer accesses the application on-line. Paper applications require paper disclosures. The board proposes to delete 213.6 from Regulation M for the same reasons as above.

213.7 contains the requirements for lease advertising. If the advertising includes "trigger terms" it must contain certain disclosures. A comment is proposed to clarify the electronic disclosure requirement. Basically, if an application is accessed electronically, electronic disclosures must accompany it. If an advertisement is in writing and a consumer requests an application; the advertisement must include *written* disclosures. Electronic disclosures in this case will not satisfy the requirement. In the case of multipage advertising that contains trigger terms on multiple pages, each page must have cross reference to each disclosure or links to the disclosure in the case of electronic applications.

213.7 also addresses references to charges and percentage rates in advertisements. The comment stated that in electronic communication charges and percentage rates must be the same size. The Board will delete the comments pertaining to this part of § 213.7. According to the Board, the prominence requirements apply whether the advertisement is written or electronic. Additionally, the proposed rule says that making the customer scroll to another part of the page, or access a link, in order to view the disclosure will not satisfy the disclosure requirement.

REGULATION Z—TRUTH IN LENDING

The proposed changes to Regulation Z are the same as the changes to the previous regulations. The Board proposes to withdraw portions of the interim final rules incorporating or cross-referencing the E-Sign Act making them unnecessary and withdrawing portions of the rule that the board believes may impose undue burdens on electronic banking and commerce and are not required for consumer protection. The Board also proposes to implement provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act that amend TILA and relate to electronic disclosures.

The changes proposed by the Board regarding closed ended and open ended credit are the same. For open ended and closed ended credit the general disclosure requirements are amended to allow creditors to provide electronic disclosures to consumers subject to the consent and other provisions of the E-Sign Act. If the disclosure is made both in written form and electronically, consent is not necessary. The new rule will also provide the situations where certain disclosures are permissible without consent. Applications, forms or solicitations accessed by the consumer in electronic form still require the disclosure. In this case, the creditor may make the disclosure without regard to the consent requirements.

Credit and charge card solicitations that are accessed by a consumer electronically require electronic disclosures on or with the application or solicitation. Credit card applications received in the mail must contain *written* disclosures. Providing the location of electronic disclosures will not satisfy the creditor's requirement. The board proposes to revise the comment about electronic disclosures to provide examples of alternative methods for presenting electronic disclosures.

The new Bankruptcy Act amends TILA to require that credit card application disclosures provided on-line or electronically must be "readily accessible to consumers in close proximity" to the solicitation. The phrase "close proximity" is interpreted in the Bankruptcy Act. The Board plans to interpret the "close proximity" standard for credit card disclosures in the future. The Board is going to issue a proposal within the next few months.

The Bankruptcy Act disclosure requirements for direct mail applications and solicitations apply equally to electronic credit card solicitations and applications. This new requirement includes a provision that credit card offers must be updated regularly to reflect changes in law, policy, etc. The Board has determined that "updated regularly" means that issuers must update variable APRs for mailed applications every 60 days and for electronic applications every 30 days. Creditors must only update other terms when they change.

Section 226.16 governs advertising for open-ended credit and 226.24 governs advertising for closed-ended credit. The proposed rules are the same for each type of credit and are the same changes as the other Regulations. Disclosures must accompany any "trigger term" in the advertisement, on or with the advertisement. For multi-page advertisements, the required disclosure does not have to be on each page a trigger term occurs as long as each page includes a cross-reference or a link to the disclosure. Furthermore, electronic disclosures are only proper if the advertisement is viewed electronically. Written ads require written disclosures. For closed-end credit only, when the customer requests credit by telephone, mail or fax, the required disclosures may be made either electronically or in writing. The consent procedures of the E-Sign Act do not have to be followed if the consumer finds an ad for credit and telephones the request. However, if the customer uses the web as opposed to the phone, the consent procedures must be followed. The disclosures must be provided before a transaction is consummated.

REGULATION DD—TRUTH IN SAVINGS

The proposed changes to Regulation DD are the same as the proposed changes to Regulation B, E, M and Z. The Board proposes to amend Regulation DD by withdrawing rules that cross reference or incorporate the E-Sign Act and pose an undue burden on electronic banking and commerce and is unnecessary for consumer protection.

The general disclosure requirements are amended to provide that institutions may provide electronic disclosures subject to the consent and other requirements of the E-Sign Act. If certain information is in deposit advertisements or if an ad promotes overdrafts the institution must make certain disclosures. Similar to the other regulations, if these ads are accessed online, the institution may make the disclosures without consent.

Specific disclosures are required before an account is opened if the account is opened using electronic communication. If consumers request the disclosures, the institution may provide the disclosures electronically by e-mailing the disclosure or notifying the consumer of a link to the location of the disclosure on the company's website. Institutions are allowed to electronically advertise an interest rate in addition to the APY. The rate must be in conjunction with, not more conspicuous than the APY. This requirement applies to electronic and written advertisements.

The Board proposes to delete Section 230.10 pertaining to electronic communication. It will not change the applicability or requirements of the E-Sign Act and therefore, is no longer needed.

CONCLUSION

The amendments to interim final rules update the requirements for electronic disclosure. The rules address electronic communication regarding general disclosures, advertising disclosures and application disclosures. The amendments also provide insight and commentary on when consent under the E-Sign Act is required.