

July 23, 2020

Hon. Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

Hon. Roger Wicker
Chairman,
Committee on Commerce, Science,
and Technology
United States Senate
Washington, DC 20510

Hon. Charles E. Schumer
Democratic Leader
United States Senate
Washington, DC 20510

Hon. Maria Cantwell
Ranking Member,
Committee on Commerce, Science,
and Technology
United States Senate
Washington, DC 20510

Dear Majority Leader McConnell, Minority Leader Schumer, Chairman Wicker and Ranking Member Cantwell:

The undersigned organizations represent a diverse group of American financial institutions and technology companies. We support inclusion of the *E-SIGN Modernization Act* (S. 4159), sponsored by Sen. John Thune, in the forthcoming Phase IV economic relief package.

The COVID-19 crisis has disrupted the financial lives of Americans, leading record numbers to turn to digital channels in order to stay on top of their finances.¹ However, outdated technical steps required by the federal Electronic Signatures in Global and National Commerce Act (“E-SIGN Act”), which was enacted at the dawn of the Internet in 2000, have prevented some consumers from quickly availing themselves of options to keep their financial lives on track. The same obstacles are affecting the ability of regulated businesses to offer digital options. It is time to update the law.

The *E-SIGN Modernization Act* addresses a simple but important problem: federal law preferences paper-based processes over equivalent digital options that are beneficial at times of disruption. Consumers who request to engage digitally with companies through services, such as online banking, must jump through additional hoops that are not required when they choose paper-based processes delivered through arguably less-efficient methods, such as the mail.

Since the beginning of the current crisis, companies large and small have found compliance with the E-SIGN Act reasonable demonstration requirement (12 U.S.C. § 7001(c)(1)(C)(ii)) challenging. Financial institutions have faced hurdles to quickly implement loan modifications, transfer balances, complete service requests begun on paper or over the phone, or fulfill requests from displaced customers for access to digital services.

¹ *Coronavirus crisis mobile banking surge is a shift that's likely to stick.* CNBC (May 27, 2020), available at <https://www.cnbc.com/2020/05/27/coronavirus-crisis-mobile-banking-surge-is-a-shift-likely-to-stick.html>.

It was not supposed to be this way. Twenty years ago, the E-SIGN Act was signed into law at Independence Hall. At that event, attended by Congressional Republicans and Democrats instrumental in authoring the legislation, President Bill Clinton summed up the bipartisan consensus:

Individuals are not just buying and selling online, they're gaining information that is empowering them as consumers and as citizens . . . [But] that potential is now being held back by old laws that were written ironically to protect the sanctity of contracts. Laws that require pen and ink signatures on paper contracts for them to be enforceable. In order to unleash the full potential of the digital economy, Vice President Gore and I unveiled three years ago our framework for global electronic commerce. In that document, we set out the principles we believe should shape the rules governing electronic contracts. **We said that the rules should be simple and non-regulatory, that they should not favor one technology over another, and they should give individuals and organizations maximum freedom to form electronic contracts as they see fit.**²

“Reasonable Demonstration” Is an Unnecessary, Outdated Feature of a Good Law

Though durable and flexible in virtually all regards, the E-SIGN Act still carries idiosyncrasies of the “frontier era” of the Internet that suggest a preference for paper over commonplace, arguably superior technologies such as email, web browsers, and banking apps.

When a consumer consents to receive electronic documents, the “**reasonable demonstration**” requirement of the E-SIGN Act requires an additional step. The consumer must “reasonably demonstrate . . . that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.”³ This requirement was a last-minute addition by legislative managers after the E-SIGN Act passed both chambers and was attributed to concerns about the availability of affordable software required to read documents. No similar requirement to test the deliverability of postal mail to a customer was included in the law.

The reasonable demonstration requirement was *not* included in original drafts of competing e-signature legislation proposed by Democrats, Republicans, and secretaries of state. The ultimate reasoning for adding a reasonable demonstration requirement boiled down to reassuring e-signature skeptics that consumers would be able to access electronic documents after requesting them. Introducing an additional requirement to test consumers’ ability to use technology was the reassurance that facilitated unanimous Senate passage of the conference report (following a 426-4 vote in the House).

Amending the E-SIGN Act to Remove Reasonable Demonstration Was Foreseen at Passage

Moments after that unanimous Senate passage, Banking Committee Chairman Phil Gramm (R-TX) took to the Senate floor to memorialize concerns about the long-term impact of compromises made to accommodate the anxieties of the moment:

² Remarks of President Bill Clinton at the signing ceremony for the E-SIGN Act at Independence Hall, 2000 (emphasis added).

³ 12 U.S.C. § 7001(c)(1)(C)(ii).

There remain some problems with the bill, but I do not believe them to be overwhelming. There are those who are fearful of the electronic marketplace, and that fear found its expression in the debates in the conference committee. **It found its expression in provisions in this bill that apply standards to electronic commerce that are not applied to paper commerce.** That is not unusual. Every major technological advance has met with fear before its full benefits were embraced . . .

I believe that many of the fears that have been raised about electronic commerce will very soon sound silly. In fact, many of them do not make much sense today. That is why I am pleased that this legislation will allow the regulators to remove many of these onerous restrictions if the fears prove unfounded, as I expect that they will. And as I expect the fear to prove unfounded, I expect the regulators to act vigorously to remove unnecessary restrictions and requirements. **Electronic commerce should labor under no greater regulatory restrictions than does the quill pen, if this is to be a system for the twenty-first century.**

We will watch very closely the development of electronic commerce. **If this legislation proves to put an unnecessary burden on electronic commerce, and if the regulators fail to act, or if legislation is needed, we will then take vigorous action in the Congress to correct the situation and make the purposes of this legislation a reality.⁴**

Regulators do possess some authority to address, indirectly, the challenges posed by reasonable demonstration. Yet, the intrinsic, subjective vagueness of the term “reasonable” means that Congress must act to address the inadequate statutory language and thereby provide certainty.

Removing Reasonable Demonstration Is Bolstered by Developments Since 2000

Concerns ran high at the time of the E-SIGN Act passage that companies would deliver information in proprietary, incompatible, and potentially expensive formats that would compare poorly in terms of consumer experience with an envelope delivered in the mail. These fears never materialized, and, in fact, the opposite trend has manifested in the marketplace.

Internet browsers remain free and are far more ubiquitous: web access software is standard on mobile phones, tablets, and smart TVs. The underlying browser code is in the public domain and HTML/XML is managed by an inclusive non-profit community,⁵ ensuring that no one company will be able to monopolize the foundational display technology of the internet. In 2008, the developer of the PDF format turned control over to the International Standards Organization (ISO), which manages it today.⁶

America’s leading experts in information collection and delivery long ago arrived at consensus that digitally delivered information is widely accessible and that the American people may be presumed broadly capable of utilizing such information without individual verification.

⁴ Remarks of Sen. Phil Gramm, Chair of the Senate Committee on Banking, Housing, and Urban Affairs, June 16, 2000 (emphasis added), available at

https://www.banking.senate.gov/themes/banking/press_archive/prel00/0616grm.htm.

⁵ World Wide Web Consortium (W3C) Members, available at [⁶ ISO 32000-1:2008 Document management — Portable document format — Part 1: PDF 1.7, available at <https://www.iso.org/standard/51502.html>.](https://www.w3.org/Consortium/Member>List</p></div><div data-bbox=)

The only Constitutionally mandated information collection, the decennial census, uses PDF to report its results. As the U.S. Census Bureau explains, “[b]ecause PDF format allows the reliable reproduction of published material on many different platforms (requiring only the use of free reader software), it is a way to conveniently and quickly disseminate information including text, tables, and graphics. All Census Bureau publications released since January 1, 1996 as well as several 1990 census and 1992 economic and agricultural census products are now in PDF format.”⁷

A 2013 Congressionally mandated study by the National Academy of Public Administration regarding print vs. digital delivery of federal government information cited “the preference for digital documents by the public and federal agency that has reduced the demand for print” as a reason to “reboot” away from paper-first practices.⁸

The *E-SIGN Modernization Act* strikes the right balance by retaining important consumer protections requiring companies to disclose minimum hardware and software requirements to access and retain electronic documents *before* the consumer consents to receive documents electronically. Companies would also be required to provide consumers with notice of changes in technical requirements, if the changes could impair their ability to access and retain electronic documents. Consumers would be able to revoke their prior consent, at no cost, in these cases.

Americans Demonstrate High Levels of Basic Tech Literacy

While the technology underlying modern electronic documents has become essentially costless, it is prudent to also evaluate how widespread access to both computers and the internet have become since the E-SIGN Act was signed into law. The mere usage of the internet is a strong proxy for the ability to use common document formats, such as web pages and PDF.

A leading public research organization has kept tabs on the changes in internet usage: “When Pew Research Center began systematically tracking Americans’ internet usage in early 2000, about half of all adults were already online. Today, nine-in-ten American adults use the internet.” There is statistical parity along dimensions of gender, race, and urban-suburban-rural usage.

Internet Usage by U.S. Adults, percentage by age

| | 18-29 | 30-49 | 50-64 | 65+ |
|-------------|--------------|--------------|--------------|------------|
| 2000 | 70% | 61% | 46% | 14% |
| 2019 | 100% | 97% | 88% | 73% |

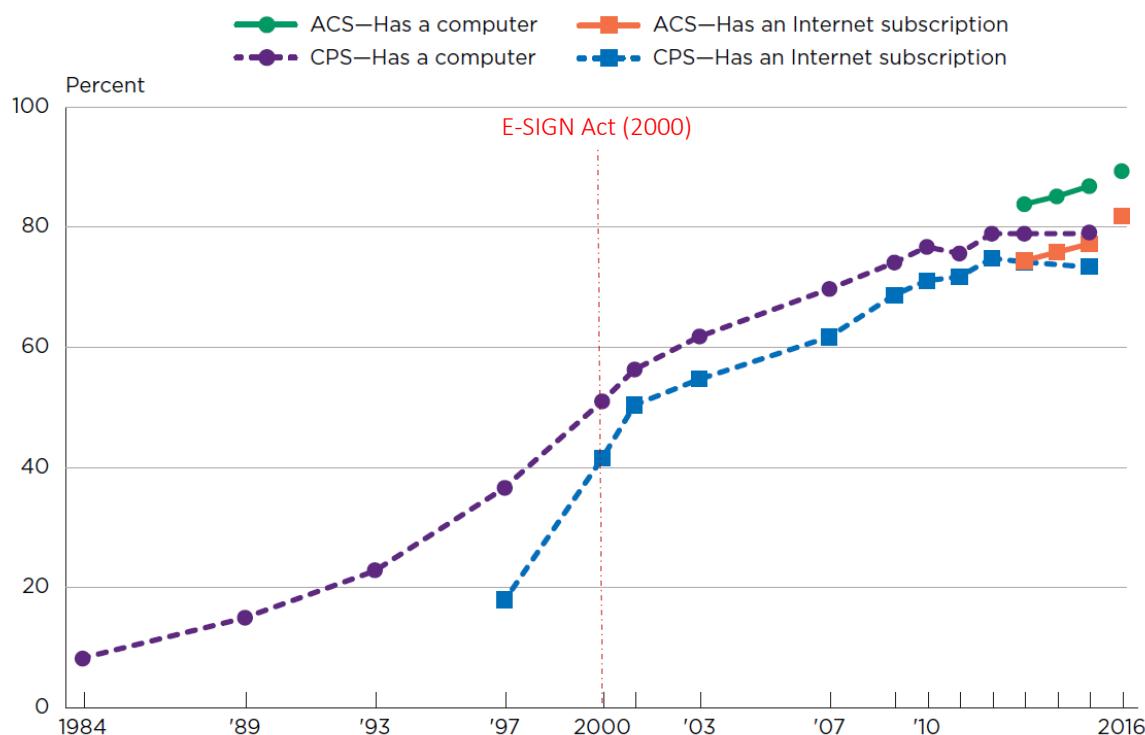
Pew Research Center Surveys (2000 and 2019)

⁷ About Portable Document Format (PDF) Files, Bureau of the Census, U.S. Department of Commerce, available at <https://www.census.gov/main/www/pdf.html>.

⁸ Rebooting the Government Printing Office: Keeping America Informed in the Digital Age. A Report by a Panel of the National Academy for Public Administration for the U.S. Congress, Congressional Research Service, and the Government Printing Office, available at https://www.gpo.gov/docs/default-source/congressional-relations-pdf-files/gpo_napa_report_final.pdf.

The U.S. Census Bureau has found similar growth in the number of Americans with access to the internet.

Percentage of Households With Computer and Internet Use: 1984 to 2016



Note: For more information, visit <www.census.gov/cps> and <www.census.gov/acs>.

Source: U.S. Census Bureau, 1984–2015 Current Population Survey, 2013–2016 American Community Survey, 1-Year Estimates.

Age Is No Longer a Major Distinguisher for Basic Tech Usage

A 2018 study by the American Association of Retired Persons (AARP) and GfK of persons over 50 years old found that “[m]obile and traditional computing devices are the primary tech for Americans 50+. Over nine in ten own a laptop, seven in ten adults 50+ own a smartphone, and four in ten own a tablet . . . Nearly nine in ten smartphone owners say they use their device to send IMs/texts or emails, and over three quarters say the use it to get directions or traffic information. Other top activities include purchasing apps, surfing the internet, getting news, and accessing social media.” About two-thirds of people in this age group use online banking or other electronic financial service product.⁹

AARP’s findings for people 50 years and older is broadly consistent with the Pew Research Center’s tracking of the general population’s internet usage, and the numbers also line up for

⁹ *Technology Use and Attitudes among Mid-Life and Older Americans*, Anderson, O., AARP (2017).

mobile usage: “[t]he share of Americans that own smartphones is now 81%, up from just 35% in Pew Research Center’s first survey of smartphone ownership conducted in 2011.”¹⁰

Many disclosures are delivered through interaction with email or a messaging system that resembles email. The ability to open and use an email account, once a novelty but now as common as a physical mailbox or wallet, is another proxy for the ability to engage with electronic documents. A 2018 global study found that “the average number of email accounts per user ratio is about 1.75 accounts per user. By 2022, the email accounts per user ratio will reach 1.86 accounts per user. Growth is particularly strong with Consumer email accounts, since many consumers tend to have multiple email accounts for different purposes (e.g. shopping vs. friends and family).”¹¹ An industry survey of office workers who use email estimate that they interact with work-related and personal applications five hours per day on average.¹²

Taken together as compelling evidence of widespread behavior changes, these statistics demonstrate the internet proficiency of the American people in 2020. There exists no contrary evidence that suggests reasonable demonstration in any way provides consumer benefit today or that its replacement with robust consent-driven processes would cause consumer harm.

Reasonable Demonstration Is Affecting Businesses of All Sizes

Community financial institutions often rely upon third-party technology providers so that bank staff can focus on customer service and serving the needs of their communities. Larger institutions may have in-house technology development but operate across a range of businesses where a unified customer experience requires well-integrated user journeys. For these financial institutions, and in fact all businesses that provide required documents electronically, the reasonable demonstration requirement in the E-SIGN Act is increasingly a stumbling block in supporting their customers during this period of disruption and dislocation.

During the current crisis, financial institutions are working with customers who are no longer able to reach a branch. Some customers had begun an auto loan application or were halfway through refinancing their mortgage when the crisis struck and branches shut down, and the only chance of completing these transactions was through a digital channel. Other customers were displaced from their usual addresses or did not want to visit a PO Box to get their mail and elected to receive electronic communications. Unfortunately, it was not that easy.

Take the example of one community financial institution. In the spring, they received a deluge of requests to conduct business digitally. But staff found it difficult to process these requests in a manner that would satisfy the reasonable demonstration requirement. The problem was not in obtaining consent from consumers to use digital channels – it was how to manually verify the ability of their customers to use email, across a wide range of products. This financial institution, which is a small business, was forced to divert precious staff to troubleshoot tech processes and ensure compliance with reasonable demonstration. The same types of challenges have appeared during natural disasters for years.

¹⁰ *Mobile Fact Sheet*, Pew Research Center (2019), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

¹¹ *Email Statistics Report 2018-2022 (Executive Summary)*, The Radicati Group (2018).

¹² *Adobe Email Usage Study* (2019), available at <https://www.slideshare.net/adobe/2019-adobe-email-usage-study>.

Obtaining consent to receive electronic documents through one service channel (such as at a branch or retailer) and then performing a reasonable demonstration process in another channel can create a high-friction customer journey, which increases confusion rather than verifying anything useful. The practical impact is that consumers become understandably frustrated by delays and ask their financial institution why their clearly provided consent to sign up for a service is not enough to immediately deliver it. Essentially, the entity making the disclosure is forced to tell their customer (or prospective customer) that they do not believe the affirmative consent that the individual just provided. This would be akin to requiring an airplane passenger sitting in an exit row to help another passenger exit the airplane's window during the boarding process, instead of simply providing an audible consent to help in the event of emergency.

There is no single leading use case where these problems manifest: we have received reports of obstacles across products and channels. It is a thread that weaves through too many customer experiences and becomes increasingly difficult to overcome elegantly as consumers make requests to banks through innovative channels, such as smartphones, smartwatches, and voice-driven processes.

Since the E-SIGN Act is a law of general applicability affecting national commerce, the reasonable demonstration requirement impacts any business that interacts with consumers digitally and is also required (by other laws) to provide consumers with written disclosures. Incidentally, businesses that are required to provide written disclosures are typically among the most highly regulated as to their fair and transparent dealing with customers. In the case of financial institutions, banks and credit unions are regarded as *the most* regulated and overseen industries. If the reasonable demonstration requirement is removed, these companies would still be required to obtain affirmative consent from consumers and would face examination from regulators on a wide range of consumer protection practices, including their E-SIGN consent process.

Now is the time to update the E-SIGN Act to realize the full potential of its intent and enable American consumers to obtain the benefits of technological progress. We ask you to support the *E-SIGN Modernization Act* and include it in the Phase IV economic relief package that is being developed.

Sincerely,

AMERICAN BANKERS ASSOCIATION

CONSUMER BANKERS ASSOCIATION

CREDIT UNION NATIONAL ASSOCIATION

ELECTRONIC TRANSACTIONS ASSOCIATION

INDEPENDENT COMMUNITY BANKERS OF AMERICA

MORTGAGE BANKERS ASSOCIATION

NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

UNITED STATES CHAMBER OF COMMERCE