June 5, 2001

Ms. Jennifer J. Johnson
Secretary
Board of Governors
of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Interim Final Rule Regulation B; Docket No.R-1040
Interim Final Rule Regulation E; Docket No.R-1041
Interim Final Rule Regulation M; Docket No. R-1042
Interim Final Rule Regulation Z; Docket No.R-1043
Interim Final Rule Regulation DD; Docket No.R-1044

The American Bankers Association ("ABA") is pleased to submit our comments to the Federal Reserve Board's (the Board") interim/final rule establishing uniform standards for the electronic delivery of disclosures required by various acts and regulations: Regulation B; (the Equal Opportunity Act) Regulation E (the Electronic Fund Transfer Act); Regulation M (the Consumer Leasing Act); Regulation Z (the Truth in Lending Act); and Regulation DD (the Truth in Savings Act). The proposals were published in the 30 March 2001 and 4 April 2001 Federal Register. Under the rules, financial institutions may deliver disclosures electronically if they obtain consumers' affirmative consent in accordance with the Electronic Signatures in Global and National Commerce Act. ("E-Sign Act"). The rules were adopted as interim rules to allow for additional public comment.

The ABA brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership – which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks – makes ABA the largest banking trade association in the country.

Generally, we believe that the regulations reflect the Board's effort to adopt flexible and practical regulations that ensure consumer protections and also recognize certain technological limitations. Our main concern is that in a number of areas, the Board appears to be restrictive, endorsing a particular technology. For example, the regulations require that disclosures, or notices of disclosures, be delivered to a general e-mailbox. We believe that the regulations should permit and encourage further experimentation in the current changing and emerging environment. Methods and approaches appropriate in a paper world may not be the most effective ones in an electronic world. At this time, there are no clear consumer preferences, responses, and habits for electronic access to financial account information. Accordingly, we urge the Board to continue to allow experimentation.

Definition of electronic communication.

The definition of electronic communication remains substantially unchanged from the 1999 proposals and means a message transmitted electronically between a financial institution and a consumer in a format that allows visual text to be displayed on equipment, for example, a personal computer monitor. The Supplementary Information explains that the equipment on which the text message is received is not limited to a personal computer, provided the visual display used to deliver the disclosures meets the "clear and readily understandable" or "clear and conspicuous" format requirement.

We suggest that the Commentaries make clear that the text must be made "available" in a clear and conspicuous (or clear and readily understandable under Regulation E) format. Today, consumer can view electronically transmitted materials on a variety of equipment other than personal computers, as the final/ interim rules recognize. For example, consumers can view electronically transmitted materials on small, hand held devices. These small devices may alter how the information is displayed, limiting the amount of information displayed on the screen or altering the fonts and format. Financial institutions cannot control how the consumer chooses to access the information. The Commentaries should recognize this and only require that it be made available in a clear and conspicuous format.

Clear and conspicuous. ("Clear and readily understandable" for Regulation E)

In accordance with the E-Sign Act, the financial institutions must provide the disclosures in a clear and conspicuous format. In addition, pursuant to the E-Sign Act,

- The financial institutions must disclose the requirements for accessing and retaining disclosures in that format;
- The consumer must demonstrate the ability to access the information electronically and affirmatively consent to electronic delivery; and
- The financial institution must provide the disclosures in accordance with the specified requirements.

The Commentaries should explain that financial institutions do not violate these requirements if, after the financial institution has initially met these requirements, a consumer changes hardware or software that does not allow access to the information.

Timing and effective delivery.

Generally, consumers must be required to access required disclosures before proceeding with opening an account or completing a transaction. A link to the disclosures satisfies the timing rule if the applicant cannot bypass the disclosures before submitting the application or completing the transaction. Alternatively, the disclosures must automatically appear on the screen, even if multiple screens are required to view all of the information. The financial institution is not required to confirm that the applicant has read the disclosures.

The Commentaries should recognize that consumers can sabotage or circumvent required links with software that allows them to disable pop-ups, banners, or links. The Commentaries should add that financial institutions must make reasonable or good faith steps to require that the links be accessed before the consumer may proceed. The Commentaries should note that it is not a violation if the consumer takes measures to disable the link.

Retainability of disclosures.

The rules provide that disclosures are in a format that the consumer may keep if the electronic disclosures are "delivered" in a format that is capable of being retained (such as by printing or storing electronically). We suggest that the regulations delete "delivered" and substitute "sent" or "made available." The financial institution cannot know whether the consumers' equipment crashed, was destroyed etc. and therefore were never "delivered."

Consent.

Generally, financial institutions must obtain a consumer's "affirmative consent in accordance with the requirements of the E-Sign Act." Under Regulation B, no consent is required for disclosures of the notice of the right of appraisal (if not routine), monitoring information, and the right to reasons (business credit) is provided on or with the application. In addition, consent is not required for advertisements under Regulation M and Regulation Z. Consent is also not required under Regulation DD to make account disclosures available upon request or to advertise deposit accounts.

We strongly support these exceptions to the consent requirement. It would be unreasonable and not helpful to consumers if they were required to provide consent under these circumstances. These disclosures are available to help inform consumers before they open an account. Adding impediments such as consent would unnecessarily hinder shopping for account information.

Address or location to receive electronic communication.

Under the rules, financial institutions must:

- Send the disclosure to the applicant's electronic address; or
- Make the disclosure available at another location such as an internet web site and
- Alert the applicant at the applicant's electronic address (or to a postal address, at the creditor's option), identifying the account involved and the web site address or other location.
- Make the disclosures available for at least 90 days from the date the disclosure first becomes available or from the date of the first notice, whichever is later.

The Commentary explains that an applicant's electronic address is an e-mail address that is not limited to receiving communications transmitted solely by the creditor. This excludes, for example, home-banking programs that allow consumers to communicate directly with a creditor on-line with the use of a computer and modem.

We strongly recommend that the Board delete the requirement that the consumer reserve the disclosures or an alert about the disclosures at the consumer's e-mail address.

We recognize the appeal of such a requirement and understand the concern that some consumers may forget or neglect to access their home banking account periodically to review their statements. For example, they might not be aware of unauthorized transactions or changes in terms. However, we do not believe that these concerns justify limiting how disclosures are provided to customers.

We do not believe that the Board should restrict how financial institutions and consumers choose to obtain disclosures, especially in a time of experimentation with new technology and new products where consumer preference and technological constraints are not clear. Many consumers may not wish to receive account notices at an e-mail address. Most today are not received in this fashion and we are unaware of any complaints or problems. In addition, using an e-mail address may not be practical. Finally, the Board appears to be dictating use of a particular technology, in contravention of the E-Sign Act.

The Board's approach is based on the assumption that customers are more likely to check an e-mailbox than access their home banking account. This is not necessarily true. Indeed, some customers may not want to receive bank notices at their e-mail address. For example, for privacy reasons, they may not wish information - even if it is just the existence of an account - sent to an e-mailbox. They may have a shared household e-mail address and prefer to keep such information private. Their only e-mail account may be at their place of employment where they do not wish to receive financial account information notices, both for privacy and professional reasons. They may also feel that direct on-line access to their bank is more secure than regular e-mail. They may not want the many e-mails from all their accounts to clutter their e-mailbox where they might get overlooked. The expansion of account aggregation may add to the desire to access account information a secure, private fashion that does not entail dozens of e-mails. Some consumers may have reasons to change their e-mail address frequently.

Moreover, most customers accessing their accounts electronically today access them not through their e-mailbox, but directly through the financial institution's line. We have heard of no problems with this arrangement. Banks report that most customers access their accounts frequently. If electronically accessing financial accounts becomes more common among "less sophisticated" users and these customers prefer to receive financial information and alerts through e-mails, the market will respond by accommodating them. Or they can continue to receive paper statements. Just as today, customers can still receive their checks with their bank statements, customers will be able to choose how to receive their financial information.

We also believe that sending information to an e-mailbox may not be practical and will not guarantee consumers will receive and access their account information. E-mail addresses change frequently: one bank reported that between 25 % and 50% of its e-mail addresses are incorrect. Consumers change e-mails frequently: e.g., to change service providers because of unsatisfactory service, avoid spamming, or a change in marital status or living arrangement. The sender is frequently unaware that the e-mailbox is no longer used as providers do not usually return notices that the mailbox has been closed. Thus, the financial institution may not be aware that it is sending e-mails to e-mail addresses that are no longer used.

In addition, financial institutions, relying on the earlier rules, have built systems that utilize on-line direct access to the financial institution. These financial institutions will have to dismantle those systems and construct a different - and not necessarily better- system at great expense. Moreover, maintaining accurate and up-to-date e-mail addresses is very expensive and labor intensive. Given the questionable rationale and benefit, we do believe the expense is unjustified.

We also challenge the Board's authority to impose this requirement. In essence, it is dictating a particular technology which the E-Sign Act specifically prohibits. Section 104(b)(3)(A) provides: "Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 101(d)."

Rather than dictate a particular method, the Board should allow financial institutions and their customers to determine the best and preferred method. The regulations should allow financial institutions to alert their customers through e-mail notice or an alert that a message is waiting provided when the customer signs onto the bank's home banking page.

If the Board retains the current requirement to provide information in an e-mailbox, it should provide at least 18 months to allow financial institutions to develop and implement systems that permit it. Many financial institutions that built systems based on the earlier regulation will be at a competitive disadvantage if they must now convert without adequate lead time.

Identifying account involved.

The regulations permit financial institutions to identify a specific account in a variety of ways and do not require the use of the account number. For example, where the applicant has only one credit card account, and no confusion would result, the creditor may refer to "your credit card account." We appreciate the Board's flexibility and believe that this is a useful and reasonable explanation.

90-day rule.

Financial institutions have the discretion to determine whether the disclosures should be available at the same location for the entire period. We believe that this is a reasonable accommodation that will help to reduce costs.

Redelivery.

Under the rules, financial institutions must take "reasonable steps" to attempt redelivery using information in its files. The Commentaries further explain that if an e-mail is returned as undeliverable, the redelivery requirement is satisfied if, for example, the financial institution sends the disclosures to a different e-mail address or postal address that it has on file. According to the Commentaries, sending the disclosures a second time to the same electronic address is not sufficient if the financial institution has a different address on file.

We strongly object to this additional requirement. First, the Commentaries appear to require paper disclosures, contrary to Section 104 (c)(4) of the E-Sign Act which specifically prohibits requiring paper disclosures. Second, consumers have a responsibility to notify financial institutions of changes in e-mail addresses. Third, providing paper disclosures will be expensive because it duplicates systems and requires labor-intensive intervention, eliminating some of the economies from electronic delivery of disclosures. In any case, the regulations should permit second attempts at the original e-mail address. First e-mails are often returned as undeliverable for reasons due to temporary circumstances: often the second attempt is successful.

The Supplementary Information notes that the interim rule does not impose a verification requirement because the cost and burden associated with verifying delivery of disclosures would not be warranted. We appreciate the Board's recognition of the impracticality of a requirement to require confirmation.

Advertising.

The Commentaries require that certain terms, for example, under Regulation DD, the annual percentage yield and the interest rate (if provided), be able to be viewed simultaneously. Our general concern is that the financial institution cannot control the consumers' devices or how the screen is configured. For example, a small device may not permit simultaneous viewing. Scrolling or sequential viewing may be needed on some devices. As with the requirement to provide text in clear and conspicuous format, the Commentary should provide that disclosures be "made available" so that they may be viewed simultaneously.

In addition, the Board should permit terms that normally must be provided simultaneously, e.g., APYs and interest rates, to flash alternatively. This device can be very effective in drawing the consumers' attention and should not be prohibited.

Regulation DD

Under Regulation DD, a depository institution may provide the disclosures electronically if the consumer provides an electronic mail address. The Commentary indicates that ten business days is a reasonable time for responding to the request for account information that consumers do not make in person, including requests made by electronic communication. This is a reasonable approach. We suggest that the Commentary clarify that the depository institution may provide the disclosures in paper, even if the request is received electronically.

Additional issues:

Document Integrity. The interim rules do not impose document integrity standards. The Board recognizes the concerns about document integrity, but believes it is not practicable at this time to impose document integrity standards for consumer disclosures or mandate the use of independent certification authorities. Moreover, the issue of document integrity affects electronic commerce generally and is not unique to the written disclosures required under the Board's consumer protection laws. We agree with the Board that it is premature to require integrity standards.

Additional consent guidance. The Board asks whether its should exercise its authority under the E-Sign Act in future rulemakings to interpret the consumer consent provision or other provisions of the act as they affect the Board's consumer protection regulations. For example, the Board asks whether interpretative guidance is needed concerning the statutory requirement that applicants confirm their consent electronically in a manner that reasonably demonstrates they can access information in the form to be used by the creditor. It asks whether clarification is needed on the effect of applicants withdrawing their consent or on requesting paper copies of electronic disclosures.

At this time, we do not believe that it is necessary or desirable for the Board to do so. Banks may wish to include additional examples and guidance in the future, but now is a time for experimentation. Technology, methods, and consumer preferences are changing too quickly. Examples at this time would tend to be restrictive and might inhibit better and more creative methods.

The Board notes that financial institutions must also inform applicants of changes in hardware or software requirements if the change creates a material risk that the applicant will not be able to access or retain the disclosure. The Board solicits comment on whether regulatory standards are needed for determining a "material risk". We believe that the E-Sign Act already addresses this adequately.

Study on Adapting Requirements to Online Banking and Lending.

The E-Sign Act eliminated legal impediments to the use of electronic records and signatures. The Board requests comments on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending and facilitate electronic delivery of consumer financial services.

As an example, under Regulations E, Z, and DD, periodic statements inform consumers about their account activity over a period of time, typically monthly. In addition, transmittal of the periodic statement triggers important consumer protections such as error resolution procedures. Online banking, however, can provide consumers with up-to-date information about their accounts on a continuing basis. The Supplementary Information notes that such information is a helpful supplement to – but does not comply as a substitute for – periodic statements. The Board asks whether rules for periodic statements should be modified for online banking, and if so, how could the rules be created to maintain for consumers 1) a perspective of the activity of an account over time and 2) protections for resolving errors or liability for unauthorized transactions.

At this time, we do not believe that there is any reason to take steps to modify rules applied to periodic statements. Whether or not the disclosures are delivered by paper or electronically, they must be provided in a clear and conspicuous format. Thus, consumers will still receive the needed information. In fact, they may be more likely to review such information.

We suggest that the Commentaries related to periodic statements make clear that listing transactions, even if presented by grouping transactions according to a specific period, e.g., monthly, does not constitute a periodic statement for purposes of the regulations. As a customer service, financial institutions allow customers to view transaction histories on-line. Consumers are able to obtain up-to-date information about account activity as well as research old transactions in an efficient, user friendly, and economical fashion. For technical reasons, they may be segregated by a time period, e.g., by billing period.

These transaction histories should not be treated as periodic statements. In effect, allowing consumer to view transaction history on-line is no different than using the telephone to inquire about transactions. It is just simpler, faster, and easier to use. There is no reason to include information required for periodic statements, as consumers will receive them separately. Requiring the disclosures will simply discourage financial institutions from offering a useful and popular service.

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The ABA appreciates the opportunity to comment on these important rules. We commend the Board on its overall flexible approach that will encourage experimentation and innovation. We are happy to provide any additional information.

Sincerely,
Nessa Eileen Feddis