

# Farm Credit Administration

1501 Farm Credit Drive  
McLean, Virginia 22102-5090  
(703) 883-4000

---

## INFORMATIONAL MEMORANDUM



July 26, 2002

To: Chairman, Board of Directors  
Chief Executive Officer  
All Farm Credit Banks and Associations

From: Michael V. Dunn, Director  
Office of Policy and Analysis

Subject: Specific Guidance on Electronic Disclosures and Notices

This Informational Memorandum (IM) responds to specific questions posed to the Farm Credit Administration (FCA) by Farm Credit System (System) institutions during a proposed rulemaking on Electronic Commerce (E-commerce). We also provided guidance in an IM on October 23, 2001, from Chief Examiner Roland E. Smith on the electronic delivery of disclosures.

### **BACKGROUND**

#### What FCA regulations apply to electronic disclosures?

A new regulation created Part 609 on E-commerce and amended Part 620 on Disclosure to Shareholders.

- Part 609 summarizes the Electronic Signatures in Global and National Commerce Act (Pub. L. 106-229) (E-SIGN), which preempts those provisions of the Farm Credit Act of 1971, as amended, and its implementing regulations that require written, signed, or nonelectronic records in business, consumer, or commercial transactions (a copy of E-SIGN is attached).
- Part 620 deletes references to traditional paper documents and their delivery and substitutes references to electronic documents and their delivery. System institutions may provide electronic disclosures and notices for annual and quarterly reports, annual meeting information statements, reports of condition of the Federal Agricultural Mortgage Corporation, and notices of significant changes in a System institution's permanent capital ratio. System institutions may do business electronically if all parties agree.

#### Why is the FCA issuing this Informational Memorandum?

In comments on the proposed rule on Parts 609 and 620, System institutions asked for some specific guidance on E-commerce, including guidance on electronic disclosures and notices. The E-commerce regulation provides only broad guidance on E-commerce issues. As we

explained in the preamble to the final regulation, published on April 8, 2002 (67 FR 16627), we did not provide specific guidance in the final regulation. We did not want our regulation to become obsolete because of changes in technology, business practices, or the products and services you offer. We stated in our final regulation that we would provide specific guidance in an IM or similar communication.

## **GENERAL REQUIREMENTS OF E-SIGN**

### Must everyone agree to do business electronically?

Yes. All parties to a transaction must agree to use E-commerce. See § 609.910 (a) of our regulations and § 101 (b) (2) of E-SIGN. As discussed below, there are additional special "consumer" consent protections and procedures that apply to some customers. System institutions must establish policies and procedures for business and consumer customers that agree to use E-commerce. System institutions and their customers may still use "traditional" nonelectronic means when conducting business.

### Must System institutions identify a "consumer" and a "business"?

Yes. There are certain protections and mandatory procedures for consumers. A "consumer" is an individual who obtains, through a transaction, products or services that are used primarily for personal, family, or household purposes. See § 609.910(a) of our regulations and § 101 (c) of E-SIGN. Some System loans qualify as consumer transactions, while others are business transactions. Thus, System institutions must determine whether a loan qualifies as a consumer transaction or a business transaction to comply with E-SIGN.

System institutions can decide to take a conservative approach and treat all borrowers as if they were consumers to simplify internal processing and procedures. Although you are not required to do so, you could offer the same protections and procedures described below to all borrowers. This way you would not have to identify consumer borrowers for the purposes of E-SIGN and would not risk violating its consumer protection provisions.

### What are the mandatory protections and procedures for electronic consumer transactions?

Section 101 (c) of E-SIGN provides that if a statute, regulation, or other rule of law requires that a disclosure be made available to a consumer in writing:

- Consumers may choose between receiving legal notices and records electronically or in writing, but can change their minds in the future (possibly subject to a fee if imposed by the institution).
- Consumer consent may apply to a particular transaction and/or to categories of records. Consumers can decide when they want electronic records and notices.
- An institution must describe the procedures for a consumer to withdraw consent and for the institution to update information it needs to contact the consumer electronically. An institution could develop a paper or electronic pamphlet describing these procedures to give to the consumer.
- An institution must tell a consumer that the institution must provide a paper copy of an electronic record (possibly subject to a fee if imposed by the institution) after the consumer consents to electronic notices and records.

- An institution must give the consumer a statement describing the computer hardware and software needed to receive and keep the information to be sent. For example, an institution could develop a pamphlet for consumers outlining the minimum computer requirements and software needed to send and receive electronic notices and records.
- Consumers who choose to receive documents electronically must show the technological capacity to do so prior to consenting to E-commerce. For example, to show technological capacity, the institution could ask the consumer to communicate with the institution by sending an e-mail to the institution through an Internet provider or by logging onto the institution's Internet Web site.
- If a System institution changes the technology that affects the consumer's ability to receive or keep information, the consumer may opt out of using E-commerce without paying a fee. Thus, if you change computer requirements or software that adversely affects the consumer, the consumer can discontinue using electronic notices without incurring a charge.

Note that these procedures apply to consumer transactions and not to requirements that are primarily governmental, such as our new termination regulations. An institution must develop policies and procedures to ensure that it complies with these special consumer consent requirements.

Is there any other guidance on electronic disclosures?

Yes. The Federal Reserve Board (FRB) issued interim regulations on the timing and delivery of electronic disclosures that pertain to FRB Regulations B, M, and Z to ensure that consumers have an adequate opportunity to access and retain required information. See 66 FR 17779, Apr. 4, 2001; 66 FR 17329, Mar. 30, 2001; and 66 FR 17322, Mar. 30, 2001. These interim rules provide guidance for delivering disclosures electronically if a consumer consents under E-SIGN.

**SPECIFIC GUIDANCE**

The guidance provided below in the first three questions responds to requests from the System. We also provide extra guidance on related topics.

When does FCA consider a borrower to have received a permitted electronic disclosure?

We consider a borrower to have received an electronic disclosure at the time the disclosing System institution sends it. We consider a borrower to have received an electronic disclosure posted at an Internet Web site when the System institution has both posted the disclosure and sent an electronic notice to the borrower stating it has posted the disclosure.

When does a System institution have to redeliver an electronic disclosure or notice?

If an e-mail to a borrower is returned as undeliverable, a System institution must send the disclosure or notice to another e-mail address or postal address provided by the borrower. Sending the disclosure to the same electronic address does not suffice. System institution procedures must address how to send electronic disclosures and process and handle returned disclosures, including getting an alternate address, such as a postal address or another e-mail address.

### How does a consumer withdraw consent after having given it?

Before a consumer consents to receiving electronic disclosures required by law, you must provide the consumer with a statement describing the procedures the consumer must use to withdraw consent. Thus, a consumer would withdraw consent under procedures that you set up. See Section 101(c)(1)(B)(iii) of E-SIGN. For disclosures not required by law, a borrower can also withdraw consent to electronic disclosures under any applicable contractual terms.

E-SIGN does not require you to describe the procedures to such a borrower before consenting to E-commerce. However, in establishing prudent business practices you may choose to provide all those consenting to E-commerce a clear understanding of the procedures for withdrawing consent. You may also want to develop a standardized procedure to address this issue.

### How should I provide disclosures when a borrower uses my electronic equipment?

If your electronic equipment (for example, a computer terminal in your lobby or an automated loan machine at a kiosk) provides electronic disclosures, you must ensure that the equipment provides timely disclosures in a clear and conspicuous format that a borrower may keep. For example, if you must provide a disclosure at the time of an electronic transaction, then you must send the disclosure to the borrower's e-mail or postal address or make it available at another location, such as your Internet Web site, unless you provide a printer with your equipment that automatically prints the disclosure.

### How long should you keep a disclosure at your Internet Web site?

FCA does not require you to keep a disclosure at your Internet Web site for a specific time. For consumer transactions, the FRB Regulations B, M, and Z require that certain consumer disclosures remain posted for 90 days. You may also want to consider 90 days a proper period of time to keep other types of disclosures not covered by the Federal Reserve Board regulations on your Internet Web site.

### What if a consumer consented to electronic disclosures before E-SIGN?

E-SIGN allows System institutions to continue to rely on legally permissible consent to receive communications electronically that a consumer gave before the effective date of E-SIGN. See Section 101(c)(5) of E-SIGN.

### What else should System institutions do?

System institutions should read E-SIGN in its entirety to see how it applies and affects E-commerce. System institutions should consult legal counsel, as appropriate, before engaging in E-commerce. You should read all our regulations in light of what E-SIGN does and does not allow. Thus far we have amended only Part 620 to specifically show E-SIGN's impact and significance, but all our regulations are subject to E-SIGN.

E-SIGN preempts most regulations requiring paper documentation in business or consumer transactions. FCA continues to have authority to require paper documentation in regulations that are primarily governmental. This means FCA can require System institutions to conduct paper-based matters with us in some situations.

If you have any questions regarding E-commerce, please contact Dale Aultman, Policy Analyst, (703) 883-4381, TTY (703) 883-4434, [AultmanD@fca.gov](mailto:AultmanD@fca.gov), or Jane Virga, Senior Attorney, (703) 883-4071, TTY (703) 883-2020, [VirgaJ@fca.gov](mailto:VirgaJ@fca.gov) .

Attachment