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National Association of Federally-Insured Credit Unions

March 18, 2020

The Honorable Kathleen Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

RE: Electronic Signature Requirements

Dear Director Kraninger:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing to recommend that the Bureau of Consumer Financial Protection (Bureau or CFPB) adopt more flexible rules for the acceptance of electronic signatures and delivery of electronic disclosures. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 120 million consumers with personal and small business financial service products. Considering the unique risks posed by COVID-19 and the unprecedented disruption to daily life that has already taken place, we believe the Bureau should act quickly to modernize electronic disclosure and signature related provisions in all of its regulations. We are also sharing proposed legislative amendments to the *Electronic Signatures in Global and National Commerce Act* (E-Sign Act), 15 U.S.C. §7001 et seq, which would facilitate relief by specifying a more accommodating method for consumers to demonstrate that they can access information in electronic form.

General Comments

The E-Sign Act generally allows electronic signatures and documents to carry the same legal weight as hard copy or paper documents. It allows credit unions to adopt online or electronic account applications where the member provides an electronic signature to agree to membership or to open an account. Similarly, loan applications may also be signed electronically. The E-Sign Act also permits the use of electronic disclosures to satisfy laws or regulations requiring written disclosures. In this case, the E-Sign Act's consumer consent requirements must be satisfied.¹

At a time when social distancing has become paramount to the health and safety of credit union members, employees, and their families, credit unions are discovering that the E-Sign Act's outdated consumer consent requirements have become a burden. Twenty years have passed since the E-Sign Act was enacted and the vast majority of adults in the U.S. now have some form of reliable internet access.² Accordingly, a cumbersome requirement for consumers to "reasonably

¹ See 15 U.S.C. § 7001(c)(1).

² Studies conducted by the Pew Research Center indicate that 96% of Americans own a cellphone of some kind, and 90 percent of American adults use the internet, with some age groups at near saturation levels. See Pew Research

demonstrate” access to electronic information before consenting to the receipt of electronic disclosures only delays the administrative processing of things like loan modifications, deferrals, fee waivers, or other services changes that, when disclosed electronically, must comply with the E-Sign Act.³

Current E-Sign Requirements Create Needless Friction

Various Bureau regulations specify that a valid method for providing electronic disclosures is to follow the consumer consent provisions in the E-Sign Act. In general, the E-Sign Act requires the mechanism for electronic delivery of disclosures to be an “opt-in” system where a credit union member has affirmatively consented to receiving the required disclosures in electronic form. In addition, the member’s affirmative consent to electronic disclosures must be made electronically or confirmed electronically. In connection with these requirements, the consumer must reasonably demonstrate that they can access information in the electronic form.⁴

While most members have the ability to retrieve PDF or other electronic documents, the credit union must still ensure the member can receive the disclosures electronically. Some financial institutions use “sample statements” during the E-Sign consent process which members need to open and retrieve a code or dollar amount (such as an ending statement balance) to enter before completing the E-Sign consent. This process, known commonly as the “test drive,” can be used as evidence the member was able to open and read the statement – thereby “reasonably demonstrating” the ability to access electronic information. However, the requirement to reasonably demonstrate access adds unnecessary delay and friction at a time when most consumers want more streamlined mobile banking options.

The E-Sign Act also lacks clarity regarding when a credit union must update a statement of the hardware and software requirements to access and retain electronic disclosures. If, after the member’s consent, the credit union changes the hardware or software requirements, and in doing so, creates a material risk the member may not be able to access and retain the electronic disclosures going forward, the credit union will need to obtain a new electronic consent from the member. Unfortunately, there is no guidance available to credit unions on which changes “create a material risk” that would result in loss of access to electronic disclosures. Such a requirement creates legal uncertainty for an event that is highly unlikely to occur given the high degree of interoperability that exists between internet browsers and mobile platforms today.

NAFCU has also heard from members that the E-Sign Act and the Bureau’s references to electronic delivery of disclosures do not clearly state whether a member’s initial E-Sign consent is sufficient for all subsequent transactions between the credit union and the member. Similarly,

Center, Internet/Broadband Fact Sheet, available at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

³ In general, these are disclosures for accounts, loans, adverse action notices under Regulation B, and most Regulation Z disclosures.

⁴ See National Credit Union Administration, Regulatory Alert 01-RA-03 (March 2001), available at <https://www.ncua.gov/files/regulatory-alerts/RA2001-03.pdf>.

there is often uncertainty regarding the extent to which the member's E-Sign consent extends to third-parties acting on behalf of the credit union (i.e. collection agency, payments vendor, etc).

The Bureau Should Adopt a Presumption Consent Framework to Facilitate Electronic Delivery of Disclosures

NAFCU has proposed legislative changes to the E-Sign Act that would create a presumption of consent if a consumer uses an online service to initiate a transaction that involves or requires the exchange of electronic records. An online service would be defined as any internet-based service, such as a website or mobile application, consistent with section 213(a) of the Economic Growth, Regulatory Relief, and Consumer Protection Act. This new framework would reflect the fact that the vast majority of Americans have internet access and are able to receive electronic records with ease.⁵

In the near term, the Bureau can facilitate an immediate transition to such a presumptive framework by amending its regulations that govern delivery of electronic disclosures. Pursuant to section 7004(d) of the E-Sign Act, the Bureau has the authority to “exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c).”⁶ Specifically, the Bureau should amend all its rules to allow financial institutions to deliver electronic disclosures without having to obtain the consumer's prior consent, so long as the consumer is initiating the transaction which requires using an online service. Furthermore, the Bureau should clarify that a financial institution that obtains this presumptive consent once may rely on it in the future for all subsequent related transactions. In general, the Bureau should construe the scope of subsequent related transaction to include disclosures that are delivered by third-parties acting on a credit union's behalf, such as a collections agency or payments vendor. In other words, these third-parties should be presumed to have the same authority as the credit union to send electronic communication after the member has opted in for electronic communications.

Conclusion

Credit unions are currently transforming business operations to adjust to the new realities imposed by the COVID-19 pandemic. These changes have introduced numerous administrative stresses that have the potential to delay or impair member service at a time when it is urgently needed, and when credit union members are looking for quick responses. Alleviating outdated administrative burdens, such as the E-Sign Act's electronic consent provisions, would be just one small step in reducing roadblocks to consumer relief at a time when it is desperately needed. Accordingly, we ask that the Bureau consider the legislative amendments we have proposed and update its electronic disclosure and signature related rules to facilitate streamlined communications.

⁵ Notably, the Bureau has already relaxed the E-Sign Act's electronic consent provisions for delivery of electronic account disclosures under Regulation DD. See 12 CFR § 1030.4(a)(2)(i); Official Comment (4)(a)(2)(i)—4.

⁶ See 15 U.S.C. § 7004(d)(1).

Bureau of Consumer Financial Protection

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Should you have any questions or require additional information, please do not hesitate to contact me or Andrew Morris, NAFCU's Senior Counsel for Research and Policy, at (703) 842-2266 or amorris@nafcu.org.

Sincerely,

A handwritten signature in black ink that reads "Carrie R. Hunt". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Carrie R. Hunt

Executive Vice President of Government Affairs and General Counsel

Attachment