

Division of Financial Practices

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580  
May 24, 2001

Walter Zalenski, Esquire  
Weil, Gotshal & Manges  
1815 L Street, NW - Suite 700  
Washington, DC 20036

Dear Mr. Zalenski:

This responds to the letter from your firm(1) ("the letter") asking the staff's views on how Section 101 of the Electronic Signatures in Global and National Commerce Act ("ESIGN Act")(2) relates to Section 604(a)(2) of the Fair Credit Reporting Act ("FCRA").(3) As described in more detail below, generally, Section 101 of the ESIGN Act gives legal force to electronic signatures, contracts, and other records. Section 604(a)(2) of the FCRA permits a consumer reporting agency to provide a consumer report when it is "in accordance with the written instructions of the consumer to whom it relates."

The letter cites a staff opinion letter (Landever, 10/12/99) -- issued prior to enactment of the ESIGN Act -- in which we stated our view that an electronic "mouse click" did not constitute "written" authorization by the consumer under Section 604(a)(2) of the FCRA. The letter asked us to confirm that the ESIGN Act, in effect, changes that result such that "the FCRA's requirement that an individual give written authorization to obtain a consumer report may be satisfied by obtaining such authorization in electronic form, whether it be via e-mail, mouse click 'yes' or by other electronic means."

Section 101(a) of the ESIGN Act sets forth the following general rule:

(a) . . . Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce -

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form . . .(4)

Therefore, electronic signatures, contracts, or other records relating to transactions are not unenforceable or invalid solely based on their electronic format. Moreover, with respect to the reach of this provision, under Section 106(13) of the ESIGN Act, the term "transaction" is defined as "an action or set of actions relating to the conduct of business,

consumer, or commercial affairs between two or more persons . . ." (5) This broad definition of "transaction" appears to include the scenario described in the letter where a business that needs a consumer report on an individual includes in a contract or application form clear authorization by the individual to obtain his or her consumer report. (6) Thus, under the ESIGN Act, a consumer's electronic authorization may not be denied legal effect solely based on its electronic nature.

Section 101(e) of the ESIGN Act sets forth a significant additional provision applicable to this issue:

Notwithstanding subsection (a), if a statute . . . requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record. (7)

In our view, because Section 604(a)(2) of the FCRA requires "written instructions," the consumer's electronic authorization is a "record" that must be "capable of being retained and accurately reproduced for later reference" for the benefit of the consumer. While a consumer's consent is not invalid merely because it is communicated in electronic form, that electronic authorization must be in a form that can be retained and retrieved in perceivable form, as specified by Section 101(e) of the ESIGN Act.

In addition, as noted above, Section 604(a)(2) of the FCRA provides a permissible purpose for a consumer reporting agency to provide a consumer report based on the "written instructions" of the consumer. In any case where the issue is whether a permissible purpose exists under Section 604(a)(2) of the FCRA, a key factor in the result -- regardless of whether paper or electronic communications are used -- will be the extent to which the consumer's "instructions" are clear. (8) In our view, a consumer's "electronic signature" under the ESIGN Act is one acceptable method of providing "written instructions" under Section 604(a)(2) of the FCRA. (9) However, whether any other method, and whether (as stated in the letter) an "e-mail, mouse click 'yes' or . . . other electronic means," clearly conveys the consumer's instructions, will depend on the specific facts of the situation.

The opinions set forth in this informal staff letter are limited to the provisions of the FCRA and ESIGN Act expressly discussed above. As staff views, they are not binding on the Commission. These views may be modified as the law develops under the ESIGN Act.

Sincerely yours,

Clarke W. Brinckerhoff

Endnotes:

1. Sheldon Feldman, who is no longer with the firm, submitted the letter.
2. 15 U.S.C. § 7001 et seq. The E-SIGN Act (Pub. L. No. 106-229, 114 Stat. 464) was signed into law on June 30, 2000, and became primarily effective on October 1, 2000.
3. 15 U.S.C. § 1681b(a)(2).
4. 15 U.S.C. § 7001(a).
5. 15 U.S.C. § 7006(13).
6. Of course, an individual's written consent for a consumer report would be unnecessary if, for example, he or she applies for credit or insurance, or initiates another type of transaction (e.g., renting an apartment) that provides a clear permissible purpose under Section 604(a)(3) of the FCRA. 15 U.S.C. § 1681b(a)(3).
7. 15 U.S.C. § 7001(e). Under Section 106(4) of the E-SIGN Act, an "electronic record" is "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." 15 U.S.C. § 7006(4) Under Section 106(9) of the E-SIGN Act, a "record" is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." 15 U.S.C. § 7006(9).
8. The "written instructions of the consumer" terminology of Section 604(a)(2), as applied to one fact situation in the paper context, is discussed in the enclosed staff opinion letter (Shibley, 06/08/99).
9. Under Section 106(5) of the E-SIGN Act, an electronic signature is an electronic "sound, symbol, or other process" that is executed or adopted by a person "with the intent to sign the record." 15 U.S.C. § 7006(5).