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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 202

[Regulation B; Docket No. R-1281]

#### Equal Credit Opportunity

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; official staff interpretation.

**SUMMARY:** The Board is amending Regulation B, which implements the Equal Credit Opportunity Act, and the official staff commentary to the regulation, to withdraw portions of the interim final rules for the electronic delivery of disclosures issued March 30, 2001. The interim final rules address the timing and delivery of electronic disclosures, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). Because compliance with the 2001 interim final rules has not been mandatory, withdrawal of these provisions from the *Code of Federal Regulations* reduces confusion about the status of the provisions and simplifies the regulation.

In addition, the Board is adopting final amendments to Regulation B to provide guidance on the electronic delivery of disclosures. For example, the final rules provide that when an application is accessed by an applicant in electronic form, disclosures may be provided to the consumer in electronic form on or with the application without regard to the consumer consent and other provisions of the E-Sign Act. Similar final rules are being adopted under other consumer financial services regulations administered by the Board.

**DATES:** The final rule is effective December 10, 2007. The mandatory compliance date is October 1, 2008.

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#### SUPPLEMENTARY INFORMATION:

##### I. Statutory Background

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

The Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 15 U.S.C. 7001 *et seq.*, was enacted in 2000. The E-Sign Act provides that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures. The E-Sign Act contains special rules for the use of electronic disclosures in consumer transactions. Under the E-Sign Act, consumer disclosures required by other laws or regulations to be provided or made available in writing may be provided or made available, as applicable, in electronic form if the consumer affirmatively consents after receiving a notice that contains certain information specified in the statute, and if certain other conditions are met.

The E-Sign Act, including the special consumer notice and consent provisions, became effective October 1, 2000, and did not require implementing regulations. Thus, creditors are currently permitted to provide in electronic form any disclosures that are required to be provided or made available to the consumer in writing under Regulation B if the consumer affirmatively consents to receipt of electronic disclosures in the manner required by section 101(c) of the E-Sign Act.

##### II. Board Proposals and Interim Rules Regarding Electronic Disclosures

On April 4, 2001, the Board published for comment interim final rules to establish uniform standards for the electronic delivery of disclosures required under Regulation B (66 FR 17779). Similar interim final rules for Regulations E, M, Z, and DD (implementing the Electronic Fund Transfer Act, the Consumer Leasing Act, the Truth in Lending Act, and the Truth in Savings Act, respectively) were published on March 30, 2001 (66 FR 17322 and 66 FR 17329) (Regulations M and Z, respectively), and April 4, 2001 (66 FR 17786 and 66 FR 17795) (Regulations E and DD, respectively). Each of the interim final rules incorporated, but did not interpret, the requirements of the E-Sign Act. Creditors and other persons, as applicable, generally were required to obtain consumers' affirmative consent to provide disclosures electronically, consistent with the requirements of the E-Sign Act. The interim final rules also incorporated many of the provisions that were part of earlier regulatory proposals issued by the Board regarding electronic disclosures.<sup>1</sup>

Under the 2001 interim final rules, disclosures could be sent to an e-mail address designated by the consumer, or could be made available at another location, such as an Internet Web site. If the disclosures were not sent by e-mail, creditors would have to provide a notice to consumers (typically by e-mail) alerting them to the availability of the disclosures. Disclosures posted on a Web site would have to be available for at least 90 days to allow consumers adequate time to access and retain the information. Creditors also would be required to make a good faith attempt to redeliver electronic disclosures that were returned undelivered, using the address information available in their files.

<sup>1</sup> On May 2, 1996, the Board proposed to amend Regulation E to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696). Based on comments received, in 1998 the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14528, March 25, 1998) and similar proposals under Regulations B, M, Z, and DD (63 FR 14552, 14538, 14548, and 14533, respectively, March 25, 1998). Based on comments received on the 1998 proposals, in 1999 the Board published revised proposals under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999).

Commenters on the interim final rules identified significant operational and information security concerns with respect to the requirement to send the disclosure or an alert notice to an e-mail address designated by the consumer. For example, commenters stated that some consumers who choose to receive electronic disclosures do not have e-mail addresses or may not want personal financial information sent to them by e-mail. Commenters also noted that e-mail is not a secure medium for delivering confidential information and that consumers' e-mail addresses frequently change. The commenters also opposed the requirement for redelivery in the event a disclosure was returned undelivered. In addition, many commenters asserted that making the disclosures available for at least 90 days, as required by the interim final rule, would increase costs and would not be necessary for consumer protection.

In August 2001, in response to comments received, the Board lifted the previously established October 1, 2001 mandatory compliance date for all of the interim final rules. (66 FR 41439, August 8, 2001.) Thus, creditors are not required to comply with the interim final rules. Since that time, the Board had not taken further action with respect to the interim final rules on electronic disclosures in order to allow electronic commerce, including electronic disclosure practices, to continue to develop without regulatory intervention and to allow the Board to gather further information about such practices.

In April 2007, the Board proposed to amend Regulation B and the official staff commentary by (1) withdrawing portions of the 2001 interim final rule that restate or cross-reference provisions of the E-Sign Act and accordingly are unnecessary; (2) withdrawing other portions of the interim final rule that the Board now believes may impose undue burdens on electronic banking and commerce and may be unnecessary for consumer protection; and (3) retaining the substance of certain provisions of the interim final rule that provide regulatory relief or guidance regarding electronic disclosures. (72 FR 21125, April 30, 2007.) Similar amendments were also proposed by the Board under Regulations E, M, Z, and DD (72 FR 21131, 72 FR 21135, 72 FR 21141, and 72 FR 21155, respectively).

### III. Summary of the Final Rule

The Board received about 25 comments on the April 2007 proposal, primarily from creditors and their representatives. Most of the industry commenters generally supported the

proposal, although some provided suggestions for clarifications or changes to particular elements of the proposal. A comment letter was also submitted on behalf of four consumer groups. The consumer group commenters suggested a number of changes to strengthen consumer protections. The comments are discussed in more detail in the Section-by-Section Analysis below.

For the reasons discussed below, the Board is now adopting amendments to Regulation B in final form, largely as proposed in April 2007. As stated in the proposal, because compliance with the 2001 interim final rules has not been mandatory, the final rule will reduce confusion about the status of the electronic disclosure provisions and simplify the regulation. (Certain provisions in the 2001 interim rules, including provisions addressing foreign language disclosures, were not affected by the lifting of the mandatory compliance date and became final in 2001; thus, those provisions are not dealt with in this rulemaking.) The Board is also adopting certain provisions that are identical or similar to provisions in the 2001 interim rules in order to enhance the ability of consumers to shop for credit online, minimize the information-gathering burdens on consumers, and provide guidance or eliminate a substantial burden on the use of electronic disclosures, as discussed further below.

Since 2001, industry and consumers have gained considerable experience with electronic disclosures. During that period, the Board has received no indication that consumers have been harmed by the fact that compliance with the interim final rules is not mandatory. The Board also has reconsidered certain aspects of the interim final rules, such as sending disclosures by e-mail, in light of concerns about data security, identity theft, and "phishing" (i.e., prompting consumers to reveal confidential personal or financial information through fraudulent e-mail requests that appear to originate from a creditor, government agency, or other trusted entity) that have become more pronounced since 2001. The Board is also eliminating certain aspects of the 2001 interim final rule, such as provisions regarding the availability and retention of electronic disclosures, as unnecessary in light of current industry practices.

The 2001 interim final rule allowed creditors to provide certain disclosures to applicants in electronic form without obtaining E-Sign consent if the disclosures were provided on or with an application. Similarly, in the April 2007 proposal, pursuant to the Board's

authority under section 703(a)(1) of the ECOA, as well as under section 104(d) of the E-Sign Act,<sup>2</sup> the Board proposed to specify the circumstances under which certain disclosures may be provided on or with an application in electronic form, rather than in writing as required by Regulation B, without obtaining the applicant's consent under section 101(c) of the E-Sign Act.

Commenters supported the Board's approach with regard to this issue. This final rule adopts the approach in the April 2007 proposal. The Board continues to believe that creditors should not be required to obtain the consumer's consent in order to provide application-related disclosures if the consumer accesses the application containing these disclosures in electronic form, such as at an Internet Web site. The Board believes consumers would not be harmed if the E-Sign consent procedures do not apply and would obtain significant benefits by having timely access to application-related disclosures in electronic form. Conversely, consumers who choose to apply for credit online would be unduly burdened if they had to consent in accordance with the E-Sign Act in order to access application forms that are accompanied by disclosures. Applying the consumer consent provisions of the E-Sign Act to these disclosures could impose substantial burdens on electronic commerce and make it more difficult for consumers to apply for credit.

At the same time, the Board recognizes that consumers who apply for credit online may not want to receive other disclosures electronically. Therefore, with respect to adverse action notices and copies of appraisal reports, creditors are required to obtain the consumer's consent, in accordance with the E-Sign Act, to provide such disclosures in electronic form, or else provide written disclosures.

<sup>2</sup> Section 703(a)(1) of the ECOA provides that regulations prescribed by the Board under the ECOA "may provide for such adjustments and exceptions \* \* \* as in the judgment of the Board are necessary or proper to effectuate the purposes of [the ECOA], \* \* \* or to facilitate or substantiate compliance [with the requirements of the ECOA]." Section 104(d) of the E-Sign Act authorizes federal agencies to adopt exemptions for specified categories of disclosures from the E-Sign notice and consent requirements, "if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers." For the reasons stated in this **Federal Register** notice, the Board believes that these criteria are met in the case of the application disclosures. In addition, the Board believes ECOA section 703(a)(1) authorizes the Board to permit creditors to provide disclosures electronically, rather than in paper form, independent of the E-Sign Act.

Finally, as proposed, certain provisions that restate or cross-reference the E-Sign Act's general rules regarding electronic disclosures (including the consumer consent provisions) and electronic signatures are being deleted as unnecessary, because the E-Sign Act is a self-effectuating statute. The revisions to Regulation B and the official staff commentary are described more fully below in the Section-by-Section Analysis.

#### IV. Section-by-Section Analysis

##### 12 CFR Part 202 (Regulation B)

##### Section 202.4 General Rules

Section 202.4(d) prescribes the form of disclosures, and specifically provides that a creditor that provides in writing any disclosures or information required by the regulation must provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by §§ 202.5 and 202.13, in a form that the applicant may keep. As proposed, the Board is revising § 202.4(d) to clarify that, with regard to disclosures that the regulation requires to be given in writing, creditors may provide such disclosures in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act. Some creditors may provide disclosures to applicants both in paper and electronic form and rely on the paper form of the disclosures to satisfy their compliance obligations. For those creditors, the duplicate electronic form of the disclosures may be provided to applicants without regard to the consumer consent or other provisions of the E-Sign Act because the electronic form of the disclosure is not used to satisfy the regulation's disclosure requirements.

The Board also proposed to revise § 202.4(d) to provide that certain disclosures, when included on or with an application, must be provided to the applicant in electronic form if the applicant accesses the application electronically, such as on a home computer. The proposal further provided that, under those circumstances, these disclosures may be provided in electronic form without regard to the consumer consent or other provisions of the E-Sign Act. The proposal affected the following disclosures:

*Section 202.5(b)(1).* Section 202.5(b)(1) provides that if a creditor inquires about an applicant's race, color, religion, national origin, or sex for the purpose of conducting a self-test, the creditor must disclose that providing the information is optional for the

applicant, that the information is requested to monitor compliance with the ECOA, and that the creditor may not discriminate either on the basis of the information or whether the applicant chooses to furnish it.

*Section 202.5(b)(2).* Section 202.5(b)(2) provides that when a creditor requests an applicant to designate a title on an application form, the application form must disclose that the designation of a title is optional.

*Section 202.5(d)(1).* Section 202.5(d)(1) provides that if an application is for other than individual unsecured credit, a creditor may inquire about the applicant's marital status, but must use only the terms *married*, *unmarried*, and *separated*. The creditor may also explain that the *unmarried* category includes single, divorced, and widowed persons.

*Section 202.5(d)(2).* Section 202.5(d)(2) prohibits a creditor from inquiring whether income stated in an application is derived from alimony, child support, or separate maintenance payments, unless the creditor discloses to the applicant that such income need not be revealed if the applicant does not want the creditor to consider it in determining the applicant's creditworthiness.

*Section 202.13.* Section 202.13(a) requires a creditor to request information regarding an applicant's ethnicity, race, sex, marital status, and age as part of an application for dwelling-secured credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence. Section 202.13(b) provides that questions about ethnicity, race, sex, marital status and age may be listed, at the creditor's option, on the application form or on a separate form that refers to the application.

Section 202.13(c) requires the creditor to disclose to the applicant that the information about ethnicity, race, sex, marital, status and age is being requested by the federal government to monitor compliance with federal statutes that prohibit creditors from discriminating against applicants. The creditor must also disclose that if the applicant chooses not to provide the information, the creditor is required to note the ethnicity, race, and sex on the basis of visual observation or surname.

*Section 202.14(a)(2)(i).* Section 202.14(a)(2)(i) requires a creditor that provides copies of appraisal reports only upon request (rather than routinely) to notify the applicant of the right to obtain a copy of the report.

Under Regulation B, an application generally is not required to be in

writing.<sup>3</sup> Section 202.2(f) of the regulation defines the term "application" to include "an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested." Since an application does not have to be in writing, the disclosures that are provided on or with an application in certain circumstances do not have to be provided in writing in all cases. These disclosures include those required under §§ 202.5(b)(1), 202.5(b)(2), 202.5(d)(1), 202.5(d)(2), and 202.13. (Section 202.14(a)(2)(i) specifies that the notice of the right to a copy of the appraisal report must be provided in writing.) However, most creditors use written or electronic application forms and make these disclosures, where applicable, on the written or electronic application form or a separate accompanying form. The Board's Model Application Forms in Appendix B to the regulation include some of these disclosures on the application forms.

The April proposal revised § 202.4(d) to provide that each of the disclosures noted above, where given on or with the application form and where the application is accessed by the applicant in electronic form, must be provided to the applicant in electronic form on or with the application. The proposed revision also clarified that under these circumstances, the disclosures may be provided in electronic form without regard to the consumer consent or other provisions of the E-Sign Act. The Board proposed to add comment 4(d)-2 to clarify this point and also to make clear that if an applicant is provided with a paper application form, the required disclosures must be provided in paper form on or with the application (and not, for example, by including a reference in the paper application to the Web site where the disclosures are located).

Many creditor commenters urged the Board to revise the regulation and commentary to permit disclosures to be given in paper form in appropriate cases, even where an application is in electronic form. In particular, commenters noted that requiring electronic disclosures could present problems for applications taken in person using electronic means.

<sup>3</sup> Under § 202.4(c), a creditor must take written applications for dwelling-related credit for which monitoring information (under § 202.13) must be collected. However, use of a printed form is not required. A creditor may accept telephone or other oral applications and either write down or enter into a computer the pertinent information provided orally by the applicant. See Comments 202.4(c)-1 and 2.

Commenters stated, for example, that a consumer or creditor employee might complete an electronic application by entering information at a terminal or kiosk in the creditor's office. These commenters noted that paper disclosures would be more appropriate in such cases, because the applicant would be able to retain them. For example, a loan officer could give the disclosures to the consumer, or in the case of an unattended kiosk, the kiosk could have a printer to provide paper disclosures.

Some creditor commenters argued that the proposed requirement would contravene the E-Sign Act, based on the provisions in E-Sign that state (1) that the statute does not require any person to accept or use electronic records in place of paper, and (2) that any regulations interpreting E-Sign may not add to its requirements. Creditor commenters suggested that, at a minimum, the regulation should provide an exception to allow paper disclosures for in-person electronic applications. Consumer group commenters stated that the regulation should not only permit, but should require, paper disclosures in the case of in-person electronic applications. For example, the commenters noted that a door-to-door solicitor could otherwise simply display certain disclosures to a consumer on the screen of a laptop computer, even though the consumer would have no way to later access the disclosures.

One creditor commenter suggested that, in addition to permitting paper disclosures for electronic applications, the regulation should also permit electronic disclosures for paper applications without consumers' consent in certain cases. For example, the commenter suggested, a basic or short-form disclosure could be provided in paper form along with the paper application, together with a Web site where a more complete disclosure could be obtained.

In the final regulation, § 202.4(d) is revised to state that if an application is accessed by the consumer in electronic form, the required application-related disclosures may (rather than must) be provided in electronic form, without regard to the consumer consent or other provisions of the E-Sign Act. The Board believes that this will eliminate a potential significant burden on electronic commerce without increasing the risk of harm to consumers. This approach will facilitate applications for credit by enabling applicants to receive important disclosures at the same time they access an application electronically without first having to provide consent

in accordance with the requirements of the E-Sign Act. Requiring applicants to follow the consent procedures set forth in the E-Sign Act in order to complete an online application is potentially burdensome and could discourage applicants from shopping for credit online. Moreover, because these applicants are viewing the application online, there appears to be little, if any, risk that the applicant will be unable to view the disclosures online as well.

The final rule states that the disclosures may, rather than must, be provided in electronic form. The proposal to require electronic disclosures for credit applications that are accessed electronically was intended to ensure that the disclosures are provided on or with the application in compliance with the timing and delivery requirements of Regulation B. Several sections of the regulation that relate to credit applications already require that the credit application disclosures be provided on or with the application, and this requirement applies to electronic as well as paper applications; the only added requirement under the proposal would have been to require that, in the case of an electronic application, the disclosures be in electronic form.

Where a consumer accesses and submits an application form using a home computer via a creditor's Web site, the creditor must provide the disclosures in electronic form with the application form on the Web site in order to meet the requirement to provide disclosures in a timely manner on or with the application. If the creditor instead mailed paper disclosures to the consumer, this requirement would not be met. This guidance is stated in new comment 4(d)-2.

In contrast, if a consumer is physically present in the creditor's office, and accesses and submits an electronic application—such as via a terminal or kiosk—the Board believes the creditor could provide disclosures in paper form and comply with the timing and delivery requirements of the regulation. In addition, as discussed by the commenters, paper disclosures may be preferable in this situation because they can be retained by the consumer. Therefore, paper disclosures are permissible in the case of in-person electronic applications in a creditor's office, when the timing and delivery requirements are met. This guidance is also stated in new comment 4(d)-2.

The final regulation, however, does not require paper disclosures for such in-person electronic applications, as suggested by the consumer group

commenters. Electronic disclosures would comply with the regulation for these applications in some cases. For example, for an electronic in-person credit application in a creditor's office, the creditor could display most of the required Regulation B disclosures to the consumer on a terminal or kiosk screen. The requirement to provide disclosures in a form the consumer may retain does not apply to the application-related disclosures under §§ 202.5 and 202.13, so this procedure would comply with the regulation for those disclosures. In the case of the notice regarding copies of appraisal reports under § 202.14, the retainability requirement does apply, and therefore creditors would likely have to provide that disclosure in paper form in an in-person application in a creditor's office.

New comment 4(d)-2 is modified from the proposal to provide the guidance discussed above. In addition, the portion of the proposed comment stating that paper applications must be accompanied by paper disclosures has been deleted as unnecessary. For example, if a credit application in paper form did not contain all of the required disclosures, but instead referred the consumer to a Web site where some or all of the disclosures could be found, the application would not be in compliance with the requirement that the disclosures be provided in a timely manner on or with the application. In addition, the provisions that state that electronic disclosures may be provided without regard to the consumer consent or other provisions of the E-Sign Act are limited to situations where the application itself is in electronic form. Thus, if a creditor wanted to provide electronic disclosures for a paper application (for example, where a paper application is submitted in person at the creditor's office), the creditor would first have to comply with the E-Sign notice and consent requirements.

#### Section 202.9 Notifications

Section 202.9(g) provides that when an application for credit is submitted through a third party to more than one creditor and no credit is offered (or the applicant does not expressly accept or use any credit offered), each creditor taking adverse action must provide the notice required by § 202.9(a), but may do so through a third party. The 2001 interim final rule added a new § 202.9(h) to clarify that such third parties may use electronic disclosures to provide the required adverse action notice. As proposed in April 2007, this provision is being deleted as unnecessary because the E-Sign Act is a self-effectuating statute and permits any

person to use electronic records subject to the conditions set forth in the Act.

#### Section 202.16 Requirements for Electronic Communication

Section 202.16 was added by the 2001 interim final rule to address the general requirements for electronic communications.<sup>4</sup> In the April 2007 proposal, the Board proposed to delete § 202.16 from Regulation B and the accompanying sections of the staff commentary. Creditor commenters largely supported the proposed deletion, and § 202.16 and the accompanying commentary are deleted in the final rule.

In the interim rule, § 202.16(a) defined the term “electronic communication” to mean a message transmitted electronically that can be displayed on equipment as visual text, such as a message displayed on a personal computer monitor screen. The deletion of § 202.16(a) does not change applicable legal requirements under the E-Sign Act.

Sections 202.16(b), (c) and (f) incorporated by reference provisions of the E-Sign Act, such as the provision allowing disclosures to be provided in electronic form, the requirement to obtain the applicant’s affirmative consent before providing such disclosures, and the provision allowing electronic signatures. The deletion of these provisions has no impact on the general applicability of the E-Sign Act to Regulation B disclosures.

The special rule in § 202.16(c) exempting the disclosures relating to adverse action in connection with business credit, appraisal reports, and the collection of monitoring information from the E-Sign Act consent requirements has been eliminated. The special rule for disclosures relating to adverse action notices provided in connection with business credit has been removed because the E-Sign Act’s consumer consent requirements do not apply to business credit. The special rules for disclosures relating to appraisal reports and the collection of monitoring information are addressed in § 202.4(d)(2) of the final rule.

Sections 202.16(d) and (e) of the interim final rule addressed specific timing and delivery requirements for electronic disclosures under Regulation B, such as the requirement to send disclosures to an applicant’s e-mail address (or post the disclosures on a Web site and send a notice alerting the

applicant to the disclosures). The Board stated in the proposal that it no longer believed that these additional provisions were necessary or appropriate. The Board noted that electronic disclosures have evolved since 2001, as industry and consumers have gained experience with them, and also noted concerns about e-mail related to data security, identity theft, and phishing.

The consumer group commenters urged the Board to require the use of e-mail to provide required disclosures in electronic form, arguing that e-mail is the only reliable way to ensure that consumers are able to actually access, receive, and retain disclosures. The consumer groups also disagreed with the statement that concerns relating to phishing, identity theft, and data security are a valid reason for not requiring the use of e-mail, noting that phishing involves gathering information from the consumer, while disclosures would be provided to the consumer, and need not include sensitive information.

While the consumer’s receipt of an e-mail message that is actually from the consumer’s creditor would not in general pose a security risk, consumers might ignore or delete e-mails from creditors (real or purported), in order to avoid falling victim to fraud schemes. Thus, disclosures sent by consumers’ creditors may not receive the attention they should. Consequently, some creditors may be reluctant to communicate by e-mail. To the extent consumers are instructed not to ignore electronic mail messages from their creditors, the risk of consumers being victimized by fraudulent e-mail might be increased. In any event, the Board believes it is preferable not to mandate the use of any particular means of electronic delivery of disclosures, but instead to allow flexibility for creditors to use whatever method may be best suited to particular types of disclosure.

Under the April 2007 proposed rule, the requirement in the 2001 interim final rule for creditors to maintain disclosures posted on a Web site for at least 90 days would be deleted. Creditor commenters supported the proposed deletion; consumer group commenters expressed concern about its impact on consumers. The Board continues to believe that an appropriate time period consumers may want electronic disclosures to be available may vary depending upon the type of disclosure, and is reluctant to establish specific time periods that would vary depending on the disclosures, which would increase the compliance burden. Therefore, the 90-day retention provision is deleted as proposed.

Nevertheless, while the Board is not requiring disclosures to be maintained on an Internet Web site for any specific time period, the general requirements of Regulation B continue to apply to electronic disclosures, such as the requirement to provide disclosures to consumers at certain specified times and in a form that the consumer may keep. The Board expects creditors to maintain disclosures on Web sites for a reasonable period of time (which may vary depending upon the particular disclosure) so that consumers have an opportunity to access, view, and retain the disclosures. As stated in the April 2007 proposal, the Board will monitor creditors’ electronic disclosure practices with regard to the ability of consumers to retain Regulation Z disclosures and would consider further revisions to the regulation to address this issue if necessary.

#### Section 202.17 Enforcement, Penalties, and Liabilities

As proposed, § 202.17 is redesignated as § 202.16 (together with the corresponding section of the official staff commentary), concurrent with the deletion of current § 202.16, as discussed above.

### V. Other Issues Raised by Commenters

#### *Clear and Conspicuous Disclosures*

An issue raised in the comments on the April 2007 proposal related to small hand-held electronic devices through which consumers may conduct financial transactions using the Internet or other electronic means (for example, personal digital assistants, Internet-enabled cellphones, and similar devices). One commenter requested clarification on whether creditors would be deemed to comply with the requirement to provide disclosures in a clear and conspicuous form, even when the consumer views them on a small screen of a hand-held electronic device. The commenter noted that the creditor has no control over what devices consumers choose to use, for example, to view disclosures on a web page. The Board believes that disclosures comply with the “clear and conspicuous” requirement as long as they are provided in a manner such that they would be clear and conspicuous when viewed on a typical home personal computer monitor.

#### *Retainable Form*

Several industry commenters requested guidance on how creditors can be sure of meeting the requirement to provide disclosures in a form that the consumer can keep. Commenters noted that some of the disclosures that are

<sup>4</sup> The requirements for electronic communication were initially adopted in § 202.17. In the Board’s comprehensive review of Regulation B, this provision was renumbered as § 202.16. (68 FR 13144, March 18, 2003.)

exempted from the E-Sign requirements regarding notice and consent are nevertheless required to be given in retainable form (for example, the notice of right to a copy of an appraisal report, under § 202.14(a)(2)(i)). Commenters pointed out that the E-Sign Act requires, with regard to consumer disclosures generally, that a creditor disclose “the hardware and software requirements for access to and retention of the electronic records” and that the consumer consent to electronic disclosures “in a manner that reasonably demonstrates that the consumer can access” the disclosures electronically. A commenter noted that if the E-Sign procedures are followed, a creditor has some degree of comfort that the retainability requirement has been met; however, with regard to disclosures that are exempted from the E-Sign notice and consent provisions (such as those under § 202.14(a)(2)(i)), it is not clear how the creditor can demonstrate compliance with the retainability requirement.

The consumer group commenters were concerned about retainability of disclosures in light of the deletion of the requirement to maintain disclosures on a Web site for at least 90 days. They urged that the final regulations require that disclosures be delivered in a format that is both downloadable and printable.

The Board believes that creditors satisfy the requirement for providing electronic disclosures in a form the consumer can retain if they are provided in a standard electronic format that can be downloaded and saved or printed on a typical home personal computer. Typically, any document that can be downloaded by the consumer can also be printed. The Board will, however, monitor creditors’ practices to evaluate whether further guidance is needed on this issue. In a situation where the consumer is provided electronic disclosures through equipment under the creditor’s control—such as a terminal or kiosk in the creditor’s offices—the creditor could, for example, provide a printer that automatically prints the disclosures.

#### *Expansion of Exception From E-Sign Notice and Consent Requirements*

One commenter suggested that the Board adopt an additional exception from the E-Sign notice and consent requirements. Specifically, the commenter suggested that the regulation should allow adverse action notices and incomplete application notices, under § 202.9, to be provided in electronic form without E-Sign notice and consent if the consumer applies online, or applies by telephone and orally consents to receiving these notices

electronically. The commenter argued that such an exception would permit faster notice, and that online credit applicants expect to receive communications from the creditor online. The Board believes that, at this time, there is insufficient evidence that the consent requirements are a burden on electronic commerce in this situation.

#### **VI. Use of “Plain Language”**

Section 722 of the Gramm-Leach-Bliley Act of 1999 requires the Board to use “plain language” in all proposed and final rules published after January 1, 2000. In the proposal, the Board invited comments on whether the proposed rules are clearly stated and effectively organized, and how the Board might make the proposed text easier to understand. No comments were received on “plain language” issues involving Regulation B.

#### **VII. Final Regulatory Flexibility Analysis**

The Board prepared an initial regulatory flexibility analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) in connection with the April 2007 proposal. The Board received no comments on its initial regulatory flexibility analysis.

The RFA generally requires an agency to perform an assessment of the impact a rule is expected to have on small entities. However, under section 605(b) of the RFA, 5 U.S.C. 605(b), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if an agency certifies, along with a statement providing the factual basis for such certification, that the rule will not have a significant economic impact on a substantial number of small entities. Based on its analysis and for the reasons stated below, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

1. *Statement of the need for, and objectives of, the final rule.* The Board is adopting revisions to Regulation B to withdraw the 2001 interim final rule on electronic communication and to allow creditors to provide certain disclosures to applicants in electronic form on or with an application that is accessed by the consumer in electronic form without regard to the consumer consent and other provisions of the E-Sign Act. The Board is also clarifying that other Regulation B disclosures may be provided to applicants in electronic form in accordance with the consumer

consent and other applicable provisions of the E-Sign Act.

The ECOA was enacted to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, age, the fact that all or part of the applicant’s income derives from a public assistance program, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The primary objective of the ECOA is to prohibit creditors from discriminating against any applicant on any of these grounds with respect to any aspect of a credit transaction. 15 U.S.C. 1691(a). The ECOA authorizes the Board to prescribe regulations to carry out the purposes of the statute. 15 U.S.C. 1691b(a)(1). The Act expressly states that the Board’s regulations may contain “such classifications, differentiations, or other provisions, \* \* \* as, in the judgment of the Board, are necessary or proper to carry out the purposes of [the Act], to prevent circumvention or evasion [of the Act], or to facilitate compliance [with the Act].” 15 U.S.C. 1691b(a)(1). The Board believes that the proposed revisions to Regulation B discussed above are within the Congress’s broad grant of authority to the Board to adopt provisions that carry out the purposes of the statute.

2. *Issues raised by comments in response to the initial regulatory flexibility analysis.* In accordance with section 603(a) of the RFA, the Board conducted an initial regulatory flexibility analysis in connection with the proposed rule. The Board did not receive any comments on its initial regulatory flexibility analysis.

3. *Small entities affected by the final rule.* The ability to provide application-related disclosures in electronic form on or with an application that is accessed by the applicant in electronic form applies to all creditors, regardless of their size. Accordingly, the final rule would reduce burden and compliance costs for small entities by providing relief, to the extent the E-Sign Act applies in these circumstances. The number of small entities affected by this final rule is unknown.

4. *Other federal rules.* The Board believes no federal rules duplicate, overlap, or conflict with the final revisions to Regulation B.

5. *Significant alternatives to the proposed revisions.* The Board solicited comment on any significant alternatives that could provide additional ways to reduce regulatory burden associated with the proposed rule. Commenters suggested that in certain circumstances where a consumer accesses a credit

application in electronic form, creditors should be permitted to provide the required disclosures in paper form (rather than electronic form as would be required under the proposed rule). The final rule permits paper disclosures in certain circumstances as suggested by the commenters. A commenter also suggested that in certain cases where a consumer receives a credit application in paper form, creditors should be permitted to provide the required disclosures in electronic form without the consumer's consent. The final rule allows electronic disclosures in the case of applications in paper form, but only if the consumer consents in accordance with the E-Sign Act.

### VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is subject to the PRA by this final rulemaking is found in 12 CFR part 202. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless it displays a currently valid OMB control number. The OMB control number is 7100-0201.

Section 703(a)(1) of the Equal Credit Opportunity Act (15 U.S.C. 1691b(a)(1)) authorizes the Board to issue regulations to carry out the provisions of the Act. The purpose of the Act is to ensure that credit is made available to all creditworthy customers without discrimination on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to contract), receipt of public assistance income, or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act (15 U.S.C. 1601 *et seq.*). This information collection is mandatory. Since the Federal Reserve does not collect any information, no issue of confidentiality normally arises. However, in the event the Board were to retain records during the course of an examination, the information may be protected from disclosure under the exemptions (b)(4), (6), and (8) of the Freedom of Information Act (5 U.S.C. 522 (b)). The adverse action disclosure is confidential between the creditor and the consumer involved.

Regulation B applies to all types of creditors, not just state member banks. However, under the Paperwork Reduction Act, the Federal Reserve accounts for the burden of the

paperwork associated with the regulation only for entities that are supervised by the Federal Reserve. Appendix A of Regulation B defines these creditors as state member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other federal agencies account for the paperwork burden for the institutions they supervise. Creditors are required to retain records for 12 to 25 months as evidence of compliance.

The annual burden is estimated to be 165,630 hours for the 1,172 Federal Reserve-supervised creditors that are respondents for purposes of the PRA. As mentioned in the Preamble, on April 30, 2007, a notice of proposed rulemaking was published in the **Federal Register** (72 FR 21125). No comments specifically addressing the burden estimate were received.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100-0201), Washington, DC 20503.

#### List of Subjects in 12 CFR Part 202

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

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

#### PART 202—EQUAL CREDIT OPPORTUNITY (REGULATION B)

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

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

■ 2. Section 202.4 is amended by revising paragraph (d) to read as follows:

#### § 202.4 General rules.

\* \* \* \* \*

(d) *Form of disclosures*—(1) *General rule.* A creditor that provides in writing

any disclosures or information required by this regulation must provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by §§ 202.5 and 202.13, in a form the applicant may retain.

(2) *Disclosures in electronic form.* The disclosures required by this part that are required to be given in writing may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). Where the disclosures under §§ 202.5(b)(1), 202.5(b)(2), 202.5(d)(1), 202.5(d)(2), 202.13, and 202.14(a)(2)(i) accompany an application accessed by the applicant in electronic form, these disclosures may be provided to the applicant in electronic form on or with the application form, without regard to the consumer consent or other provisions of the E-Sign Act.

\* \* \* \* \*

#### § 202.9 [Removed]

■ 3. Section 202.9 is amended by removing paragraph (h).

#### § 202.16 [Removed]

■ 4. Section 202.16 is removed.

#### § 202.17 [Redesignated]

■ 5. Section 202.17 is redesignated as § 202.16.

■ 6. In Supplement I to Part 202, the following amendments are made:

■ a. In *Section 202.4—General Rules*, under *Paragraph (4)(d)*, new paragraph 2. is added.

■ b. Section 202.16—Requirements for Electronic Communication is removed;

■ c. Section 202.17—Enforcement, Penalties, and Liabilities is redesignated as section 202.16.

The amendments to read as follows:

#### SUPPLEMENT I TO PART 202—OFFICIAL STAFF INTERPRETATIONS

\* \* \* \* \*

#### *Section 202.4—General Rules*

\* \* \* \* \*

#### *Paragraph (4)(d)*

\* \* \* \* \*

2. *Form of disclosures.* Whether the disclosures required to be on or with an application must be in electronic form depends upon the following:

i. If an applicant accesses a credit application electronically other than in-person in a creditor's office (covered under ii. below), such as online at a home computer, the creditor must provide the disclosures in electronic form (such as with the application form on its Web site) in order to meet the requirement to provide



disclosures in a timely manner on or with the application. If the creditor instead mailed paper disclosures to the applicant, this requirement would not be met.

ii. In contrast, if an applicant is physically present in the creditor's office, and accesses a credit application electronically, such as via a terminal or kiosk, the creditor may provide disclosures in either electronic or paper form, provided the creditor complies with the timing, delivery, and retainability requirements of the regulation.

\* \* \* \* \*

By order of the Board of Governors of the Federal Reserve System, October 31, 2007.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. E7-21697 Filed 11-8-07; 8:45 am]

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## FEDERAL RESERVE SYSTEM

### 12 CFR Part 205

[Regulation E; Docket No. R-1282]

#### Electronic Fund Transfer

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule; official staff interpretation.

**SUMMARY:** The Board is amending Regulation E, which implements the Electronic Fund Transfer Act, and the official staff commentary to the regulation, to withdraw portions of the interim final rules for the electronic delivery of disclosures issued March 30, 2001. The interim final rules addressed the timing and delivery of electronic disclosures, consistent with the requirements of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). Because compliance with the 2001 interim final rules has not been mandatory, withdrawal of these provisions from the *Code of Federal Regulations* reduces confusion about the status of the provisions and simplifies the regulation. Similar rules are being adopted under other consumer fair lending and financial services regulations administered by the Board.

**DATES:** The final rule is effective December 10, 2007. The mandatory compliance date is October 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** John C. Wood, Counsel, Division of Consumer and Community Affairs, at (202) 452-2412 or (202) 452-3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

#### SUPPLEMENTARY INFORMATION:

## I. Statutory Background

The purpose of the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.*, is to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer (EFT) systems, and to provide individual consumer rights. The Board's Regulation E (12 CFR part 205) implements the EFTA. Examples of types of transfers covered by the EFTA and Regulation E include transfers initiated through an automated teller machine (ATM), point-of-sale (POS) terminal, automated clearinghouse (ACH), telephone bill-payment plan, or remote banking service. The EFTA and Regulation E require financial institutions to provide certain disclosures to consumers in writing, including but not limited to initial disclosures of terms and conditions of an EFT service, documentation of EFTs by means of terminal receipts and periodic account activity statements, and change in terms notices. Certain persons other than financial institutions are also required to comply with specific disclosure provisions of Regulation E.

The Electronic Signatures in Global and National Commerce Act (the E-Sign Act), 15 U.S.C. 7001 *et seq.*, was enacted in 2000. The E-Sign Act provides that electronic documents and electronic signatures have the same validity as paper documents and handwritten signatures. The E-Sign Act contains special rules for the use of electronic disclosures in consumer transactions. Under the E-Sign Act, consumer disclosures required by other laws or regulations to be provided or made available in writing may be provided or made available, as applicable, in electronic form if the consumer affirmatively consents after receiving a notice that contains certain information specified in the statute, and if certain other conditions are met.

The E-Sign Act, including the special consumer notice and consent provisions, became effective October 1, 2000, and did not require implementing regulations. Thus, financial institutions are currently permitted to provide in electronic form any disclosures that are required to be provided or made available to the consumer in writing under Regulation E if the consumer affirmatively consents to receipt of electronic disclosures in the manner required by section 101(c) of the E-Sign Act.

## II. Board Proposals and Interim Rules Regarding Electronic Disclosures

On April 4, 2001, the Board published for comment interim final rules to establish uniform standards for the electronic delivery of disclosures required under Regulation E (66 FR 17786). Similar interim final rules for Regulations B, M, Z, and DD (implementing the Equal Credit Opportunity Act, the Consumer Leasing Act, the Truth in Lending Act, and the Truth in Savings Act, respectively) were published on March 30, 2001 (66 FR 17322 and 66 FR 17329) (Regulations M and Z, respectively), and April 4, 2001 (66 FR 17779 and 66 FR 17795) (Regulations B and DD, respectively). Each of the interim final rules incorporated, but did not interpret, the requirements of the E-Sign Act. Financial institutions and other persons, as applicable, generally were required to obtain consumers' affirmative consent to provide disclosures electronically, consistent with the requirements of the E-Sign Act. The interim final rules also incorporated many of the provisions that were part of earlier regulatory proposals issued by the Board regarding electronic disclosures.<sup>1</sup>

Under the 2001 interim final rules, disclosures could be sent to an e-mail address designated by the consumer, or could be made available at another location, such as an Internet Web site. If the disclosures were not sent by e-mail, financial institutions would have to provide a notice to consumers (typically by e-mail) alerting them to the availability of the disclosures. Disclosures posted on a Web site would have to be available for at least 90 days to allow consumers adequate time to access and retain the information. Institutions also would be required to make a good faith attempt to redeliver electronic disclosures that were returned undelivered, using the address information available in their files.

Commenters on the interim final rules identified significant operational and information security concerns with respect to the requirement to send the disclosure or an alert notice to an e-mail address designated by the consumer.

<sup>1</sup> On May 2, 1996, the Board proposed to amend Regulation E to permit financial institutions to provide disclosures by sending them electronically (61 FR 19696). Based on comments received, in 1998 the Board published an interim rule permitting the electronic delivery of disclosures under Regulation E (63 FR 14528, March 25, 1998) and similar proposals under Regulations B, M, Z, and DD (63 FR 14552, 14538, 14548, and 14533, respectively, March 25, 1998). Based on comments received on the 1998 proposals, in 1999 the Board published revised proposals under Regulations B, E, M, Z, and DD (64 FR 49688, 49699, 49713, 49722 and 49740, respectively, September 14, 1999).