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ESIGN PUBLIC WORKSHOP

TUESDAY, APRIL 3, 2001

FEDERAL TRADE COMMISSION  
600 PENNSYLVANIA AVENUE, N.W.  
ROOM 432  
WASHINGTON, D.C. 20580

For The Record, Inc.  
Waldorf, Maryland  
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## P R O C E E D I N G S

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3 MS. HARRINGTON: It's time to begin.

4 Thank you, and I am going to turn this over to  
5 Jodie Bernstein for a few welcoming and opening remarks.

6 MS. BERNSTEIN: Good morning, everybody. We are  
7 delighted to see all of you here this morning. And we  
8 want to start on time because, as always, we have a full  
9 agenda which I know will be a very productive session.

10 So, thank you all for coming on behalf of the  
11 Bureau of Consumer Protection, and the U.S. Commerce  
12 Department, as well. Actually, the NTIA is really  
13 represented here this morning down at the end of the  
14 table and we're delighted to be able to do this together  
15 with them, because if, for no other reason, that  
16 Congress directed us to do this together, but we would  
17 have done it anyway. We would have done it anyway.

18 And as you know, it is a fairly discrete  
19 specific kind of requirement that the Congress inserted  
20 into the statute directing us to assess burdens and  
21 benefits involved in meeting the, quote, "reasonable  
22 demonstration" requirement that is in the statute, and  
23 asked us to report back to the Congress by June 30th.

24 Your comments that some of you have already  
25 submitted and your participation today will obviously be

1 of great assistance to us. We've used these workshop  
2 formats on a number of subjects, and on occasion with  
3 the Commerce Department with NTIA, it's worked very  
4 effectively. And we look forward to that as we prepare  
5 the report, but today's discussion will be critical in  
6 informing ourselves.

7 So, again, thank you for participating. We know  
8 it will be a full day. And again, welcome, and we need  
9 to make a thank you to VeriSign for the coffee and  
10 goodies out in the hall. So, thank you all very much,  
11 and it will sweeten our morning.

12 MS. HARRINGTON: Thank you, Jodie, and as  
13 always, you're setting the standard, you finished your  
14 remarks two and a half minutes ahead of schedule and  
15 that's how we intend to conduct the whole day, that is  
16 right on schedule or maybe even just slightly ahead of.

17 Let me go over a few of the housekeeping and  
18 procedural matters that you need to know about. First  
19 of all, many of you received from Eric -- Eric, raise  
20 your hand -- public comment cards, and we have more of  
21 those. There is at the end of the day, a portion of the  
22 day set aside for participation from the public for  
23 those of you who are here, but not sitting at the table,  
24 to engage in the discussion.

25 And if you wish to participate during that

1 portion of the day, we need you to fill out a card  
2 telling us who you are and if you have some  
3 representational status, tell us about that, too, so  
4 that we can gauge the number of people who want to  
5 participate during that portion of the program, and  
6 allocate the time correctly and make sure that we get to  
7 each one of you.

8           Second, we have overflow space in Room 332. As  
9 you see, this is being telecast on closed circuit within  
10 the building, and so if you don't want to be in this  
11 room, either because you can't find a chair or whatever,  
12 feel free to go to Room 332.

13           Beginning at noon, and continuing until the end  
14 of the day, we have in the overflow room some  
15 demonstrations by vendors and technologists of  
16 procedures that might be used or are being used to  
17 comply with various aspects of the consumer consent  
18 provisions in E-SIGN. We think that's pretty interesting  
19 stuff and we would urge you to go down there and take a  
20 look.

21           During our roundtable discussions, which begin  
22 with the legal issues panel at 9:30, here is the  
23 process: For discussants who wish to participate, we  
24 ask you to just raise your name tag up, set it on end,  
25 and the moderators will recognize you in whatever order

1 seems to make sense for the flow of the discussion.

2 Now, an important point that we want to make is  
3 that today's goal is to really advance the discussion of  
4 these issues and not to rehash what people have already  
5 submitted in very fine and substantive comments. So,  
6 moderators will be assertive in making sure that what  
7 we're having here is a discussion and not a series of  
8 speeches.

9 We want participants to talk to one another, to  
10 challenge each other. If we have participants with  
11 significantly opposing views, we hope that you will talk  
12 to each other, because we have asked you to participate,  
13 principally based on your expertise and knowledge, and  
14 we, the staff of the NTIA and the FTC, presume that the  
15 participants know a lot more about these specific areas  
16 of concern than we do.

17 So, we need you to help us flush out the issues,  
18 challenge one another, refine thinking. Our experience  
19 is that as a result of these discussions, and we've had,  
20 as Jodie said, many, many workshops like this here at  
21 the FTC, some with our colleagues from the NTIA, and our  
22 experience is that by the end of the day, we find that  
23 there is often more agreement than disagreement and that  
24 people's thinking is often modified as a result of  
25 listening and talking with each other.

1           So, that said, are there any other housekeeping  
2 details that we need to touch on?

3           MS. MAJOR: Mike Pazyniak asked me -- Mike,  
4 stand up --

5           MS. HARRINGTON: Into the microphone, please.

6           MS. MAJOR: If anybody regarding the tech demos  
7 has any questions, that you should see Michael and he  
8 will help you.

9           MS. HARRINGTON: Okay, and one other very  
10 important point, any time someone speaks, you need to  
11 speak into the microphone so that the people downstairs  
12 in the overflow room can hear what you are saying, and  
13 we also have webcasting of this session today, so there  
14 may even be people out there who are listening to this  
15 program.

16           And we also have email participation as an  
17 option for people in the public who are not here and  
18 want to email in their questions that we can get to  
19 either during the discussions or during the public  
20 participation session. We invite those of you tuning in  
21 on the Internet to send us your questions. And I  
22 believe that the instructions for doing that can be  
23 found on the FTC website, FTC.gov.

24           That said, let's start. We are going to hear  
25 from three very thoughtful commenters. We're asking

1       them to give us about five to six minutes of overview  
2       comments that set the stage for this discussion. We are  
3       interested in hearing them highlight issues of  
4       consensus, controversy, disagreement, and to help us set  
5       the stage for the discussion.

6               So, we're going to begin by hearing from Margot  
7       Saunders who is with the National Consumer Law Center.  
8       Margot, do you want to grab a microphone there.

9               And for all of our presenters who we're so  
10       grateful to, let me just warn you, I'll be watching the  
11       clock.

12               MS. SAUNDERS: Thank you very much for inviting  
13       me here today. I have a lot to say, but apparently I  
14       have a lot of opportunity to say it, so I'll try to  
15       spread it out all over the day.

16               Can you hear me all right?

17               Let me first explain that the National Consumer  
18       Law Center is a public interest law firm that represents  
19       low income consumers, and we became involved in this  
20       issue at first very reluctantly, because we didn't  
21       believe that electronic commerce issues were very  
22       relevant to the very poorest of the poor who we  
23       represent.

24               And then we read ESIGN, the electronic signature  
25       bill that we're talking about today, just as on the day



1 that it was set to go through the Senate on unanimous  
2 consent in August 1999. And realized that it said,  
3 quite starkly, that a writing should -- a writing -- a  
4 legal requirement for a writing would be satisfied by an  
5 electronic record.

6 Sitting by itself as it did in that law, and as  
7 it does -- as that language does in the Uniform  
8 Electronic Transactions Act, created quite a bit of stir  
9 among the legal services advocates, because we realized  
10 that the first thing that would happen to many low  
11 income people is they would be faced with dealing  
12 with -- with receiving electronic records in place of  
13 paper writings, whether or not they had a computer.

14 So, it was from that perspective, the  
15 interrelationship between electronic commerce and the  
16 real world commerce that we address this whole issue.  
17 And that's, I think, an important perspective to keep in  
18 mind.

19 If we were only dealing in E-SIGN, with the  
20 commerce between people or participants who were both  
21 online, we would be devising different types of consumer  
22 protection. But it's the interrelationship between the  
23 physical world and e-commerce that creates somewhat of  
24 the controversy and a lot of the difficulty in trying to  
25 design appropriate consumer protections.

1           We initially sought, obviously, quite a few more  
2 consumer protections than we actually got. The consumer  
3 consent provision is a real product of the legislative  
4 process, rather than a necessarily well thought out and  
5 conceived negotiation. It's, I think unfortunately,  
6 probably a -- more like a sausage than a clean  
7 resolution -- than a clean legal resolution of a bill,  
8 of a problem.

9           I think that what would be best for me to do in  
10 my remaining two minutes would be to explain exactly  
11 what we're most afraid of. We see consumers in the real  
12 world who are taken advantage of all the time. We see,  
13 especially in low income and minority communities,  
14 consumers who are -- who are not sophisticated, who do  
15 not have sufficient choice in the marketplace, or even  
16 when they have it, they do not feel or do not know how  
17 to exercise it.

18           We see, unfortunately, in the low income  
19 marketplace, many, many instances of some businesses  
20 skirting the edges of legality, taking advantage of the  
21 lack of clarity in the law, often quite brazenly pushing  
22 the envelope of the law in trying to see how much they  
23 can get away with.

24           I think predatory lending, which is a new issue  
25 for many people, is an evident problem which is an

1     indication of how there are certainly some people in  
2     industry, in commerce in this country, who will push the  
3     envelope and do whatever is legal, whether or not it is  
4     right.

5             We know that if e-commerce in the name of  
6     facilitating e-commerce, a law allows the delivery of an  
7     electronic notice or disclosure to someone, whether or  
8     not they can actually receive it, but some members of  
9     business will take advantage of that.

10            So, for example, we're concerned about the  
11     little old lady sitting at home who is visited by the  
12     home repair siding salesman. Right now, that siding  
13     salesman has to, and while he's going to rip her off in  
14     many instances, he has to at least give her paper  
15     writings evidencing the full details in which he's going  
16     to rip her off so that if she goes to an attorney later,  
17     she has the information, and the attorney can try to  
18     help her.

19            She also has a very important notice of the  
20     right to cancel the transaction, and she has it as a  
21     piece of paper in her hand. After he leaves, and she  
22     has three days to think about that, that's an FTC  
23     required notice.

24            If ESIGN did not have the consumer electronic  
25     consent provision, then she could be asked to sign,

1 among all the pieces of paper that she signs that day,  
2 an agreement that would allow the -- all of these  
3 disclosures and notices in the contract itself to be  
4 sent to her at an email address established by the  
5 salesman.

6 We know that that will happen if it's legal, and  
7 if that happens, that little old lady will be even worse  
8 off than she is now. At least with electronic consent,  
9 she has to be able to -- the electronic consent process  
10 has to indicate that she has the ability to access  
11 electronic records, and that is not likely to be able to  
12 happen -- to occur in this instance.

13 MS. HARRINGTON: Thank you, Margot. Now we will  
14 turn to Jerry Buckley, who is counsel for the Electronic  
15 Financial Services Council, and one helpful thing that  
16 Margot did for us, I think, was to tell us what her  
17 organization is most concerned about in all of this, and  
18 if both you and Ben could be thinking about that, to  
19 tell us your thought on that as you present that would  
20 be useful. So, thanks, Jerry.

21 MR. BUCKLEY: Thank you, Eileen. I represent --  
22 I'm a partner in Goodwin & Proctor, and I represent the  
23 Electronic Financial Services Council, which I believe  
24 is the only trade association which is focused entirely  
25 on trying to promote changes in the law and regulations

1 which will facilitate the electronic delivery of  
2 financial services.

3 Last year's passage of the landmark ESIGN  
4 legislation has cleared the way for businesses and  
5 consumers to access the benefits of conducting all sorts  
6 of transactions online. The act amends thousands of  
7 state and federal laws in a very simple way, as we know,  
8 it simply provides that a signature, a contract or a  
9 related record in any transaction in interstate or  
10 foreign commerce may not be denied legal effect,  
11 validity or enforceability solely because it is in  
12 electronic form.

13 The long-range effects of this sample change in  
14 the law in our view will make this one of the most  
15 important statutes to be passed by the 106th Congress.  
16 We expect that not only will consumers be able to access  
17 products and services 24 hours a day, seven days a week,  
18 but and not only will literally billions of dollars be  
19 saved in records management, but it will also bring a  
20 wider array of products and services to inner-city  
21 residents and to rural consumers.

22 It will allow consumers to shop in the privacy  
23 of their homes, without pressure. It will allow  
24 consumers to ask questions about products, without  
25 embarrassment. It will empower more effective, timely

1 and understandable consumer disclosures, and it is this  
2 feature of being able to have explained financial  
3 products in simpler and more understandable terms that  
4 we believe will some day empower consumers to take the  
5 features of various financial products to mix and match  
6 them and to create new financial instruments tailored to  
7 their individual needs.

8           Combinations of lending, insurance and  
9 securities features, engineered mutually by a financial  
10 institution, and financial services providers and  
11 consumers online, we believe can allow the creation of  
12 products which meet consumers' unique needs, and we  
13 believe that this process, which is going to take some  
14 time, will justify the claim that this, indeed, is  
15 landmark legislation for the financial services  
16 industry.

17           While these changes in business processes will  
18 be substantial, the business community, to its credit,  
19 we believe, is approaching the use of these powers in a  
20 thoughtful and methodical way. That the ESIGN Act has  
21 not spawned the rapid deployment of new products in our  
22 view is healthy.

23           Rather, businesses, in our experience, are  
24 steadily developing the infrastructure to offer  
25 financial products which will gain wide market

1 acceptance. I shall speak later about the efforts of  
2 our organization to promote industry guidelines for the  
3 origination and sale of home mortgage loans in the  
4 secondary market.

5 As you all know, with the passage of this  
6 legislation, you and I, Eileen and I could enter into a  
7 contract to do business online, and I could give her a  
8 lease or arrange for a mortgage, but whether that  
9 product would be accepted in the secondary market,  
10 whether the lease would be financed by a financial  
11 institution, will depend upon the ability of the various  
12 industries to develop the infrastructure that is  
13 necessary.

14 It reminds me of when the secondary mortgage  
15 market was being created some 20 years ago, all of the  
16 reps and warranties, all of the procedures that were  
17 followed, were developed carefully back in the early  
18 1980s, and we have had very little problem in that  
19 industry.

20 I think we have to approach the creation of the  
21 infrastructure for electronic transactions in the same  
22 thoughtful way, and we're trying to do that.

23 The act is self effectuating, that is it does  
24 not require the issuance of regulations to become  
25 effective, but does allow for regulatory guidance of the

1 kind that the Federal Reserve issued last Friday. What  
2 is important, though, is that the provisions of the act  
3 not be superseded or changed by regulations, thus the  
4 act imposes a healthy set of requirements.

5 First that regulation be consistent with section  
6 101 of the act, secondly that it not add to the  
7 requirements of section 101, that there be substantial  
8 justification for the regulation, that the methods would  
9 be substantially equivalent to the requirements imposed  
10 on records that are not electronic records, and that the  
11 regulations not impose unreasonable costs on the  
12 acceptance or use of electronic records.

13 We think these are very important provisions in  
14 the act, and we strongly support them.

15 The consumer consent provisions of the act are  
16 important, and we very strongly supported those when  
17 legislation was being considered. We have noted in the  
18 paper that we submitted that we -- that the procedures  
19 to use the powers -- first of all, I'm sorry, that we  
20 are encountering some challenges with respect to the  
21 reasonable demonstration test as well as to the issue of  
22 when disclosures must be provided.

23 I would emphasize that these are by no means  
24 barriers to the use of the act, but rather hurdles to  
25 the utility of which may be inappropriate, and may need



1 examination in the future.

2 These and other issues which we will cover in  
3 more detail in the legal issues discussion to come.

4 We want to thank the FTC and the Commerce  
5 Department for organizing this workshop, and we would  
6 also like to point out that while we have responded to  
7 the request for suggestions of areas where the statute  
8 might be creating problems or need modification, we  
9 believe that at this stage, the appropriate course of  
10 action is to allow more time for businesses and  
11 consumers to gain experience working under the  
12 provisions of the act, as passed, before trying to  
13 fashion improvements.

14 The need as we see it at this point is not for  
15 new legislation, but for patient efforts to develop  
16 business practices which will bring the benefits of this  
17 legislation to a wide number of users as reasonably as  
18 possibly. Thank you.

19 MS. HARRINGTON: Thank you, Jerry. Ben?

20 MR. DAYANIM: Thank you. I want to thank you  
21 very much for including me in today's proceedings. And  
22 I was listening to Margot and to Jerry and it brought  
23 back memories from several months ago.

24 I have to say it's almost as if we planned  
25 the -- our remarks, although we didn't, because I think

1 what we've heard from Margot and Jerry is really the two  
2 different perspectives on ESIGN, the fears and the  
3 promise associated with the act, and so that sets me up  
4 very nicely to kind of try, anyway, to draw them  
5 together, and I have the unique pleasure today of  
6 speaking on behalf of myself.

7 I'm an attorney with Paul Hastings, I was  
8 involved with ESIGN on behalf of a client, but I'm here  
9 speaking my own mind today which gives me perhaps a  
10 little more flexibility than otherwise might be the  
11 case.

12 I think in considering the issues that both  
13 Margot and Jerry raised, you first need to step back and  
14 ask yourself what is the objective that was attempted  
15 through the consent provisions. And I think that  
16 everyone, with perhaps the exception of Professor Winn,  
17 who submitted comments, very interesting comments to the  
18 proceeding here, would come at this from the perspective  
19 of saying we don't want to affect the substantive law  
20 that existed prior to ESIGN, except in the narrow aspect  
21 of allowing electronic media to substitute for paper.

22 In other words, in this particular instance of  
23 consumer protections and consent, we simply want to  
24 replicate the substantive protections that exist in the  
25 offline world by translating them onto the online world.

1 And we don't want to favor or disfavor the online world  
2 in doing that.

3 And, you know, as I said, I think that was the  
4 near unanimous objective, and I think it's a very  
5 high-minded objective, and it sounds like a very  
6 appropriate objective, and I actually think it is the  
7 appropriate objective. The problem is, is that when you  
8 try to implement that objective, you run into the  
9 reality that there are inherent differences between  
10 electronic media and paper.

11 And so then the question becomes how do you  
12 accommodate those differences without overly -- without  
13 strangling the very benefit that you're trying to  
14 achieve by enabling e-commerce to flower.

15 And that is, you know, maybe not simply put, but  
16 somewhat simply put, that the nub of the issue with  
17 which we all struggled in trying to devise the consent  
18 provisions. And you will hear a lot more about them in  
19 the panels later today, so I'm not going to really  
20 address any of the details now. I will simply say that  
21 in my view, what ESIGN did, and Margot is quite right, I  
22 think it was like cutting sausages, it was not  
23 necessarily by design, although I think every individual  
24 had this goal in mind, was try to reach that balance.

25 And I think it approximates that balance,

1       although not very elegantly, and in ways that I  
2       personally would have preferred it not, nevertheless, I  
3       think at the end of the day it comes out roughly at that  
4       spot.

5               And I do share with Jerry the view that the fact  
6       that you haven't seen necessarily, although I think it's  
7       all a matter of perspective, an explosion of financial  
8       services or other e-commerce that takes advantage of  
9       ESIGN is not reflective of the consent provisions  
10      themselves, perhaps in isolated instances it might be,  
11      but as a general rule it's not, it's simply that  
12      businesses are trying to figure out the best way they  
13      want to approach e-commerce generally, and I think some  
14      of that has been -- is part of a larger economic picture  
15      and some of it is part of just a re-assessment by  
16      businesses regarding how they want to approach the  
17      Internet and how they want to approach e-commerce. I  
18      don't think this is a situation where the statute has  
19      created any barriers.

20             MS. HARRINGTON: Thank you. I would invite any  
21      of the folks who are at the table right now to ask any  
22      questions of these presenters that you might have, or  
23      make any observations that you might have. We have  
24      about four minutes left on this session. And I think  
25      that we can use it.

1           And I actually have a question. And it comes  
2 out of Margot's concern, which is that, if I can  
3 summarize, that the most vulnerable of consumers may be  
4 victimized by the businesses that operate on the ethical  
5 margins. And is that a fair --

6           MS. SAUNDERS: That's our primary concern.

7           MS. HARRINGTON: -- statement of your concern.

8           MS. SAUNDERS: We have others, too, but that's  
9 the main one.

10          MS. HARRINGTON: One question I have is  
11 whether the concern about both consumers and businesses  
12 that might be more at the margin, ought to drive policy,  
13 and if so, why? And I would invite any of you very  
14 quickly to answer that.

15          MS. SAUNDERS: Well, I would hope that this  
16 society that we live in is one that -- one in which we  
17 care for everyone, including our less fortunate, and we  
18 have 200-plus years of laws that recognize that the less  
19 fortunate and the less sophisticated should be  
20 protected.

21          Certainly our entire legal system is based on  
22 the whole analysis of ensuring a fair resolution of  
23 problems, our criminal justice system is based on the  
24 expectation that we should allow innocent -- excuse me,  
25 guilty men to go free rather than wrongly convict an

1 innocent one. Since biblical times, laws have limited  
2 commerce based on the recognition that the difference in  
3 bargaining power between individuals, especially  
4 individuals in need of borrowing money, need to be  
5 protected from lenders.

6 So, unless we're on a radically different  
7 course, I would hope that we not change that basic  
8 premise of our legal system.

9 MS. HARRINGTON: Okay, thank you. Bob?

10 MR. WITTE: Hi, I'm Bob Witte, I'm with  
11 Kirkpatrick & Lockhart, and I'm here on behalf of the  
12 Investment Company Institute.

13 You know, I think that's a really key question,  
14 and I think Margot is fair and right in saying that we  
15 have to care as a society about the less fortunate and  
16 less able to protect themselves. The question, though,  
17 I guess is, is that what drives the policy. And I think  
18 it's got to be a consideration in the policy, but  
19 whatever the policy is, whatever the rule is, whatever  
20 the orders are, there will always be a margin. There  
21 will always be somebody, some group that's at the edge  
22 of it, and as you said, Margot, there will always be  
23 unfortunately some people who are taken advantage of.

24 So, as I think was clear from both Jerry and  
25 Ben's remarks, the issue is a balancing, and the

1 question is are we going to have a rule that -- I don't  
2 even think that's the question, I think the question is  
3 how do we avoid having a rule that so burdens or  
4 adversely affects the business and the commerce that is  
5 important to everybody, at whatever end of the spectrum,  
6 by overconcern, we want to avoid overconcern without  
7 lack of concern for those who are less able to care for  
8 themselves.

9           And notwithstanding biblical times, there is a  
10 certain ethic in this country, too, about people having  
11 responsibility for their own actions, and while we need  
12 to take into account those who are less able to take  
13 responsibility, or respond to fraud, which is really  
14 what you were talking about, we need to recognize that  
15 there is some element of responsibility inherent in our  
16 social structure, and I think in our own government.

17           MS. HARRINGTON: Elizabeth, very quickly.

18           MS. YEN: Thank you, Eileen. I'm Elizabeth Yen,  
19 I'm a lawyer with the firm of Hudson Cook, and I'm in  
20 the Connecticut office of Hudson Cook.

21           I just wanted to respond quickly that for the  
22 transactions that we already believe are very, very  
23 important and put consumers at high risk, we already  
24 have a lot of statutory protections built in in terms  
25 of, for example, Margot referred to the rights of

1 cancellation, rescission notices have to be delivered in  
2 duplicate, certain disclosures have to be in ten point,  
3 all cap, bold-faced type, and you've got a lot of sort  
4 of form and also substantive protections built into the  
5 system.

6 In the fraud context, in the context of  
7 e-commerce fraud, I think it's going to be difficult for  
8 the merchant to actually prove that all of those  
9 disclosures were provided. And even without e-commerce,  
10 obviously you have some shady dealings where people do  
11 not observe those formalities. And at the end of the  
12 day, those contracts are void. I don't know that the  
13 result would be any different in the electronic world.

14 MS. HARRINGTON: That's going to be the last  
15 word. We're up at about 65,000 feet looking down on our  
16 task here, which is to evaluate the cost and benefits of  
17 the reasonable demonstration portion of the consumer  
18 consent provisions, but that weighing of costs and  
19 benefits necessarily begins, I think, with the very  
20 broad look that we've just taken. And thank you very  
21 much to our three overview presenters, it was excellent.

22 We're now going to move into the legal issues  
23 panel, which will be moderated by my colleague, April  
24 Major. Let me remind all of the participants, and we  
25 need some of you who are on this panel to move up to the



1 table now, and they would be Margot, Jerry and Ben are  
2 already here, Elizabeth, Bob, Jane Stafford, Mark  
3 MacCarthy, and I see Jeff Wood is already here.

4 So, if you would take your seat, let me remind  
5 you, panelists or discussants, if you want to speak,  
6 raise your tent, and please identify yourself, name and  
7 organization, so that our reporter can get that into the  
8 transcript. Thank you.

9 MS. MAJOR: Thank you, Eileen. I want to thank  
10 all of you for your thoughtful comments and agreeing on  
11 being here today for today's discussion. I want to  
12 thank Margot and Ben and Jerry for setting the stage for  
13 the day's discussion and providing such an excellent  
14 framework for which we will work upon for the next hour  
15 when we discuss the legal issues associated with section  
16 101(C)(1)(C)(ii).

17 Now, if there's anything that we can agree upon  
18 today, I think, it's that ESIGN is not an easy statute.  
19 Section 101(C)(1)(C)(ii) has caused a good deal of  
20 controversy, to say the least, and that's what we're  
21 here to talk about right now. Particularly when we're  
22 studying what the statute requires, what the statute  
23 provides, and how to comply with the statute.

24 So, I would like to start this panel off with  
25 the most basic question of what does section

1 101(C)(1)(C)(ii) provide, what does it require of  
2 sellers, and what does it require of consumers, and I  
3 think this discussion will necessarily lead into a  
4 discussion of the ambiguities which all of you have  
5 mentioned in your comments that are associated with this  
6 section.

7 Ben, would you like to lead us off in what you  
8 think this provision requires?

9 MR. DAYANIM: I will attempt to do so.

10 Well, looking at it on its face, it really has  
11 two key components, and we all know what they are. The  
12 first is that the consent or the confirmation of that  
13 consent be electronic. And the second is that the  
14 consent or the confirmation of the consent be done in a  
15 manner that reasonably demonstrates that the consumer  
16 can access the information that is going to be provided  
17 to him or her. And it is there that all of the  
18 controversy lies.

19 My view of what that means, I tend to think that  
20 it was intended as a common sense test. And I think  
21 that most folks are interpreting it that way. In other  
22 words, the electronic part is fairly self evident. The  
23 reasonable demonstration part is the part that creates  
24 the ambiguity, and I think there -- if it appears from  
25 the circumstances that the consumer was able to access

1 the information, I mean that's reasonable demonstration.

2 A good way to do that, although not necessarily  
3 required, although I would think that it would be a good  
4 practice, would be to provide the request for consent  
5 that the consumer is responding to in the same format in  
6 which the records will be provided, because then if the  
7 consumer is able to understand your request and respond  
8 to it, then presumably the consumer can -- that  
9 presumably the consumer will be able to access the  
10 records that will be provided subsequently as well  
11 because they will be in the same format.

12 There are many ways to do it. In the comments  
13 that I submitted, I had two suggestions that are not  
14 original to me, they were two suggestions that were  
15 raised at the time of the statute, and although I  
16 recognize that there may be some concern with them, I  
17 think that they are nonetheless essentially appropriate.

18 And the first is to provide the request for  
19 consent in the form of an attachment to an email, and  
20 therefore if the person is able to open the attachment  
21 and respond, in other words read the instructions and  
22 respond appropriately, then that person would be able to  
23 access the records.

24 And the other manner is through a, for example,  
25 if it's website type function, to have it come up on the

1 screen, again in the same format that that record will  
2 ultimately provided. I mean, that's a -- that may be  
3 considered to be a little -- what's the word -- some  
4 might consider that to be a little Pollyanna-ish,  
5 because the words themselves are ambiguous and there is  
6 room for mischief there. But so far we haven't seen it.

7 MS. MAJOR: Well, I -- go ahead.

8 MR. WITTE: If I could just expand a little bit,  
9 this is Bob Witte, expand a little bit on what Ben said.

10 It seems to me that the mischief, in part, comes  
11 from, as it often does in legislation or rules of any  
12 kind, from the language. And those of us who were  
13 involved somewhat in the process of the legislation  
14 know, I was one who yelled and screamed a lot about the  
15 particulars of the language, because the language of the  
16 statute does tie the demonstration to the consent.

17 It talks about consent in a manner that  
18 reasonably demonstrates as opposed to there being a  
19 reasonable demonstration. And so what that gives rise  
20 to is some uncertainty. And I say uncertainty because  
21 during the process, the legislative process, in  
22 discussing this issue on the Hill and elsewhere, people  
23 who advocated the language really said well, nobody is  
24 going to interpret it that way.

25 And frankly I think that's Ben's position. And

1 he's nodding, let the record show, but I think that's  
2 really the issue. You know, how tied, really, is the  
3 demonstration to the consent. And we have legislative  
4 history that helps. While it may -- as legislative  
5 history often does -- suggest various avenues, there's  
6 some consensus there, too.

7 I think there are four paradigm kinds of ways  
8 that you can expect to have a reasonable demonstration.  
9 One is what I've called the self validating sort of  
10 consent, similar, really, to one of Ben's examples. An  
11 easy one is somebody's accessing information on the  
12 Internet, and the consent is there on the Internet, it's  
13 all in HTML, they are going to get all of the  
14 disclosures that are going to be covered by the consent  
15 in HTML, merely the process of accessing and consenting  
16 demonstrates an ability to deal with HTML, so that ought  
17 to be a reasonable demonstration. That one seems to me  
18 no controversy really available as to whether that would  
19 be adequate.

20 Legislative history, I think pretty strongly  
21 suggests, if you look at the colloquies and elsewhere,  
22 that you could go even further than that, that it would  
23 be at least sufficient if you provide an opportunity to  
24 test a format, let's say a PDF format that you might  
25 push out to the consumer in the course of the consent,

1 maybe you are going to correspond with them over the  
2 Internet or through email and say okay, attached here is  
3 a PDF document, give it a shot, see if you can open it,  
4 and then respond with an affirmation that says I could  
5 open it.

6 And that then that would be a sufficient  
7 reasonable demonstration. That's the second paradigm.  
8 And as I said, I think there's a fair amount of support,  
9 in fact a lot of support, in the legislative history to  
10 suggest that that's enough. Even though you can't  
11 really say that that is quite the manner of the consent,  
12 it is the consent, per se, at least, that affirmed it.

13 Another possibility, of course, is that you get  
14 an affirmation of the ability to deal with this  
15 particular format, irrespective of whether the  
16 particular provider at the particular time has provided  
17 an opportunity to test that format out.

18 And if anybody, whether it's a sophisticated  
19 user or Aunt Sally, says yeah, I can use this, you know,  
20 why isn't that good enough.

21 And then there's a fourth, which is frankly  
22 hardest to tie to the consent, but which logic suggests,  
23 at least to me, really ought to be sufficient. And that  
24 is if you could really demonstrate that the consumer  
25 could access or even did access the relevant

1 information, irrespective of whether that's part of the  
2 consent process, and there are many circumstances in  
3 which this could occur, then why is that not enough to  
4 be a reasonable demonstration of the ability of the  
5 consumer to access?

6 Now, those are different paradigms, I suppose  
7 there are others, but those are the ones that come to  
8 mind to me, and they're the ones that people in the  
9 investment company industry, and I think certainly in  
10 the financial services and probably more broadly, much  
11 more broadly than that, people are struggling with  
12 deciding well, what can we do, and what will work.

13 The law is full of reasonableness tests, and  
14 those of us who are lawyers would have a lot less to do  
15 if there were none in the law, but the fact is they work  
16 pretty well by and large, but what we've had here is  
17 kind of an unhappy conjunction, I think, of first of  
18 all --

19 MS. MAJOR: Let me interrupt you because you've  
20 just brought up about six different issues that I think  
21 all need to be addressed.

22 MR. WITTE: Well, give me one more minute and I  
23 promise to be quiet for a while.

24 MS. MAJOR: Okay.

25 MR. WITTE: Jerry says no.

1           The conjunction is, first of all, as I  
2 mentioned, the problem with the statutory language,  
3 which gives you question as to whether you're limited  
4 more than you might otherwise be. The second is that  
5 there are substantial risks involved in not complying,  
6 and we'll talk about that, I'm sure, as time goes on,  
7 and the third is that at least so far, there has been  
8 kind of a remarkable dearth of regulatory  
9 interpretation.

10           There are regulatory agencies, at least in our  
11 industry, in the financial services industry broadly,  
12 that have jurisdiction. Jerry mentioned the Federal  
13 Reserve came out, although I would say finally, although  
14 they were really among the first to come out with any  
15 regulations actually speaking to ESIGN, and on this  
16 subject they really didn't say much.

17           They basically said well just do that, and  
18 whatever that is, do that. The IRS came out with rules  
19 that parallel ESIGN, and they also said well, do that,  
20 and in our sector, the SEC, for reasons that I really  
21 couldn't say, have not spoken to this.

22           So, there are areas in which regulatory  
23 interpretation is very helpful, especially the kind  
24 which the SEC, at least, has been want to use, which is  
25 here's some examples of what will work, you know, you



1 can maybe do other things, but these will work. And of  
2 course I would submit if you took my four examples and  
3 said these will work, things will be a lot better,  
4 because the down side, the risk factor would be very  
5 small.

6 MS. MAJOR: Thank you. Margot?

7 MS. SAUNDERS: In many ways, although most of us  
8 think it could be done better, there's an elegant beauty  
9 to this electronic consent provision, because it  
10 accomplishes some protection for three different  
11 problems. One, it presumably tests the consumer's  
12 capacity to access any electronic records. So, that's  
13 an important -- that's especially important to my  
14 clients.

15 Two, it protects the consumer's capacity to  
16 access the type of records that will be provided by this  
17 business. In other words, the software capabilities.  
18 And three, it serves to emphasize to the consumer the  
19 significance of what the consumer is agreeing to in  
20 regards to receiving future electronic communications.

21 So, with those few words, which I attribute to  
22 Andy Pincus, general counsel of the Department of  
23 Commerce, he tried to address those three distinct  
24 concerns that consumer advocates had.

25 I believe that my example that I gave of the

1 little old lady sitting at home would not -- there is no  
2 way under this language that a court could find that  
3 even if the salesman provided a laptop to her, and she  
4 then electronically consented through either the  
5 Internet or an email account that the salesman  
6 established for her, that using the laptop provided by  
7 the business seeking the consent, that that would not  
8 reasonably demonstrate that the consumer can access  
9 information.

10 I also believe that the consumer sitting at the  
11 car dealership, who accesses information through the car  
12 dealership's Internet website or through an email  
13 account established by the car dealer, even if the  
14 consumer is on the premises of the car dealer, that that  
15 does not -- I don't think -- indicate that the consumer  
16 can reasonably access information.

17 The consumer -- this requirement is that the  
18 consumer has to do something affirmative, take some  
19 steps. That does not mean that a consumer -- and I  
20 think this is unfortunate, but I don't believe that a  
21 consumer who then goes to the public library or goes to  
22 a public access computer or kiosk and consents through a  
23 website or through an email account that they already  
24 have, that that -- I don't think that that process would  
25 be illegal.

1           In other words, I think that would be acceptable  
2 under this scenario -- under this language.

3           MS. MAJOR: Mark, would you like to respond to  
4 that?

5           MR. MacCARTHY: Not directly to what Margot was  
6 saying.

7           MS. MAJOR: Okay.

8           MR. MacCARTHY: I'm Mark MacCarthy with Visa.  
9 Just a couple of quick comments. One, I think it is  
10 important that our friends at the Federal Reserve have  
11 stepped up and, you know, made some attempt to interpret  
12 the ESIGN legislation in the context of administering  
13 their own organic statute, the Truth in Lending Act and  
14 the regulation Z.

15           I think that does show that it is possible and  
16 indeed desirable for existing regulatory agencies to  
17 step up and to show how the requirements of ESIGN can be  
18 used in conjunction with the underlying regulatory  
19 requirements with respect to disclosure, but our sense  
20 is that it is desirable at this point to leave the kind  
21 of flexibility that was built into the Electronic  
22 Signatures Act in place, and that regulatory  
23 interpretations that narrow or confine the range of  
24 different ways in which people could comply with the  
25 consent provision would really cut short some of the

1 experimentation and flexibility that the statute, I  
2 think, wisely left unconstrained.

3 One thing that I think would be worth putting on  
4 the table is we're discussing the consent issue as if  
5 consent is universally required in the context of  
6 disclosures, but it's worth mentioning that the fed had  
7 indicated in at least a couple of areas, consent is not  
8 required.

9 Now, perhaps it falls into the category that  
10 you're talking about, the sort of, you know,  
11 self-validating kind of situation, but for example, in  
12 the area where electronically a solicitation or an  
13 application form has to contain on it or with it any of  
14 the required disclosures under regulation Z.

15 If that kind of application is being delivered  
16 electronically, then it doesn't make sense to prior to  
17 delivering that electronically to ask for consent to  
18 deliver the disclosures electronically. You're already  
19 in the situation where someone is reading the  
20 application form or reading the solicitation, and the  
21 required disclosures have to be done in conjunction with  
22 that.

23 It doesn't create a loophole because, you know,  
24 it doesn't create the possibility that someone would,  
25 for example, in the paper world, withdraw the

1 information from the paper and say I'll give it to you  
2 electronically. The information in the paper world  
3 still has to be provided in paper form rather than in  
4 electronic form, but recognizes realistically that to  
5 require consent before providing disclosures in that  
6 kind of context is a kind of catch 22.

7 So, we're sort of acting as if it were  
8 universally assumed that you need consent, but in fact  
9 in some circumstances, disclosures, electronic  
10 disclosures, will take place even though for practical  
11 reasons there won't be a requirement for consent.

12 MS. MAJOR: Well, I think you're bringing up the  
13 issue that a lot of you discussed in your comments.  
14 Some of you are asking for more guidance with respect to  
15 this language reasonably demonstrate. Some of you are  
16 asking for narrow interpretations of this, and some of  
17 you are discussing the need for broad and flexible  
18 interpretations of the statute.

19 And I would like to you discuss this in the  
20 context of how does one reasonably demonstrate that they  
21 can access this information in the manner that it's  
22 being provided?

23 Jeff, would you like to continue?

24 MR. WOOD: Sure. Jeff Wood, I'm an attorney  
25 with Household Bank and I very much appreciate being

1 invited today.

2 I want to follow up on one issue that I think is  
3 very important. The Congress, you know, adopt one --  
4 sort of a one-size-fits-all approach, and one thing that  
5 the Federal Reserve recognized which is mentioned is  
6 that, you know, not all disclosures are the same, not  
7 all contracts are the same, not all documents are the  
8 same, you know, we banks have a lot of information to  
9 provide to consumers and, you know, many times customers  
10 are frustrated because they're receiving so much  
11 information that they don't know what to do with.

12 But what was recognized I think is a very  
13 important point, is that, you know, disclosure is  
14 provided at the application stage, which don't need to  
15 require consent under the proposal, or the interim final  
16 rule, you know, are different from disclosures that are  
17 provided at the stage of contract. And, you know, I  
18 think that's a very important point.

19 With respect to the reasonable demonstration  
20 test, I think that it is -- it is workable, if not  
21 totally unworkable, but I think that it does reflect a  
22 tension that is probably an appropriate tension between,  
23 you know, letting commerce do whatever commerce needs to  
24 do on the one hand, and on the other hand providing  
25 appropriate protections.

1           So, I think that it's there, and I think that  
2           one thing that is difficult, and I think we'll get into  
3           this later in the day when we talk about practices, how  
4           do you actually -- how do the technological people, you  
5           know, actually ensure that there is, you know, that  
6           there has been that demonstration. And Bob went through  
7           some of the four paradigms, and I think that a  
8           conservative business is, you know, more likely to pick  
9           the one sure bet, you know, if the customer is using a  
10          website and receiving documents in HTML, then he's got  
11          it.

12           You know, that's too bad in a way, because  
13          that's limiting, that's going to limit the nature of  
14          e-commerce. And so that's too bad, and I don't know  
15          exactly what the way is around that.

16           There's just one more point, that not only are  
17          there different levels of disclosures, but there are  
18          also different types of disclosures. For example, under  
19          the Graham-Leach-Bliley Act, you provide a privacy  
20          statement along with the right to opt out.

21           That's kind of an interesting one, because the  
22          customer doesn't have to respond to the privacy  
23          statement, he doesn't have to access -- he has to be  
24          able to access the documents, but he or she does not  
25          have to acknowledge receiving it under the law and the

1 regulations, but there does need to be an opportunity to  
2 opt out if the company is sharing personal information  
3 with third parties.

4 So, you know, does the opportunity to opt out  
5 if, you know, access to a particular matter, did that  
6 help to reasonably demonstrate that the customer got the  
7 document. You know, I mean there raises a lot of  
8 issues.

9 MS. MAJOR: So, do you interpret E-SIGN as  
10 requiring that the consumer -- they respond to the  
11 seller that they have actually received this  
12 information, is there this extra step required here?

13 MR. WOOD: You know, that's an extremely  
14 important issue, and I think that yes and no is the  
15 answer. I think that depending on the nature in which  
16 the documents are received. If they're received in a  
17 certain way.

18 MS. MAJOR: Give an example.

19 MR. WOOD: The example of the HTML, the consumer  
20 clicked consent, you know, I apply, for example, or I  
21 agree, or submit.

22 MS. MAJOR: So, you're saying that the consumer  
23 is already on the Internet, already sitting behind a  
24 computer.

25 MR. WOOD: Right.



1           MS. MAJOR: The information is being disclosed  
2 to the consumer via an HTML webpage, it's enough that  
3 the consumer clicks on I consent or I agree, that that  
4 you would interpret as complying with section  
5 101(C)(1)(C)(ii)?

6           MR. WOOD: I think that would have to be  
7 reasonable, reasonable demonstration, with respect to --  
8 only with respect to what's being provided at that time.  
9 I don't think that it necessarily works for documents  
10 that are provided at a later time.

11           MS. HARRINGTON: Follow-up question, Jeff. You  
12 said that following the more conservative paradigm,  
13 using HTML only, would limit e-commerce. Can you  
14 specifically tell me, give me an example of how that is  
15 limiting?

16           MR. WOOD: Yeah, one of the commenters made a  
17 good point about, for example, monthly statements that  
18 are provided at a later time, obviously. And one thing  
19 we've found in e-commerce is that our customers are a  
20 little leery of e-commerce at the beginning stage of the  
21 relationship, but after they're already a customer,  
22 after, you know, they know who we are, we know who they  
23 are, they're much more comfortable with it.

24           And so, you know, we have customers, millions of  
25 customers, who, you know, want to sign up for what we

1 call customer care, what many companies call customer  
2 care, which is receiving statements, or being able to  
3 make bill payments online, or that kind of thing. And  
4 the technology is a little different at that stage,  
5 maybe, than it is at the beginning stage.

6 So, you know, specifically, you know, we find  
7 it -- it's kind of a -- it goes both ways. We find it  
8 difficult to consummate a transaction, you know, by that  
9 I mean originating a transaction, you know, at the first  
10 step, you know, there's a lot of hurdles. You know,  
11 there's the privacy statement, there's all the  
12 disclosures, there's the contract, et cetera. That's a  
13 little more difficult. But it's in a way a lot easier  
14 to provide statements.

15 Now, the question was, one of the comments  
16 raised a very good question, you know, do you provide  
17 the statement online, meaning the customer can simply  
18 log onto the website and look at his statement, and how  
19 do you know that that customer did that? And that's  
20 kind of a -- that's kind of a little thing that we're  
21 working on. I mean, I think a lot of companies are  
22 working on.

23 MS. MAJOR: Jane and then Ben.

24 MS. STAFFORD: Yeah, one of the things that Mark  
25 brought up about the federal regulators coming in and

1 beginning to define within their own venues certain  
2 aspects, regulations, E, DED, the alphabet that's been  
3 just recently promulgated by the Fed, raises some  
4 concerns in a sense of saying now we're going to have to  
5 look from ESIGN down to another regulation to see where  
6 we begin to comply and where we don't begin to comply.  
7 And I think that's just something that we're going to  
8 have to deal with as we go forward.

9           The example, for example, of equity line,  
10 original disclosures, which are required by the  
11 regulation Z to be in writing, apparently do not have to  
12 be delivered with an ESIGN consent. And perhaps you can  
13 understand that, because that is something of a  
14 preliminary, informational, promotional type thing, even  
15 though there are required regulatory disclosures in it.  
16 I think that's one issue.

17           So, I think we have to be concerned. Our other  
18 concern in terms of writing is a concern, and everyone  
19 who's creating contracts needs to be concerned with what  
20 state laws you're using, because different state laws  
21 have different writing requirements. And while you  
22 could have a state law that says you must deliver  
23 consumer a modified UCC to provide that you must deliver  
24 checking statements in paper, therefore you are now  
25 under ESIGN in order to be able to deliver that checking

1 statement. And so you have to know your state laws.

2 And most of us are working nationally or  
3 internationally, which creates a very interesting  
4 situation. We certainly can determine venue in our  
5 contracts, and hope that that stands up, but I think  
6 that's an issue.

7 I think the other issue that we've talked about  
8 in terms of the technological piece, and I'm sure the  
9 technology people will talk about this is, is this  
10 statute clearly, I think we all kind of have come to a  
11 consensus that the HTML process really works well with  
12 ESIGN. You can create your click-through buttons, you  
13 can create your -- design your site so that if you don't  
14 agree, you don't get to go forward, and, you know,  
15 you've got an evidentiary piece.

16 I think when you go into something like delivery  
17 by email, or even delivery of a message that something  
18 is available, if you go out on the website, but you have  
19 to deliver that by e-mail, and that is, by the way, a  
20 proposal I believe in the Fed's new regs, you have now  
21 just created an entire department of administration to  
22 make sure that that email has been delivered because  
23 this statute requires that, that you have to demonstrate  
24 that it has been delivered.

25 If you have somebody who changes an email

1 address, if you have a site down, there are some  
2 webmasters who do not return unreturned emails, how are  
3 you sure that that is delivered, and that's an  
4 evidentiary piece that you have to create within your  
5 institution.

6           So, I think that there are some limitations, or  
7 I'm not sure, actually, in saying all of that, whether  
8 this requires regulations or requires more broadness. I  
9 don't know. But I think that the reasonableness  
10 standard of proving delivery is an extremely difficult  
11 one, and I think what really is going to happen is that  
12 at the early passes, people are going to stay with the  
13 HTML, but delivering on wireless, for example, is  
14 another whole issue that I'm not sure how we'll create  
15 the -- I mean it's a project we at Wachovia Bank are  
16 working on, but I'm not sure exactly how we're going to  
17 meet all the requirements on a wireless system where you  
18 have to have -- I mean, having one department of people  
19 having to count. The whole purpose of electronics is to  
20 get out of that business.

21           MS. MAJOR: Thank you, very good remarks. Ben?

22           MR. DAYANIM: Yeah, just two quick points coming  
23 off what Jane and Jeff mentioned, and I'll steal a page  
24 from Bob Witte's very appropriate school of very close  
25 statutory analysis. To point out that firstly, what

1 we're not talking about here is delivery.

2 I mean, if you read the statute, if you look at  
3 the section, you know, not the (C)(1)(C)(ii) piece that  
4 we've been focusing on, but the introductory piece.  
5 What it says is that where there's a requirement that a  
6 record be delivered or made available in writing, the  
7 requirement that it be in writing is satisfied if, et  
8 cetera.

9 So, all this deals with is whether or not you're  
10 satisfying the requirement of writing, not satisfying  
11 the requirement of delivery. Delivery is a whole  
12 separate issue that E-SIGN very consciously does not  
13 address. That's one point to keep in mind.

14 A second point to keep in mind is that it  
15 doesn't say that if you don't meet this regime, that you  
16 haven't satisfied the requirement that information be in  
17 writing.

18 So, firstly, you're only dealing with -- and I  
19 guess there are really three points, because firstly,  
20 you're not dealing with delivery. This doesn't get you  
21 home with delivery at all. Secondly, you're only  
22 dealing with requirements that have to be delivered in  
23 writing.

24 So, things that don't have to be provided in  
25 writing don't really fall subject to this. That's

1 important to keep in mind, too, when you're talking  
2 about some of the new disclosures or other kinds of  
3 requirements that you may be obligated to communicate,  
4 but not necessarily be obligated to communicate in  
5 writing.

6           And then thirdly, even if you don't satisfy the  
7 technical language of the provision, I would say that --  
8 using Bob Witte's I guess fourth paradigm -- if you  
9 reasonably -- if you can actually reasonably demonstrate  
10 that the person actually was able to access the  
11 information, then I really don't see any problem, and  
12 I've advised clients that way, because yes, you may not  
13 be eligible for what -- I'll use a term that maybe some  
14 people might disagree with, you may not be eligible for  
15 the safe harbor provided by this mechanism, but you've  
16 actually provided the information, the information  
17 actually was accessed. I cannot conceive of a  
18 circumstance where you would incur liability under that  
19 situation.

20           MS. MAJOR: I think that we recognize that there  
21 is controversy over whether actual delivery is required  
22 and I would like some of you to address that. The other  
23 thing that you brought up was the in-writing  
24 requirement, and I think there are some issues involved  
25 in that. What is exactly -- what is, you know,

1 something that's required to be in writing, what does  
2 that mean. But I know Teresa has a question, so I will  
3 let her go.

4 MS. SCHWARTZ: I wanted to ask whether this -- I  
5 wanted to ask whether this distinction that I hear being  
6 drawn between preliminary disclosures that statutes may  
7 require in writing, whether those preliminary  
8 disclosures are -- should be treated differently under  
9 ESIGN from disclosures that are required in writing  
10 preliminary to an actual transaction. And whether  
11 that -- there is a line that might be drawn there,  
12 whether people agree that that is a line that senses,  
13 even though the statute doesn't draw that line, it calls  
14 for consent whenever disclosures are required by statute  
15 to be in writing, which can be preliminary disclosures.

16 So, and I understand the Fed perhaps is drawing  
17 that line or appears to be drawing that line, but I  
18 wondered if others here would draw that same line, you  
19 know, more broadly across statutory requirements.

20 MS. MAJOR: Bob or Margot, would you like to  
21 respond to that?

22 MS. SAUNDERS: Can I respond to that and several  
23 others?

24 MS. MAJOR: Absolutely.

25 MR. WITTE: Only if I can.



1           MS. SAUNDERS: I don't think -- unfortunately, I  
2 don't think ESIGN draws the distinction that the Fed has  
3 apparently made. As I said, I think the only -- the  
4 only distinction that the -- the only recognition that  
5 there would be an ongoing relationship that ESIGN makes  
6 is this requirement that the consumer must do -- must  
7 electronically consent, which is meant to -- I think  
8 one of the purposes is meant to emphasize to the  
9 consumer the importance of what they're doing, that  
10 they are agreeing to receive all future records  
11 electronically.

12           I agree that with what Ben said on several  
13 points, that the statute specifically and deliberately  
14 does not address delivery. There is no mention of  
15 delivery, other than as a trigger for the consent,  
16 in here, and there's lots of legislative Congressional  
17 language that said that we look for delivery  
18 requirements under the other law that's being satisfied.

19           I think the reason why is that we couldn't begin  
20 to agree on how we evaluate delivery.

21           MS. MAJOR: So that the seller is under no  
22 obligation to in some way demonstrate that the consumer  
23 actually -- I mean he actually delivered the --

24           MS. SAUNDERS: I think the seller is absolutely  
25 under that obligation under the other law that requires

1 the delivery of the document.

2 So, for example, under the FTC's notice  
3 requirement to provide notice of the right to  
4 cancellation on a door-to-door sale, that rule, as I  
5 remember it, requires that the salesman deliver to or  
6 provide to in writing two notices -- two copies of the  
7 notice of the right to cancel. That means that that  
8 salesman has the obligation of ensuring that the -- I  
9 think -- consumer has received it.

10 Because what is contemplated in that  
11 transaction, when the FTC passed that rule, was that the  
12 two people were standing right there. So, the -- we  
13 have to look at what was contemplated when the  
14 requirement for delivery was originally written, and if  
15 it was assumed that delivery would mean handing the  
16 other person a piece of paper, that also assumed that  
17 the person had to take the piece of paper.

18 So, delivery cannot mean in that context simply  
19 posting it on the website or even emailing it.

20 MS. MAJOR: I think that's a --

21 MS. SAUNDERS: But that -- I was just going to  
22 finish the sentence, but that same delivery requirement  
23 may not apply to other statutes which don't by their  
24 terms contemplate the face-to-face relationship.

25 MS. MAJOR: I was just going to underline what

1 you said. I think that it's important to remember that  
2 ESIGN doesn't exist in a vacuum, that it's always  
3 overlaying some pre-existing legal requirement, and that  
4 often is lost in this type of legal issues discussion.  
5 Continue.

6 MS. SAUNDERS: Two other issues that I wanted to  
7 address very quickly. One is the in-writing  
8 requirement. The question has come up as to whether any  
9 document required by other law to be in writing must  
10 have been consented to electronically before it can be  
11 delivered electronically. That's, I think we've already  
12 addressed that question.

13 The other issue there is, what does the other  
14 law have to say? Does the other law have to say the  
15 words in writing to trigger this requirement? And I  
16 would argue that the answer is no, if the other law  
17 implicitly assumed that the only way to deliver the  
18 information required was in writing, then that implicit  
19 assumption should trigger the electronic consent.

20 For example, under North Carolina law, where I'm  
21 licensed, there's a four paragraph long requirement  
22 about late fees for mortgages, which we worked very hard  
23 to get through the legislature. This was 12 years ago,  
24 I think, and no one ever contemplated that there was any  
25 way to deliver all of these disclosures, other than in

1 writing.

2           So, while there's fairly complex disclosures  
3 that must be delivered to the consumer, the statute  
4 doesn't say in writing. I would argue that that  
5 implicit requirement for a writing would also require --  
6 would also trigger the electronic consent, and that a  
7 mortgagor in North Carolina could not -- mortgagee in  
8 North Carolina could not deliver a late fees notice  
9 electronically without having previously received an  
10 electronic consent from the consumer.

11           MS. MAJOR: Would it be your interpretation,  
12 then, that the in-writing requirement doesn't  
13 necessarily correspond with something that was required  
14 to be delivered in -- on paper, but when they use the  
15 term "in-writing," they are using the type of language  
16 to imply something that the consumer can retain, can  
17 hold onto, that doesn't necessarily have to be on a  
18 piece of paper. I think some of the legislative history  
19 in the floor debates used the term "paper," but is that  
20 necessarily part of the in-writing requirement?

21           MS. SAUNDERS: I'm a little confused. If you're  
22 saying that the delivery of a writing requirement could  
23 be faxed? I'm not quite sure how you deliver something  
24 in writing before electronic disclosures existed, other  
25 than on paper. I mean -- silver paper or fax paper?

1 MS. MAJOR: Something maybe that's required to  
2 be attached to on a label or a piece of clothing or  
3 written on a tire.

4 MS. SAUNDERS: Oh. I think retention is very --

5 MS. MAJOR: Retention is really the key of that,  
6 right?

7 MS. SAUNDERS: Yes, and I have that as a note  
8 here that I wanted to bring up, that we're all talking  
9 about access, but the consent provision also keys in the  
10 retention requirement. And ESIGN has a very specific  
11 protective retention requirement that goes far beyond  
12 UETA's retention requirement.

13 And I think that the retention requirement in  
14 ESIGN is -- must be implicitly read into the access  
15 requirement. In other words, ESIGN does not require  
16 that a consumer must indicate that they have the ability  
17 to retain. That was the fight that we lost,  
18 unfortunately.

19 But ESIGN does require that for a record to be  
20 provided that is otherwise required to be provided in  
21 writing, it can only be provided pursuant to the  
22 requirements of 101(D), and that -- so, that record  
23 retention requirement is triggered by an underlying law  
24 requiring a writing, which is one thing that's different  
25 from UETA, whose record retention requirement is only

1 triggered by an underlying law requiring retention. And  
2 that record retention requirement requires that the  
3 record accurately reflect the information and be capable  
4 of being accurately reproduced for later reference by  
5 the consumer. We can weed that in because it's required  
6 to be retainable by all parties.

7 That means that going back to the HTML or  
8 MicrosoftWord discussion, that when a document is  
9 delivered electronically, which is otherwise required to  
10 be delivered by other law in writing, it's got to be  
11 delivered in a record format which can be accurately  
12 reproduced for later reference by the consumer.

13 Now, I would posit that a word processing  
14 document such as WordPerfect or Word probably does not  
15 meet those requirements, because it's like writing on a  
16 chalkboard, and how can this consumer open the document  
17 and then be able to reproduce it for later reference and  
18 prove that it is the same document that they received,  
19 because it may have a different date on it, just simply  
20 by virtue of being opened by the consumer.

21 So, that's a complication that should be  
22 factored in, which I think can be addressed using HTML  
23 or PDF or some other kind of format.

24 MS. MAJOR: Bob?

25 MR. WITTE: Boy, there's a lot of apples in with

1 these oranges.

2 I mean, it's a little scary, the last thing, I  
3 guess, because it sounds like the only things that will  
4 work are the things that wouldn't be sufficient because  
5 you're positive that they can't be retained because by  
6 printing them out by its nature changes them. That's a  
7 little scary.

8 MS. SAUNDERS: I didn't mean that.

9 MR. WITTE: If you didn't, that's good, because  
10 that's what it sounded like to me.

11 I think we have to -- there's a lot of  
12 distinctions that I think are worth while trying to  
13 make, and I'm not sure how many of them I can hit, but I  
14 will try to hit a few.

15 One of them is that it is worth noting, as  
16 Margot did note, that rule (C)(ii), which is the  
17 reasonable demonstration test, does not contain the  
18 retention requirement, and as Margot said, that battle  
19 was lost, if indeed it was fought, I would say it must  
20 have been lost early, because I don't remember that one  
21 being particularly hot, but in any event, it is true  
22 that (C)(1) says that you have to provide hardware and  
23 software information as to the ability to access and  
24 retain, which is fair enough, and appropriate, but there  
25 isn't a requirement that the consent itself evidence an

1 ability to retain.

2 It is true, again, as Margot said, that the  
3 requirements, you know, relating to record retention,  
4 well record retention doesn't really have anything to do  
5 with this, because we're not talking about regulatory  
6 requirements to retain documents, which is what 101(D)  
7 is all about, but 101(E) does talk about the capability  
8 of saying that if documents required to be in writing  
9 and are delivered in the form of electronic records,  
10 then they must be capable of access and retention by  
11 parties who are entitled to do so, whoever they may be.

12 But that is not the consent, okay, because there  
13 isn't anything in ESIGN that requires the disclosures  
14 that are associated with the consent to be in writing,  
15 indeed it would be counterintuitive if they were  
16 required to be in writing, assuming, at least, that we  
17 distinguish the electronic communication from  
18 writing/paper, one of the great conundra of this thing.

19 So, the ESIGN disclosures on consent process are  
20 not as a matter of law things which must be retained;  
21 however, anybody who wants to evidence compliance with  
22 the consent requirements is going to be well advised to  
23 at least be able to retain the information and have  
24 evidence itself, himself, whatever, of having done so.

25 Which brings me back, I guess, to the earlier



1 point that was made about delivery. There is nothing in  
2 ESIGN that I know of that requires proof that anything  
3 be delivered. I think, again, as Margot said, it is  
4 accurate to say that other law will determine whether or  
5 not you have delivered or not delivered. And in fact,  
6 one of the points that many of us on the industry side  
7 made early and often in this process is yeah, providing  
8 -- the ability to provide information in electronic form  
9 as opposed to paper or writing form does not mean that  
10 you don't still have to succeed in delivering it.

11 What constitutes delivery, or whether there's  
12 really a delivery as opposed to make available  
13 requirement, is indeed determined by other law.

14 Now, this distinction and this point, I am going  
15 to come back to what Ben said, the language in 101(C)(1)  
16 that talks about satisfying the requirement to provide  
17 such information in writing, is actually, it's a very  
18 intriguing provision, and to understand really what's  
19 meant here, because it's true, it says in writing, and  
20 it is true that many people asserted loudly during the  
21 process that we are not specifying requirements for  
22 delivery here, which there are no specific, you know,  
23 you shall deliver this way or deliver it by 2:00 in the  
24 afternoon or something like that, but on the other hand,  
25 what, after all, is the point of 101(C) if it is not to

1 say that if you get this consent, and you provide the  
2 appropriate disclosures, and you obtain the reasonable  
3 demonstration, that you may indeed provide this  
4 information in electronic form. And that means provide  
5 it, you know.

6 Yes, if you're supposed to provide it, succeed,  
7 somehow, and if you haven't succeeded, there may be a  
8 consequence, but it I think would be a mistake to  
9 suggest that those who apply the law are free to layer  
10 on all kinds of additional burdens on electronic  
11 communication under the rubric of delivery and say this  
12 is merely writing, and that is to say this is the 101(C)  
13 merely deals with the writing requirement, delivery,  
14 well, that's something else.

15 And maybe that's out there, indeed it is out  
16 there, and it's something I've actually written about,  
17 the fact that it is out there, but I don't think it's  
18 really consistent with the whole point of this  
19 provision, to be layering on those kinds of additional  
20 requirements.

21 MS. MAJOR: Elizabeth?

22 MS. YEN: Yes, thank you. I wanted to just note  
23 that I think the law on delivery is going to evolve.  
24 The same way that the law on delivery with respect to  
25 use of the mail, for example, has evolved. And we now

1 have a very robust body of case law that says you're  
2 entitled to certain presumptions, but things were  
3 delivered and received if you use the U.S. Mail, first  
4 class, postage prepaid.

5 Those are issues that have been resolved in the  
6 courts over the last 50 or 60 years, they give us  
7 presumptions like the mailbox rule, and I think that we  
8 will find that evolve over time in the electronic world.

9 As far as the question I think Teresa Schwartz  
10 raised earlier about the distinction the Fed has drawn  
11 between application disclosures, and the disclosures  
12 that pertain to an actual transaction.

13 Transaction is a defined term in ESIGN, and if  
14 you read the definition, it appears to contemplate that  
15 you actually have a sale, a lease, an exchange, a  
16 licensing or some other disposition of property or  
17 services, and I think what happened was that if you look  
18 at that definition of transaction, plus the definition  
19 of consumer in ESIGN, a consumer is an individual who  
20 actually obtains products or services through a  
21 transaction. You could come up with an argument that  
22 101(C)(1) really is focused on a transaction.

23 So, I was actually very pleased to see that the  
24 distinction was drawn in these new Federal Reserve  
25 interim rules.

1           I believe it was Eileen who asked earlier for an  
2           example of some possible hinderance to the development  
3           of e-commerce, and I thought I would just give you an  
4           example of a hypothetical that I just sort of made up on  
5           the fly.

6           Suppose I want to offer an entirely paperless  
7           credit card -- well, unsecured, open end line of credit,  
8           paperless. I might mail you the card, but I mean we  
9           could posit a scenario where maybe there isn't even a  
10          piece of plastic, it's totally paperless. You're on my  
11          website, I give you all the credit card applications,  
12          solicitation type disclosures that are required by Truth  
13          in Lending, and those apparently are not governed by  
14          101(C), but then if you do -- and I instantaneously  
15          approve you for credit online. This is all taking 90  
16          seconds.

17          I now therefore have to give you a transaction  
18          disclosure, which is your credit card agreement and the  
19          disclosures that go with that. So now I am into this  
20          world of consent and reasonable demonstration. I for  
21          security reasons do not want you to tamper with your  
22          periodic statements that I am going to send you in  
23          connection with this loan account that we are about to  
24          open.

25          So, I am probably not going to want to use HTML

1 for those statements. I may prefer to use PDF, because  
2 that's a little harder for a consumer to then jigger.  
3 That is going to be a problem. I've had some technology  
4 people tell me that if I'm on a secure website, because  
5 we have collected some personal financial information  
6 from you in the course of your application for this  
7 process product. I've probably asked you for your  
8 social security number so it's a secure site.

9 It's apparently going to be a technological  
10 issue to make you click open some sort of a test PDF  
11 file and then get back out of that file and confirm to  
12 me during this two-minute on line process that you were  
13 able to access something that mimics an account  
14 statement.

15 I'm not saying it's not possible to do, but I  
16 have been told by some programming people that it really  
17 complicates the design of that website.

18 MS. MAJOR: Thank you very much, Elizabeth, that  
19 example was very helpful. Jeff?

20 MR. WOOD: Thank you. Yes, that is absolutely  
21 true, the use of different formats in a website, and one  
22 transaction I think is unduly complicating.

23 I want to follow up on really just one point,  
24 and that's the question about the consent and the --  
25 whether or not the E-SIGN does apply or should apply or

1 will apply to all documents, I really appreciate  
2 Elizabeth's point of the definition of transaction. I  
3 think that's very helpful.

4 Also, it's tied together with the delivery  
5 issue, because, for example, you know, under reg Z you  
6 know, disclosure is provided to the consumer during at  
7 least five different points along the transaction.

8 Not every consumer who looks on the website and  
9 receives, say, application disclosures about what's  
10 being typed on the website, well, apply, and that's one  
11 level, and I mean not every customer who applies and  
12 receives application disclosures, you know, will then  
13 proceed to a transaction because they might either not  
14 be approved for credit or they might decide might to go  
15 on with the credit product. And so on and so forth, on  
16 down the line.

17 In Truth in Lending, not every document has to  
18 be provided in the same way. For example, the  
19 applications disclosure with a newspaper advertising, or  
20 printed in the direct mail solicitation. You don't know  
21 necessarily now that the newspaper is going to be opened  
22 up and read by John Doe and you have John Doe's consent  
23 to receive disclosures that way.

24 So, the delivery, it's presumed because he  
25 bought the newspaper and read it. That standard is

1 totally different at the time that John Doe is actually  
2 entering into a transaction and his ascent to -- his  
3 comments to repay and so forth is satisfied.

4 So, I think the two, the level of disclosure and  
5 consent versus the delivery, I think should really go  
6 hand in hand. Likewise, there are post closing  
7 requirements, for example, many states have notices of  
8 right to cure for a delinquency prior to repossession.

9 We did -- we had a question recently, and  
10 someone asked how many of these have to be driven by  
11 certified mail? Well, only a few states require that  
12 that type of notice be given by certified mail. You  
13 know, query now that would be implicated by ESIGN, and  
14 that's not what we're here to discuss today, but my  
15 point is many disclosures simply go out in mail, and  
16 they go to the mailbox, and you have the mailbox, so you  
17 don't know that the customer is going to open his mail  
18 and read it, you have a safe harbor because it's going  
19 to the mailbox.

20 And I think, too, impose on e-commerce the  
21 requirement that the customer not only get it in his  
22 electronic mailbox, but that he open it and/or that he  
23 reply to it, I think is putting a burden on electronic  
24 commerce that goes above and beyond what is existing in  
25 the mail world.

1           MS. HARRINGTON: Jeff, could I ask a follow-up  
2           on that? One difference between the mail, the U.S.  
3           Postal mail delivery system and the state of sort of  
4           electronic information and access to it, is that we know  
5           that conceivably, everyone can have mail delivered to  
6           them. There are a variety of ways to get real mail  
7           delivered, but we don't know, for example, that everyone  
8           can access PDF files. I thought Elizabeth's example was  
9           very helpful.

10           So, while, you know, conceptually, I think it's  
11           probably right that we need to wait for this law to  
12           evolve, what do we do right now? What would be the --  
13           what would satisfy the reasonable demonstration  
14           requirement that the consumer can indeed access PDF in  
15           like one minute? What would your company do?

16           MR. WOOD: I think that's a good segue into the  
17           next topic about technology, because I think it's a  
18           technological question. If -- I think in some cases,  
19           you would need to have a return mail or a return  
20           something from the customer saying yes, I did access  
21           this, because you can't determine, you know, reasonably  
22           based on technology that it was opened.

23           On the other hand, if you know that this  
24           customer -- I guess where I have a problem is, you know,  
25           if the customer's computer changes, you know, five years



1 down the road, what happens then? But that, I think, is  
2 addressed by the act in the next session.

3 MS. HARRINGTON: So, you say word back from  
4 consumer, yes, I can access PDS does it. Margot? Does  
5 that do it for you? Consumer says by email, yes, I can  
6 access PDF?

7 MS. SAUNDERS: I think the consumer has had  
8 to -- sorry, I think it's required that the consumer  
9 must open a PDF document, read something in it and  
10 respond. That's -- that is very specific.

11 MS. HARRINGTON: Okay, answer plus.

12 MS. SAUNDERS: Answer plus, yes.

13 MS. HARRINGTON: Answer plus. Anybody else,  
14 Jerry, quickly?

15 MR. BUCKLEY: I just didn't want to respond to  
16 that point at this point, but I just wanted to make an  
17 observation regarding what the Federal Reserve has done.

18 MS. HARRINGTON: Can you hold it, because Mark  
19 has an answer to this one.

20 MR. BUCKLEY: Yeah, thanks.

21 MR. MacCARTHY: I think in the context that you  
22 just described, something that would indicate  
23 automatically that the customer has opened up the  
24 required document would satisfy the requirement. If it  
25 was built into the system.

1 MS. HARRINGTON: PDF sensor?

2 MR. MacCARTHY: Something like that.

3 MS. HARRINGTON: I want to go to these, we only  
4 have one minute.

5 MS. MAJOR: Go ahead, Jerry.

6 MR. BUCKLEY: I just wanted to say, and it's a  
7 point Ben made earlier, in writing doesn't necessarily  
8 mean on paper. And the Federal Reserve clearly  
9 contemplated that when it proposed its regulations long  
10 before ESIGN was even introduced. And I think that the  
11 Federal Reserve's ability to prescribe and permit the  
12 delivery of the early disclosures is outside of ESIGN,  
13 and rests on its general authority under its acts.

14 So, it's important to keep in mind that ESIGN is  
15 a safe harbor, and that its requirements don't  
16 necessarily apply to acts which otherwise authorize an  
17 agency to permit the delivery of disclosures  
18 electronically.

19 MS. MAJOR: Okay, Bob, you have one minute, and  
20 Margot has one minute to respond.

21 MR. WITTE: Well, I hope it's a direct response,  
22 but in -- I think that the four paradigms that I  
23 identified at the beginning ought to all be sufficient,  
24 really, and if PDF or PDF plus or affirmation or  
25 affirmation plus. Mere affirmation, at least in a

1 context of credibility, you know, maybe somebody who is  
2 established on -- for advocacy purposes as a computer  
3 programmer is in a little bit different situation than  
4 Aunt Sally, my favorite example, but maybe not.

5           There certainly ought to be contexts where  
6 that's sufficient, and what about proof of opening? You  
7 know, I mean after all, if you can ultimately establish  
8 that the PDF was used, what's wrong with that? I don't  
9 think there's any way to have a requirement that you  
10 show that the person actually opened it. You can't do  
11 that. There's almost no way to prove that they actually  
12 did. But at a minimum if you go back to the PDF plus  
13 opportunity test, is proof of test, and I don't think  
14 there's any basis for suggesting that there has to be a  
15 proof of testing.

16           MS. SAUNDERS: I wanted to very quickly address  
17 the definition of consumer. The definition of consumer  
18 was added to ESIGN very specifically to mimic the  
19 definition of consumer in numerous state laws across the  
20 country for unfair and deceptive trade practices, Truth  
21 in Lending Act and others. I think that the expanded  
22 definition of consumer under those state laws has to be  
23 read into the definition of consumer in this law,  
24 because it's become a term of art rather than a new term  
25 which was specifically and newly depth-defying to ESIGN.

1 MS. MAJOR: Well, thank you all so much, and  
2 we've ended at 10:30 on the dot. We will take a break  
3 until 10:45 and start then with the technology issues.

4 (Pause in the proceedings.)

5 MS. NIELSON: Hello, everyone, I'm Fran Nielson  
6 from the National Institute of Standards and Technology,  
7 welcome to the technology panel portion of the workshop.  
8 Thank you especially to all of the panelists and those  
9 who are here to provide their wisdom on this study.

10 We're going to have -- I would like to make one  
11 little announcement before we get started, and that is  
12 there are some comment cards around so that if you have  
13 a question you would like to submit to the panel, if you  
14 could fill out your question and wave it in the air, one  
15 of our helpers will come pick it up and deliver it to  
16 the panel. So, I will say that at the start.

17 First we're going to have some short technology  
18 demonstrations. I believe our first demonstration is  
19 Dr. Brown, iLumin.

20 DR. BROWN: iLumin. I'm with iLumin and I'm  
21 grateful to be here today. What we wanted to show you  
22 was a platform that we have developed on the web to  
23 perform e-commerce that does have what we believe and  
24 our in-house counsel has said might conform to the law  
25 for consent, and so we'll have to see if we get sued or

1 not.

2 This is the log-in screen to the website. So,  
3 the website -- this is a web-based application where  
4 everything is done from a browser to a server at the  
5 e-commerce site. And so we have added here, "By logging  
6 in, I am consenting to receive any records  
7 electronically that I can access through digital  
8 handshake technology." So, we're informing you of that.

9 If you have not yet registered with the site,  
10 the registration form here says, "By submitting the  
11 registration form below, I am consenting to receive any  
12 records electronically that I access through digital  
13 handshake technology."

14 So, if I go back and log in, we'll get to some  
15 documents. And it says that I have two different  
16 signing rooms, I want to open up this signing room, and  
17 we have added the note here, "By completing any  
18 transaction in this signing room, I have consented to  
19 receive the records electronically." So, every time you  
20 come to something, we're informing you that if you  
21 continue on, you are consenting.

22 So, here we have a form to change health plans,  
23 and I've started to fill this out, and I will just say  
24 I'm ready to sign it, and when I do, it's going to be  
25 processed and it comes back and we have the note on

1 here, "By signing this document, I have consented to  
2 conduct this transaction electronically." So, every  
3 step of the way, we're informing you that if you  
4 continue with this, you are consenting to this.

5 Now, some other work that we are doing involves  
6 the transformation of data from an XML document to  
7 different formats, and I just show this, because later  
8 in the law, on the record retention, it says,  
9 "Accurately reflects the information set forth in the  
10 contract or other records," and one of the things that  
11 we are doing is not only allowing the document, which we  
12 code as XML, to exist and be translated with the style  
13 transformation, as defined by W3C, to an HTML  
14 representation that you saw on the screen that I showed  
15 you just briefly, but we also are transforming it to the  
16 PDA format, the WML, for browsing, and also transforming  
17 the information to a wave file that can then be heard  
18 over a cell phone.

19 And so in each of these cases, we're trying to  
20 take the same information and transform it so that the  
21 consumer may be able to receive it by dialing in off of  
22 a phone, by having a Internet appliance like a PDA be  
23 able to see it, as well as a web browser. And so in  
24 this work, we are keeping the data in an XML format, and  
25 that's what we are then transforming. And one of the

1 things that we're concerned with that the law -- we're  
2 concerned with the statement that it accurately reflects  
3 the information set forth in the contract or other  
4 record, because we may have a truck driver who receives  
5 a bill of lading on his cell phone, and we'll listen to  
6 the document being read to him over the cell phone, and  
7 then sign that bill of lading digitally by typing a pass  
8 code onto the cell phone while the other end who  
9 receives that document may see it on the website.

10 And so we're very concerned that we not be  
11 restricted to the exact format of it, that the  
12 information accurately reflects so that when it's read  
13 to you, with the wave file versus viewing it on a WML  
14 device versus an HTML device, that we get the same  
15 information.

16 MS. NIELSON: Okay, thank you, Dr. Brown. The  
17 second demonstration, then, is from NewRiver. Virginia?

18 While they are setting up their demonstration, I  
19 was asked to announce that there is a lunch room on the  
20 7th floor. Today's menu may or may not appeal to you,  
21 six pieces of fried wings, macaroni and cheese and mixed  
22 vegetables for \$4.55, or halfsmoke on a bun, a soda and  
23 chips for \$3.25.

24 And now back to our regularly scheduled program.  
25 I just had to say that.

1           There's also a salad bar and sandwiches.

2           MS. GOBATS: Thank you. My demonstration is a  
3 little different in that it's from the point of view of  
4 the investor. We're from the financial services base,  
5 and we are dealing with in this case E\*Trade's  
6 customers, and E\*Trade, I have to give you that  
7 information that of course it is an electronic service  
8 organization, and they are at the forefront of this kind  
9 of consent management.

10           In the E\*Trade world, people are transacting  
11 business electronically all the time, but they are asked  
12 from the point of view of consenting to the delivery of  
13 electronic documents in the future, they are asked to  
14 sign on with their E\*Trade user name, their password and  
15 the log on. I don't have to fill anything in in this  
16 demo, but I would be filling this information in.

17           And this is, of course, equivalent, really, to  
18 the signature, because I'm coming into a secure site  
19 where I'm already known. I'm going to log onto or click  
20 on account services, which shows me what my balance is,  
21 and most of the firms that we deal with are already  
22 providing electronic availability or electronic access  
23 to statements, not in lieu of paper, but as a service.

24           I'm going to then click on set delivery options,  
25 where I'm offered trade confirmations up here in the



1 right, trade confirmations, monthly statements or posted  
2 checks. I was interested in the comment about the  
3 checks in the earlier discussion.

4 The education portion of this screen, electronic  
5 document service is the front end, here's how it  
6 happens, here's how E\*Trade electronic delivery,  
7 document delivery service works, tell us how you want to  
8 do it, if you choose, if you consent, and how your  
9 documents are filed. This all conforms with the ESIGN  
10 regulations.

11 I'm going to consent to not U.S. Mail delivery  
12 of my trade confirmation, but electronic delivery, and  
13 I'm going to request electronic delivery, it will be  
14 electronic delivery for statements as well. I don't  
15 have to re-enter, because we're fooling ourselves here.  
16 And then I see the consent to electronic delivery of  
17 trade confirmations, and I'm going to consent right on  
18 it. I'm not going to go through reading this, but we  
19 are showing them that we are making the disclosure right  
20 here and either I can change my mind and go back, or I  
21 consent.

22 That's it. It's that easy. Log off, you've  
23 successfully logged off, thank you for using E\*Trade,  
24 which is the normal log-off for E\*Trade.

25 The second one, demonstration is from a -- from

1 the mutual fund world, and here, it's just a little bit  
2 different because the customers may or may not be  
3 electronic customers. Is it going to come up is the  
4 question. Electronic sign on.

5 Now, when the person, when the investor comes  
6 into the site, they really are in the secure site  
7 already, because they've already obtained a password.  
8 If they haven't obtained that password, you see that the  
9 second option, which is to reset a forgotten PIN, and  
10 when you take that option, you also can get a new PIN,  
11 if you don't have a personal identification number  
12 already.

13 As you see, you sign off your social security  
14 number and your PIN, and you log in, and I am going  
15 to -- I am presented with a view of my own portfolio,  
16 and then I'm going to click on the electronic delivery  
17 consent, and specify my electronic delivery preference,  
18 who do I want -- where do I want it mailed, and whether  
19 I want an investor statement, yes, I do, electronically,  
20 and I want to receive notification, which is an issue  
21 that the user has to know that they are going to be  
22 notified, and then whether I also want an additional  
23 paper copy.

24 I continue, this is the disclosure part, and I  
25 agree. And that's it. It's that simple. You have

1 enrolled, click, it's over. It's a simple process.

2 MS. NIELSON: Okay, thank you. Our last mini  
3 demonstration, then, is from Selwood Research. Jeremy?

4 MR. NEWMAN: I'm Jeremy Newman from Selwood  
5 Research of the UK, thank you very much for having us  
6 today. It's nice to be in Washington on a fine spring  
7 morning, representing I think the G in ESIGN, the global  
8 side of things, without which we would have ESIN.

9 Essentially, and I'll ask Fran later what is  
10 meant by a halfsmoke on a roll, that's another matter.

11 Really three key things we're trying to actually  
12 nail down, three corners, the holy triangulation of  
13 evidence of informed consent, and what I'm doing here in  
14 this presentation or illustration is to try and say  
15 well, how are we actually going to nail these three,  
16 because I don't think you can do just two of them.

17 So, you need have the ability of receive  
18 records, informed consent, we talked about that, but I  
19 think ease of use both for the business and the consumer  
20 is really the paramount thing, it's reducing the burden  
21 on both sides.

22 So, these are the three elements, again, we've  
23 got the business and the consumer and what we call the  
24 recital service provider at the bottom, and at some  
25 point in the overall scheme of things, the flow, the

1 transaction flow, an invitation or a request is sent  
2 from the business to the consumer for this consent.

3 So, what does the consumer see? In replacement  
4 for a signature block, where they actually say please  
5 sign here on a piece of paper, we have this thing called  
6 a sign spot, which tells the affirming party, the  
7 consumer in this case, what to do.

8 And this could be manifested on an email, with a  
9 simple -- what I've got here, a preamble and a piece of  
10 text, and our proposal with recite a line, is that you  
11 pick up a phone and you say what you want to do, and  
12 that's recorded. So, you've got the evidence, you've  
13 got the informed consent, from the consumer, this could  
14 also be manifested on a webpage, and so you pick up a  
15 phone, you dial this toll free number, you enter a  
16 document code of some sort, invented by the business,  
17 the relying party, and I John Doe consent to receive  
18 electronic records from Acme underwriting as described  
19 in document number 0224973. Done.

20 That's done by the consumer to the service, and  
21 then after this, the service provides links to both the  
22 business and the consumer, because the consumer is  
23 really a kind of pseudo relying party. The consumer  
24 needs to say, you know, after the event at some point, I  
25 did sign this and I did it on this time and I have this

1 here proof.

2 So, the links go back essentially as an  
3 identifier or a number that goes back to the consumer,  
4 that says if you want to retrieve your recording at some  
5 point downstream, this is the number that you use, and  
6 the business also gets instant electronic notification  
7 of the agreement having been struck.

8 So, the benefits are obviously excellent  
9 evidence of informed consent, you can hear the person  
10 saying I want to do this, the accessibility is  
11 demonstrated, and Bob Witte earlier saying that there's  
12 no method that allows you to prove that the document has  
13 been opened, well this is one method, because you have  
14 to open the document to see the number, in order to key  
15 it into the telephone when you give the recital.

16 So, it's very simple to use, everyone is  
17 familiar with using telephones, there's approximately  
18 1.1 billion telephone handsets on the planet, and people  
19 are used to doing -- leaving voicemails and using  
20 telephones for doing things like card activation and so  
21 forth, and it's a very positive affirmation. I think  
22 that people need to bear in mind that positive  
23 affirmation is essentially preparing the consumer to say  
24 I want to do this, handing the card over to the consumer  
25 saying if you're ready, we're ready to do this, and

1 we're moving away from this intense focus on  
2 authentication of the consumer. You have already  
3 established that. This is a system that goes on top of  
4 a known relationship between two parties to actually  
5 prove the policy of the transaction, and in this case as  
6 a consumer consent provision. Thanks very much.

7 MS. NIELSON: Okay, thank you, Jeremy. I want  
8 to remind the panelists or tell them for the first time  
9 if they weren't part of the earlier panel, that the way  
10 we're going to proceed is if you want to make a comment,  
11 you flip your name card vertically.

12 Having said that, I've already been asked by  
13 Margot to describe the difference in her opinion and  
14 maybe everyone's opinion what paper and electronic  
15 versions are, just to set the stage for our  
16 conversation. Okay, Margot.

17 MS. SAUNDERS: Thank you. We're talking about  
18 these very interesting technological questions, but I  
19 want to bring us back to the difference between  
20 electronic and writings, and just clear -- kind of state  
21 for the record what we all kind of intuitively know.

22 A piece of paper can be handed to or mailed to a  
23 person, and they can read it without special equipment.  
24 You need a computer to access or read an electronic  
25 record. A written record can be received by the

1 consumer at no cost. It doesn't cost the consumer  
2 anything to have a mailbox. Everybody, including  
3 homeless people, have mailboxes and can get U.S. Mail.

4 The electronic record can only be accessed  
5 through a computer connected to a third party from whom  
6 payment is generally required on an ongoing basis, the  
7 Internet service provider. If the consumer moves, the  
8 U.S. postal mail can be easily forwarded, at no cost to  
9 the consumer, and with minimal difficulty, with  
10 generally one notice to the post office a year will  
11 suffice to forward all incoming mail.

12 ISPs generally do not forward electronic mail,  
13 occasionally with some ISPs, electronic mail will bounce  
14 back as undeliverable to the sender, but that's not  
15 automatic and it's not universal.

16 A paper writing does not require special  
17 equipment to hold onto or retain. Consumer need only  
18 put a piece of paper in their drawer or a file or  
19 wherever they want, where it will stay until the  
20 consumer moves it. On the other hand, an electronic  
21 record can only be retained electronically. The  
22 consumer must continue to have access to a computer with  
23 the ability to retain the record. So if they retained  
24 it on a hard disk, they must be able to access it on the  
25 hard disk, or at least access to a computer with a

1 printer to retain a printed -- to print out a printed  
2 copy of the electronic record.

3 A paper writing is by its nature tangible, once  
4 handed to or mailed to a person, it won't go away. It  
5 won't -- nothing will happen to it unless the consumer  
6 does something to it. But an electronic record can be  
7 provided in a form which will disappear after a period  
8 of time to be determined by the provider of the record.

9 For example, if the consumer is provided an  
10 important notice by the -- by an email with a web link,  
11 and the consumer doesn't access the web link within the  
12 expected period of days, the web link may no longer be  
13 available when the consumer goes to access it, unlike a  
14 piece of U.S. Mail, which will stay on the consumer's  
15 desk until they throw it away.

16 The printed matter on a paper writing will not  
17 change every time someone looks at it, and a paper  
18 writing can later be used to -- in court to prove the  
19 contents of that writing. On the other hand, an  
20 electronic record can easily be provided in a format  
21 which is not retainable by the consumer.

22 Many of us have had the experience of trying to  
23 retain or print out websites, and that's not always  
24 possible. But even if you can retain it, it will not  
25 necessarily have the same level of integrity or



1 protection against inadvertent or deliberate change as a  
2 paper writing will have. The electronic record is not  
3 always preserved in a particularly locked format. Thank  
4 you.

5 MS. NIELSON: Okay. Thank you, Margot.

6 Our first question, then, to the panel members,  
7 what kind of software and other technology for obtaining  
8 consumer consent is out there? We've heard -- we've  
9 seen a demonstration from iLumin and from NewRiver and  
10 Selwood, they can chime in with more definition, or is  
11 there someone else who would like to make a comment on  
12 their particular product?

13 MR. LAURIE: Thanks. I will put up my sign. I  
14 did want to mention that -- thank you. This is Michael  
15 Laurie from Silanas Technology. I wanted to mention  
16 that our company is also involved in providing software  
17 that is used for capturing consent, more specifically  
18 consent in the sense of somebody who is signing  
19 documents, and signing could be, you know, anything from  
20 a handwritten signature to whatever will provide that  
21 capability.

22 So, our company has focused quite a bit over the  
23 past few years on understanding how those processes take  
24 place in the paper world, and making sure that the  
25 processes coming from the paper world can then be used

1 in the electronic world as well.

2 So, what we've found was with most of the people  
3 who use this type of technology is that being able to  
4 understand what they're doing at any given moment is  
5 crucial to achieving that capability. And probably I  
6 spent at least as crucial as security technology, which  
7 is often confused with the process of signing.

8 So, Silanas has produced software that is  
9 capable of working in a number of different formats,  
10 some of which have been mentioned here, such as PDF, as  
11 well as word processing formats. And to some extent to  
12 also address the issues that were mentioned with regards  
13 to paper versus electronic, whereas a document can be  
14 maintained and its integrity can be maintained, as well  
15 as the consent that was provided as part of that  
16 document can also be maintained as part of that  
17 document.

18 And that's something that we have been working  
19 on very hard to ensure that we recognize that paper is a  
20 very difficult technology to beat. It's -- you can take  
21 it out and use it whenever you need to, it never runs  
22 out of power, it doesn't crash on you or whatever, so it  
23 works all the time.

24 Being able to replicate that in the electronic  
25 world is a real challenge, and something that to some

1 extent our company has achieved so far. It's not  
2 perfect, but then neither is paper, as we have  
3 discovered.

4 So, that's what I wanted to at least mention as  
5 a starter to this session.

6 MS. NIELSON: Okay, thank you, Michael. Is it  
7 Tom?

8 MR. WELLS: Hi, Tom Wells at b4bpartner, and we,  
9 too, have an electronic signature consent process, with  
10 a little different spin. We sign HTML or XHTML or  
11 dynamic HTML documents, depending on the type of data,  
12 by placing information on the document itself, the name  
13 of the consumer, a date and time stamp and document  
14 signature ID, because we think it's important, like  
15 Michael mentioned earlier, that in the electronic  
16 signature world, it closely mimics the physical world,  
17 so that the consumer has a document that has some  
18 indication that the document has been signed.

19 And where we go a step further is, we've  
20 integrated that with a web vault product for the  
21 consumer that's stored at the institution's website, to  
22 date and time stamp the document so that the consumer  
23 can always dial back into the Internet and through an  
24 authentication process, look at his document.

25 Similar to what E\*Trade is doing with their file

1 cabinet system, except with more functionality, you're  
2 able to fax in and you're able to multiple -- have  
3 multiple party signings within the web vault. But I  
4 wanted to get to Margot's point. I live in south  
5 Florida, and when Hurricane Andrew hits, documents do  
6 not stay on the desk stop. They fly everywhere.

7 And understanding that, I think that the  
8 electronic -- certainly you mentioned all the favorable  
9 things about paper versus electronic, but there are some  
10 benefits about electronic versus paper. One of which is  
11 if your house is destroyed, your electronic records are  
12 not destroyed. Another one is accessibility.

13 I believe, Margot, that the initial consumers  
14 are going to be -- are not going to be your typical  
15 clients, they're going to be high network individuals  
16 who travel often. It's a new technology. They have to  
17 have the capacity and the Digital Divide indicates that  
18 maybe some of your consumers may not have access  
19 immediately.

20 So, accessibility, for people to be able to  
21 receive their records wherever they are, any time,  
22 anywhere.

23 The third thing is the ability to share  
24 documents, and to clearly collaborate with third parties  
25 is an important feature, because when you have a piece

1 of paper, then I need to either mail it to my attorney  
2 or fax it to my attorney and if I have to fax it, then  
3 it requires me to be concerned who is at the other end  
4 of that fax line, and it may be a secretary, and not the  
5 attorney.

6 And then finally, the last thing is that I  
7 practiced estate planning law for 12 years, and when  
8 people die, the surviving spouse can't always remember  
9 where all those records are, and so probate estates may  
10 just continue on and on, which is not a bad thing for an  
11 estate planning attorney, but for the consumer, it's not  
12 the best thing.

13 So, an electronic document aggregation tool can  
14 really solve a lot of the problems we have right now in  
15 the paper world.

16 MS. NIELSON: Thank you, Tom. Let's go with  
17 Jane, and then Virginia.

18 MS. WINN: Hello, my name is Jane Winn, I teach  
19 at SMU Law School in Dallas, Texas. I was going to say,  
20 and I live in Texas, where we've learned that when  
21 tornados hit buildings, they pull the papers out.

22 What I think is interesting is who has chosen to  
23 participate in this public process, and who's absent. I  
24 don't notice any standard developing organizations here,  
25 and I think that you can't talk about consumer

1 protection in electronic commerce without thinking about  
2 the role of standard developing organizations.

3 Many of the problems that people are addressing  
4 in using existing technologies to mediate contract  
5 processes, as far as I can tell, arise from the fact  
6 that most of the products that we're working with right  
7 now were developed for the publishing industry. PDF is  
8 about brochures, HTML is about document mark-up. These  
9 technical standards were not developed with transaction  
10 processing in mind.

11 Right now, today, while we're having this  
12 meeting, there are standard developing organizations  
13 around the world working on the next generation of  
14 electronic commerce technology, which will explicitly  
15 address transaction processing in contract formation.  
16 And if those people aren't present in the room today,  
17 it's not clear to me that consumer interests can be  
18 adequately protected.

19 What I would suggest is that if we define the  
20 debate in terms of finding an equivalent to a writing,  
21 we're going to continuously miss the emerging issues in  
22 consumer protection. I think that what we've seen in a  
23 lot of arenas is that open public standards for  
24 technology are an important form of consumer protection,  
25 and all of these vendors here today with their fine

1 products would be on a level playing field competing for  
2 consumer acceptance if there was a workable framework of  
3 open public standards.

4 I personally would prefer not to do electronic  
5 commerce in a world where the standards are owned by  
6 organizations that have their headquarters in western  
7 states. Since law professors get into trouble for  
8 demeaning multinational corporations, I'm avoiding  
9 identifying specific organizations.

10 So, what I would say is that the issue on the  
11 table can be thought of as contract formation processes  
12 generally, and I think that notwithstanding the fact  
13 that many of these product vendors who come here today  
14 have fine products, what the consumer's interest is, is  
15 in making sure that the standard developing  
16 organizations take account of consumer interests and  
17 remain accountable.

18 MS. NIELSON: Okay, thank you, Jane. Virginia?

19 MS. GOBATS: First I have to answer who's out  
20 there. Who's out there providing consent or thinking  
21 about servicing this issue of consent. Certainly the  
22 financial services space, where NewRiver practices, each  
23 of those, each of the organizations, all of the silos,  
24 insurance, banking, mutual funds, verbal annuities, back  
25 in insurance again, and all the people who are in the

1 electronic commerce world already are working on their  
2 own consent process.

3 Legacy Systems add a little piece of a routine,  
4 a technical routine, to the methodology they already use  
5 to deliver the electronic information about people's  
6 accounts, or people's financial portfolios. They  
7 already have PINs in place or secure environments in  
8 place. So, the people who are working are the insiders  
9 in financial industry, are working on something that  
10 just expands a process that's already in place by adding  
11 another method of communication.

12 So, I think they are there developing their own  
13 services, or they are using an outsource or many  
14 outsources in combination, like the people who are here.  
15 That's who's there.

16 To address Margot's issue on the subject of just  
17 reliability, you know, will that web link still be  
18 there, each time the notification that a document is  
19 available for electronic viewing is sent, a new  
20 hyperlink is sent.

21 Now, I don't know if every organization does  
22 that, but certainly the ones I'm familiar with do that,  
23 send an email notification that your documents are ready  
24 for viewing, with a hyperlink in it to a secure site, a  
25 scalable secure site.



1 MS. SAUNDERS: And how long does that remain on  
2 the web?

3 MS. GOBATS: It isn't on the web, it's at a  
4 secure site that you are sent to. So, we're not in the  
5 HTTP world.

6 MS. SAUNDERS: Isn't there a limited amount of  
7 time that it stays there?

8 MS. GOBATS: Yes, but it's regulated. Under  
9 financial services, there are rules about how long you  
10 have to keep the records available. So, I mean, you can  
11 call today and ask your mutual fund firm that you're  
12 doing business with to give you a statement from ten  
13 years ago and they will produce it, in paper. So, the  
14 question is whether they'll charge you or not, you know,  
15 it's too long, but there's a staging process, as when  
16 it's available in the site, at the secure site, for  
17 immediate access.

18 When it's available for, you know, within 48  
19 hours, when it's available within two days, or when it's  
20 available in a week, and by mail.

21 So, the industry has addressed that issue of how  
22 long it's retained, and certainly in the mutual fund  
23 industry where service has been a theme, for a long  
24 time, and good service, the clients are aware of the  
25 fact that they can get old records in paper, and they

1 are now being told that they can get those old records  
2 electronically.

3 So, I think at least an attempt has been made to  
4 satisfy that caution. And then the nexus on being able  
5 to reproduce the record. Certainly the people that we  
6 are working with already have in place or are developing  
7 the methods of keeping the template that was used on the  
8 date that the document was delivered.

9 So that if somebody wants an old document, the  
10 date of the delivery of that document is in the records,  
11 and the template that was used on that date is. So,  
12 essentially, the document is reconstructed on the fly,  
13 and it will look just like it looked then. And there  
14 are demonstrations of that. It's in -- it's alive and  
15 well at the moment.

16 And then the last thing is that I think that  
17 from the point of view of all of the users, you know,  
18 across the broad spectrum of people who are technology  
19 conversant and those who are not, we're thinking at our  
20 firm, at NewRiver, that the process is really educate,  
21 educate people about what electronic delivery is about,  
22 then solicit their consent or solicit their -- or ask  
23 them if they're interested and if this is appropriate  
24 for them.

25 It's not appropriate for everybody, just like

1 automatic voice response is not appropriate for  
2 everybody, then collect it from them, and then maintain  
3 those records, and provide service, using those records  
4 of consent or I like to say preference. I prefer to get  
5 these kinds of documents electronically, and tell them  
6 that at any time, you can also get this in paper.

7 If I need one, if I'm getting a divorce, and I  
8 need pieces of paper, I'm going to be able to get the  
9 paper, and I can turn off and turn on my choice at any  
10 time. I can consent to electronic delivery for three  
11 months, decide I really don't like it, then consent  
12 again, go back and forth, back and forth, consent and  
13 revoke.

14 And in all of the screens, in these screens that  
15 I showed you, and in most of the screens that I've seen  
16 from our clients, that is right up front. One last  
17 thing, I'll give up my air time.

18 Yes, there is a cost to electronic delivery, and  
19 it is the cost of the phone connection or the cost from  
20 your ISP, and that, we are obligated to tell people up  
21 front. So --

22 MS. NIELSON: Okay. Thank you, Virginia.  
23 Thomas, and then Bill's going to talk a little bit about  
24 the standards question that Jane brought up.

25 MR. GRECO: Okay, very quickly, because I think

1 there's a lot of other issues that we can get to here  
2 that's a more profitable use of folks time. My name is  
3 Tom Greco, I'm with the Digital Signature Trust Company,  
4 a particular type of provider of electronic signatures,  
5 digital certificates and digital signature technology.

6 I think Virginia makes a very good point. There  
7 are going to be a number of applications that we're  
8 going to be attacking with this electronic technology.  
9 Some will merit the use of certain technology, some will  
10 not merit the use of certain technology. This is going  
11 to be a marketplace decision, businesses will offer up  
12 more or less complicated technologies depending on the  
13 merits.

14 The use of an electronic process to do a home  
15 mortgage, for example, probably entails certain  
16 technology requirements and document storage, document  
17 integrity, retrieval of records. That's not necessarily  
18 the same for the run of the mill consumer electronic  
19 purchase, and we need to recognize that and certainly  
20 when we write new laws, for example, E-SIGN, not try to  
21 make one size fit all.

22 Not all electronic transactions are going to  
23 require PKI technology, but PKI technology works very  
24 well for certain types of applications. Margot raises  
25 the document integrity issue. That's one that PKI can

1 solve. There are solutions out there that encompass  
2 long-term document storage, in terms of being able to  
3 provide a document 30 years from now, that was the same  
4 document or looks the same that the consumer signed  
5 today.

6           These are the processes that are actually being  
7 worked out today. There are folks out there designing  
8 business processes to take advantage of electronics.  
9 That is coming. Notwithstanding Jane's comment that it  
10 might be appropriate to have standard-based bodies doing  
11 a lot of this work. The fact of the matter is that  
12 standards-based bodies take quite some time to develop.

13           There are loads of standards right now that  
14 people are writing technology solutions to. PKI  
15 standards exist, for example, XML standards exist.  
16 They're out there, they're being attacked, and the users  
17 ever applying those processes.

18           So, I think there's a lot of things happening  
19 right now to move towards a more fundamental fully  
20 developed electronic commerce world, and we'll see, back  
21 to the point of I think why we're here today, what is it  
22 that, you know, FTC and Commerce should be telling  
23 Congress in their report.

24           Well, one of my points is that I think that  
25 we're at the very beginning stages of being able to

1 answer some of the questions, what do businesses need,  
2 what do consumers need to make this kind of thing  
3 happen. And I think, you know, frankly, six months into  
4 it, we're willfully, you know, have a lack of knowledge  
5 of exactly what these processes should look like.

6 I think this is a law that we can work with  
7 today, and as we gain more knowledge about what the, you  
8 know, hurdles are being presented by things like  
9 consumer consent, we'll have a better ability to tell,  
10 you know, Congress, for example, here's what we're  
11 finding, here's what businesses are finding, here's what  
12 consumers have been finding, these are the tweaks that  
13 are necessary.

14 MS. NIELSON: Thanks, Tom.

15 MR. BURR: Well, I'm Bill Burr from the National  
16 Institute of Standards and Technology. I would like to  
17 say that we at least occasionally do develop standards.  
18 We do work on them. And to some at least, in the area  
19 of digital signatures. And as Tom pointed out, there's  
20 really quite a lot of standards activity there.

21 What I have been struck by all of this is that  
22 when I first saw the E-SIGN Act, I was a little bit  
23 shocked in a way. If you contrast what we're doing in  
24 the U.S. with, say, the European Union Directive on  
25 Electronic Signatures and what's come out of that, with

1 that or the German digital signature law and so on, they  
2 tend to favor what I would call a fairly very weight  
3 rigorous system of signatures, and I take the ESIGN bill  
4 to be very different than that, and in essence to say  
5 something along the lines of you don't have to do  
6 everything in a really heavy way, truly  
7 cryptographically rigorous fashion that will let the  
8 marketplace decide more and perhaps evolve.

9 Technologies that are appropriate and meet  
10 business needs, and they don't necessarily have to be  
11 truly from the cartographers point of view rigorous or  
12 strong. Now, PKI, I think, is the strong technology. I  
13 think I read a paper of Jane's recently that was  
14 somewhat skeptical of the success of PKI, but it does, I  
15 believe, offer a way to do very rigorous heavyweight  
16 kinds of protections that will ensure integrity and who  
17 signed it and a lot of other things.

18 From Margot's point of view, I don't think that  
19 broadly imposing that on everything will help the poor,  
20 the downtrodden, the people who are not technology  
21 adroit at all, it will make it much worse for them.  
22 They will have a lot more to overcome to participate.

23 So, you know, you have to strike some sort of a  
24 balance here. There are lots of standards. I think as  
25 Tom point out, standards is a painful and tedious

1 process, and we have a law, and people want to do  
2 business, and I think we're going to have to improvise,  
3 but I suppose we could have somebody here from the WC3,  
4 I think a couple of the companies here probably  
5 participate in that. But I don't know, you know, we're  
6 going to have to live with it as far as I see and do the  
7 best we can.

8 MS. NIELSON: Okay. Thanks, Bill. Margot and  
9 then Jim.

10 MS. SAUNDERS: I have a couple of points. One,  
11 despite what I may seem, I'm not troglodyte, I am not  
12 against e-commerce, I use it myself all the time, I  
13 think that it is a wonderful resource. I think that it  
14 will significantly help low income communities and low  
15 income people in particular, it will widen their choices  
16 and widen their marketplaces and I think it's terrific.

17 But my function here today is to continue to  
18 remind everyone else that the whole world is not yet  
19 online and the difference is based between poor people  
20 and those who are online. I want to quote the  
21 Department of Commerce's statistics to you all, just  
22 again to set the stage that I think, Tom, you said that  
23 your product is going to not go -- it's not designed for  
24 my clients, it's designed for much wealthier folks,  
25 and --



1           MR. WELLS: Well, maybe not, I say that it would  
2 be a mistake to try and appease all the clients all of  
3 the time initially.

4           MS. SAUNDERS: I completely agree. I'm just  
5 trying to -- as you all may notice, I'm only one up  
6 here, so I don't mean to be the one talking all the  
7 time, but according to the Department of Commerce's  
8 recent report on the Digital Divide, 45 percent of this  
9 country is online, but only 35 percent of the households  
10 have access from their home, and the balance of those --  
11 so, we are talking about ongoing easy access to  
12 information for 35 percent of the population. While the  
13 remaining 10 percent between 35 and 45 percent who are  
14 online and 35 who have access at their home, a majority  
15 of those folks access the Internet from their work,  
16 which is not always a favorite thing to do for personal  
17 information.

18           And another large percentage access it at public  
19 access points such as public libraries and schools. Or  
20 someone else's computers. But again, I want to remind  
21 us, remind everybody, if we were simply designing a  
22 system for communication that was solely online, the  
23 concerns that we continue to articulate would not be a  
24 problem.

25           So that when a consumer was standing in a room,

1 if we had a difference -- if there would be no problem  
2 about providing that consumer standing in the room with  
3 paper disclosures, we wouldn't need this electronic  
4 consent issue. If there would be no problem about the  
5 consumer who consented to receive online disclosures,  
6 and then six months or two years later had a financial  
7 reverse due to sickness or loss of job or something, and  
8 suddenly lost their access to the Internet, we wouldn't  
9 have as much -- and if that consumer could then easily  
10 go offline and say I want everything on paper because I  
11 don't have easy access any longer, we wouldn't have the  
12 same degree of concern.

13 So, it's, again, it's the interplay between the  
14 physical world and the real world, and the electronic  
15 world that I'm most concerned with.

16 I do want to take one second to respond to a  
17 couple of the demonstrations, by Dr. Brown specifically.  
18 He said that you could click on a button that said I am  
19 consenting to receive electronic records that I access  
20 using a certain technology, and I don't believe that  
21 unless the technology is used to actually consent, that  
22 that satisfies the law's requirement to electronically  
23 consent, quote, "in a manner" which reasonably  
24 demonstrates the consumer's capacity to access.

25 So, and that wasn't clear from the

1 demonstration.

2 Also, another example provided was that a truck  
3 driver could be read a bill of lading over a wireless  
4 telephone. I don't know off the top of my head whether  
5 a bill of lading has an underlying state law requirement  
6 that it be in writing. But if it does, it may satisfy  
7 some requirement, but it does not -- that delivery of  
8 that bill of lading does not satisfy the requirement in  
9 101(E), which is that if a writing is required, it must  
10 be provided in a manner -- it may be denied if it's not  
11 provided in a form that's capable of being retained, and  
12 how in the world would that wireless -- would that  
13 consumer, would that -- whether or not he's a consumer,  
14 would that truck driver be able to retain an oral  
15 communication of that bill of lading. Thank you.

16 MS. NIELSON: Okay, I have Jim, and then Mark  
17 and then Bruce.

18 MR. BRANDT: Thank you. I'm Jim Brandt with  
19 VeriSign, and VeriSign provides industry-leading  
20 technology to support secure electronic commerce in  
21 communication, specifically through the use of digital  
22 certificates and underlying public infrastructure,  
23 which, in fact, provides the security services that the  
24 ESIGN Act and also the government corollary JAPEA Act  
25 contemplates. That is to be able to identify

1 specifically who is you're communicating, that is  
2 identification, over the web in electronic communication  
3 to protect the communications, to provide integrity to  
4 that information, and perhaps the privacy of the  
5 information as well.

6           These technologies through standards of bodies  
7 working with Bill and others, internationally have  
8 developed and integrated this kind of technology within  
9 all of the technologies we've talked about here in terms  
10 of standard protocols, supporting secure mail, web  
11 interfaces, even secure form technology, as well as  
12 transactions associated with XML and others that are  
13 evolving.

14           Now, in terms of its usage, I think although  
15 it's hard to define a ubiquitous standard, I think it's  
16 fair to say that within business, within business today,  
17 PKI is effectively the de facto standard for providing  
18 security for e-commerce transactions, and is becoming so  
19 within the Federal Government as well.

20           I think what we find is that again, in terms of  
21 utility, there are enabling programs in driving the use  
22 of this kind of technology to provide the level of  
23 service that not only business but government is  
24 requiring, and is being required by their constituents,  
25 in terms of either trading partners wanting to have more

1 convenience or more open access for more information,  
2 more timeliness, lower costs of operations, et cetera.

3           So, there are real driving reasons why this  
4 technology is being enabled within government and  
5 industry today. I think it's fair to say that to date,  
6 that probably has not evolved into the commercial  
7 market, and I would submit probably because there is not  
8 enabling applications to drive it there. In terms of  
9 motivation by a consumer or other one to take advantage  
10 of this technology to become more familiar with it, and  
11 to reap some of the benefits that the technology can  
12 provide.

13           I think there is, however, opportunities for the  
14 technology if some of the vendors here today, including  
15 VeriSign, to assist in that education and discovery and  
16 communication process that exists today. We, for  
17 example, have an opportunity for a consumer to come to  
18 VeriSign website and to request for a digital  
19 certificate to be able to explore the technologies in  
20 terms of email and communications, et cetera, on a trial  
21 basis. And this technology, of course, can go a long  
22 way, and this opportunity can go a long way to bridging  
23 that educational gap that we've talked about.

24           I think in terms of the use, certainly, I think  
25 it's correct that not everybody today is connected, not

1 everybody has a computer; however, this technology, it  
2 supports the ability for shared communication platforms,  
3 and provides the ability through a number of more recent  
4 developments in the industry to provide secure  
5 communications for individuals at shared resources such  
6 as at a kiosk or in a library computer, et cetera, where  
7 the benefits can be expanded beyond just the household.

8 MS. NIELSON: Okay, thank you, Jim. Mark, did  
9 you change your mind?

10 MR. MacCARTHY: Oh, I'm sorry, no, I was  
11 anticipating.

12 MS. NIELSON: Okay, go ahead.

13 MR. MacCARTHY: Since people tend to leave them  
14 up, I tend to put my down before I get called on.

15 I think this has been a very fruitful discussion  
16 and I want to take the opportunity again to thank the  
17 Federal Trade Commission and NTIA for hosting this  
18 workshop.

19 Having lived through both UETA and E-SIGN, I  
20 found the discussion this morning very sophisticated and  
21 a very useful discussion for understanding from a  
22 variety of perspectives some of the nuances and the  
23 issues that we're still all trying to grapple with as  
24 this, I think, landmark bill gets implemented and dealt  
25 with in a variety of contexts.

1           Having listened to part of the discussion, the  
2 technology discussion so far this morning, I want to  
3 address my comments coming back to the purpose of the  
4 workshop and the report, trying to give you our  
5 association's views, which include about a thousand  
6 companies who develop code and content for the Internet,  
7 for business, for end user consumers and for education.

8           And I want to leave you with three points, some  
9 of which echo some of the earlier comments. The first  
10 is it's important to recall that ESIGN, it was meant to  
11 be a technology neutral bill. And underlying part of  
12 that technology neutrality was actually an element of  
13 protecting consumers from being held hostage to  
14 particular technologies and the legal implications of  
15 those.

16           And so I think it's very important to remember  
17 that part of the technology neutrality is, in fact, a  
18 way of lessening the burden on consumers, rather than  
19 burdening them with specific obligations if a technology  
20 is used and therefore the law says that means X, Y or Z.

21           I think what we've heard today is a variety of  
22 environments in which, depending on who the end users  
23 are, what the environment is, which includes legal  
24 obligations where writings may be required, that there  
25 will be adapted for those sectors the appropriate

1 technologies that facilitate, pick a transaction,  
2 determine whether consent has occurred, which may not be  
3 a technological issue, I want to point out, and which  
4 provide the written background, other collateral  
5 information that is relevant to the transaction. And I  
6 think it's very important to understand that it will not  
7 be a one size fits all when it comes to this issue.

8 Part of the discussion this morning, I think, I  
9 think what we've heard are that there are different  
10 levels of sophistication depending on the users. Let me  
11 tell you that when all of the parties were sitting down  
12 trying to figure out the ESIGN bill, less than a year  
13 ago, I would say that none of the technologies that were  
14 demonstrated here were even on the radar screen. And I  
15 think that's very important to keep in mind. That, in  
16 fact, what we saw six months ago, in terms of these  
17 kinds of applications, are not going to be true a year  
18 from now, and that we're going to see new applications  
19 that will probably even more effectively get consumers  
20 and end users what they want while providing businesses  
21 an opportunity to reach more customers. And I think  
22 that's important to keep in mind as we look at some of  
23 these technology issues in the context of the specific  
24 purpose of the study.

25 The second point I want to make is I think it's



1 important for NTIA and the Federal Trade Commission to  
2 recognize that in developing each of these technologies  
3 a number of factors come into play, only part of which  
4 are writing requirements that come under ESIGN. Part of  
5 it is a service orientation of trying to meet the  
6 customer needs, trying to do so in a cost efficient  
7 manner, part of it is security needs.

8 I think the discussion this morning suggested  
9 that businesses and application hosting providers are  
10 trying to incorporate a number of different business  
11 goals into what they're doing. This is only one factor  
12 that plays into that.

13 For example, in our industry, and this is very  
14 relevant to the access question, our industry is  
15 wrestling with the implementation of section 508 of the  
16 Americans with Disabilities Act, which talks about how  
17 we're going to access technologies using the Federal  
18 Government procurement system.

19 So, it's important to keep in mind that there  
20 are a number of different business factors that go into  
21 these decisions, not just the writing requirements or  
22 whether we're going to capture a consumer in a way that  
23 is adversely effected.

24 But I think the third point that's important to  
25 remember is that -- and I appreciated Margot's

1 recollection of why there is, I think, a comfort level  
2 with paper, but even the fact that there is paper  
3 doesn't satisfy key questions about whether there is, in  
4 fact, a contract, what the intent of the parties was.  
5 Whether it's paper or electronic, you still have the  
6 outside legal framework issues about whether they are  
7 consistent with public policy or whether there was a  
8 contract, and it's important to remember that in ESIGN,  
9 this consent provision, (C)(ii), is one of only a number  
10 of steps that are provided for in terms of as a stop gap  
11 measure, procedural issues that involve access to the  
12 technology and what kind of technological capacity you  
13 have, and so it's important to see this particular  
14 provision in the panoply of all of the consent  
15 provisions, not just any one.

16 So, I think this technology discussion is very  
17 useful and we look forward to working with you as you  
18 prepare your report on the implications of this --  
19 technology implications of this for this particular  
20 section.

21 MS. NIELSON: Okay, thank you, Mark. I just  
22 want to say one thing. Time is short and I hate to cut  
23 off the conversation. I want to let Bruce make a  
24 comment because he hasn't had an opportunity in this  
25 forum, and is it Keith? I'm sorry, my eyesight. And

1 then Keith. I know I'm going out of order, because you  
2 ladies have already had an opportunity to speak, and  
3 then Marianne, and I'm sorry, sir, I can't see your tag.  
4 Yes, is that okay? So, if we can keep our comments  
5 short, because it's now 11:45, and we were supposed to  
6 end. So, Bruce, Mary Ann, and Christopher.

7 DR. BROWN: Well, while the product that I  
8 demonstrated today was Internet-based, I don't believe  
9 that the Internet is the only way to access, and what I  
10 was trying to infer with the telephone was that the  
11 telephone could be the ubiquitous connection to any of  
12 these e-commerce, and we are in the process of  
13 developing that.

14 The idea that we would like to be able to close  
15 on a house by walking into the house and saying gee,  
16 this is the one I want, and be able to dial up and do  
17 the closing instantly is sort of the realm that we want  
18 to move to, and we call it mobile digital commerce, that  
19 would be totally wireless and you totally can do  
20 everything from a ubiquitous information appliance that  
21 may be a cell phone, it may be a PDA, but that's where  
22 we believe the world is going.

23 MS. NIELSON: Thanks, Bruce. Keith?

24 MR. ANDERSON: Excuse me, Craig. I'm Keith  
25 Anderson, I'm with the Federal Trade Commission.

1           I had a question, actually, now is probably not  
2 the right time to be asking questions, so let me put it  
3 out there and people may want to address it this  
4 afternoon. Margot raised the question about what  
5 happens if you get the wrong email address or the email  
6 address is dead, and I'm wondering where we stand  
7 technologically on that issue.

8           Is there -- is there a system out there -- is  
9 there a system on the horizon that would allow us to  
10 know whether any mail is received by the right party?  
11 Does this -- is there a -- even a universal kick back if  
12 I mistype an address and get an address that doesn't  
13 exist.

14           MS. NIELSON: You should let a vendor answer  
15 that, but as a user, I can tell you no. That's the  
16 short answer. But this is my personal opinion.

17           If that is a requirement, we need to lay it out  
18 to the vendors that this is something that is needed,  
19 and I mean, technology in my opinion can do almost  
20 anything, we just have to tell it what it is that we  
21 want it to do.

22           MR. ANDERSON: Sure.

23           MS. NIELSON: But now, to my knowledge, unless  
24 somebody else can correct me.

25           MR. ANDERSON: It's not a requirement at this

1 point, but it's a problem, because if I furnish my email  
2 address to somebody to send me notices and I make a  
3 mistake or a year passes and I change my account, if  
4 I've lost that information, that's a difficulty.

5 MS. NIELSON: That's correct. The same thing as  
6 moving, when you're getting regular mail, you have to  
7 take some action.

8 MR. ANDERSON: But as Margot noted, the system  
9 exists to handle that one, I'm not sure the system --  
10 that's what I'm trying to figure out, does that system  
11 exist in the e-world.

12 MS. GOBATS: I'm jumping up and down over here.

13 MS. NIELSON: I'm sorry.

14 MS. GOBATS: We do have a very robust bounce  
15 process that we offer to our clients, and there are  
16 other robust bounce processes. Yes, you're at the mercy  
17 of the ISP to get it bounced back, and it isn't 100  
18 percent, but we do have one, and based on the preference  
19 of the compliance people within each of the clients, you  
20 get a number of bounces and then you revert it back to  
21 paper immediately.

22 The second thing is about the emails changing.  
23 There are a few. Maybe not several, but at least a few  
24 organizations who are talking to the U.S. Post Office  
25 about a universal electronic address that is for your

1 important kinds of things, like a registered email, that  
2 never changes, no matter if you change your ISP or not.

3 So, there are a lot of people who are working  
4 toward solving those problems. And then the last thing  
5 is that even if they lose -- if you lose them, through  
6 bounced email or they move or they suddenly don't have  
7 enough money to pay the Internet service provider, keep  
8 in mind that the financial organizations are always  
9 talking to those clients, in all the other mediums,  
10 phone, mail, trust me, the mail is not going to stop  
11 coming to you if you get your documents, your client's  
12 documents electronically.

13 So, you can use any one of the methods of  
14 communicating with the firm and the firm with you,  
15 regardless of your ability to continue to get electronic  
16 deliveries.

17 MS. NIELSON: Okay. Marianne?

18 MS. SCHWANKE: I have a couple of questions, but  
19 they're brief, I think. I just wanted to follow up with  
20 each of the organizations that demonstrated technology  
21 to make sure I understand how that particular technology  
22 actually can be employed to get consent in the way that  
23 ESIGN requires.

24 So, if I could just ask -- well, I'll follow up  
25 with Virginia first. Is both the consent process and

1 the information that's provided electronically both via  
2 a secure website? When the consumer is initially asked  
3 for their consent.

4 MS. GOBATS: Let me separate it here. The  
5 consent process is at a secure website, because you have  
6 to already be a customer to get in and whatever. The  
7 delivery is of an email, and that is not in a secure  
8 site, but the hyperlink to look at the information is a  
9 hyperlink to a secure site that has a firewall and that  
10 you need to have your PIN to get into.

11 MS. SCHWANKE: So the email delivers a  
12 notification that the electronic information is at a  
13 secure website.

14 MS. GOBATS: Available.

15 MS. SCHWANKE: The actual if you're required to  
16 provide a certain piece of information in writing, that  
17 information is provided electronically on the website,  
18 but you get a notice by email that says you have to go  
19 to this website to get the information?

20 MS. GOBATS: But a secure site, with all of the  
21 appropriate firewalls and all of that we are accustomed  
22 to seeing now when you look at confidential personal  
23 information.

24 MS. SCHWANKE: And then initially you consent to  
25 receiving that information by being at that secure

1 website. I'm just trying to connect the consent and the  
2 information you're getting.

3 MS. GOBATS: You consent to be notified that the  
4 information is available to you. Now the information  
5 could be available to you, that link could be to a  
6 website where you get impersonal information, like  
7 product information, annual report prospectus, whatever,  
8 that might be right on the website in PDF 4. Or if it's  
9 your investor statement, you will definitely be sent to  
10 a secure site with all the firewall protections in which  
11 you have to uniquely identify yourself before you can  
12 get at your personal information.

13 MS. SCHWANKE: And you've already been at that  
14 website initially to consent?

15 THE WITNESS: But that's not -- yes, you've  
16 already been there to consent, yes.

17 MS. SCHWANKE: Okay. Can I just ask the same  
18 question of iLumin. Is the consent process and the  
19 information both provided via a website?

20 DR. BROWN: Yes.

21 MS. SCHWANKE: Okay, so you've been to the  
22 website, you consent, you're already using clicking on  
23 the website, and that is also the same format that the  
24 information that you are going to be receiving, that  
25 ordinarily you would be required to get it in writing,



1 is also on the website?

2 DR. BROWN: Yes.

3 MS. SCHWANKE: And then the same question really  
4 for Selwood, I think I understand that Selwood's process  
5 is a little bit different, you get an email message that  
6 can suggest that you actually call and give your consent  
7 orally, then how is the information that you're  
8 receiving electronically provided to you and how by  
9 making a phone call do you consent in a way that shows  
10 that you can access that information?

11 MR. SMITHIES: This is Christopher Smithies of  
12 Selwood Research. The information can be delivered to  
13 you in any way, in any electronic means -- by any  
14 electronic means. Your response will demonstrate your  
15 receipt, because you are given as part of that  
16 communication the instruction to respond to indicate  
17 that you have a particular attitude with regard to that  
18 communication.

19 In this case, for example, that you consent, and  
20 that you are asked to provide a unique number to  
21 identify precisely in respect of what you are  
22 consenting. In other words, to identify the  
23 solicitation that you received. So, without knowing --  
24 you wouldn't know that unique number unless you had been  
25 able to read and understand that solicitation.

1           So, by virtue of that fact, it's clear that you  
2           are reacting to having not only opened, but understood  
3           that communication. And you are now being asked to say  
4           in language, that you consent.

5           MS. SCHWANKE: So, you get a solicitation, say,  
6           for example, by email, and it has a number in it to call  
7           and also some kind of code or code number, and you call  
8           and you orally say I consent to receive the information  
9           electronically and I provide this number.

10          MR. SMITHIES: Yes.

11          MS. SCHWANKE: Then how is the information that  
12          you're consenting to receive electronically delivered to  
13          you?

14          MR. SMITHIES: It's delivered along in the  
15          same -- in the same message as the solicitation to  
16          respond to it, they're both in the same communication.

17          MS. SCHWANKE: In the same format?

18          MR. SMITHIES: In the same format.

19          MS. SCHWANKE: Okay, so if you received an  
20          email, then the information that you're consenting to  
21          receive electronically is also sent to you by email?

22          MR. SMITHIES: Yes. As it were, you could have  
23          paragraph 1 that could be, for example, some kind of  
24          notice, and paragraph 2, just in the same essential  
25          format as paragraph 1, could say and now would you

1 please indicate that you understand and accept this by  
2 now telephoning this number, keying in this unique  
3 number, and reciting the following words.

4 So, there would be just two sections of one and  
5 the same document.

6 MS. SCHWANKE: And then is there a situation  
7 where you might on an ongoing basis receive electronic  
8 information, and if so, in what format would that come?

9 MR. SMITHIES: Paragraph 1 might say something  
10 to the effect if you're being asked to consent to  
11 receiving messages like this one, for the next two  
12 years, if you agree to this, please follow the steps  
13 below. Below then would be the steps.

14 So, you're being asked to positively respond.

15 MS. SCHWANKE: Thank you.

16 MS. NIELSON: Christopher, did you want to make  
17 a comment?

18 MR. SMITHIES: Yes, thank you.

19 MS. NIELSON: I think that's going to have to be  
20 our closing comments except for mine.

21 MR. SMITHIES: I would be very interested to  
22 hear certain examples of how consumers are protected by  
23 being asked to consent. And also I think it's very  
24 useful to consider examples where consumers might be  
25 benefited by the kinds of provisions that have been made

1 to protect them by the ESIGN legislation.

2 I want -- I think it would be very constructive  
3 to concentrate on just what sort of consumer is helped  
4 and what sort of potential abuse would be cured by  
5 certain approaches, and I think that we need to perhaps  
6 even stand back from the technological issue, because I  
7 think once we have got a mean -- once we have got our  
8 aims and ideals in place, there will always be some  
9 technology designed to comply with that.

10 It seems to me that just for example, that if I  
11 were a very impressionable and easily persuaded person,  
12 and I have a pressure salesman telling me to press this  
13 button, press this button now, put that card in, just  
14 type this 12-digit number, and I say yes, I will do all  
15 that, but what am I doing here, what's happening? And  
16 he says thank you, that's all right, you can go now, I  
17 could go out of his showroom with my head spinning and  
18 probably have complied with the consumer consent  
19 provisions of ESIGN, but whether I as a slightly  
20 confused consumer have been helped by them, I don't  
21 know.

22 Possibly, you know, a lot of barrages of legal  
23 notices which I have to click to say I understand may  
24 actually not materially help the very consumers that  
25 it's designed to help. That is just an issue that I

1 might raise. And it might also be useful to  
2 contemplate, you know, if I have, in fact, gone through  
3 such a procedure, what has been reasonably demonstrated  
4 thereby?

5 MS. NIELSON: I appreciate your comments,  
6 because it's a lead-in to the next panel session, in our  
7 opinion, this is where we will talk about the benefits  
8 and the burdens. Also, I want to encourage you to  
9 attend the technical demos in Room 532. We have more  
10 from all of our colleagues on the panel, and some  
11 additional ones, so please go down there, ask your  
12 specific questions. Thank you all for your  
13 participation. I think this has been a very interesting  
14 and informative discussion. If you have additional  
15 comments and concerns and questions, I think you can  
16 still get them to us for incorporation in the workshop  
17 record. Thank you very much.

18 (Whereupon, at 12:00 p.m., a lunch recess was  
19 taken.)

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## 1 AFTERNOON SESSION

2 (1:06 p.m.)

3 MS. SMITH: Hi, can we get started? Is  
4 everybody ready to start the new panel? I hope  
5 everybody had a good lunch and they're all fired up to  
6 start again. My name is Kathy Smith, I'm the chief  
7 counsel at NTIA, and the first thing I would like to do  
8 is thank you all again for your willingness to  
9 participate in this public workshop. We enjoyed reading  
10 your comments. I listened this morning to the audiocast  
11 of the early morning panels and I have to say it  
12 appeared that we got a lot of useful information and I  
13 hope that the same thing happens this afternoon.

14 Just to begin so that we can start some ground  
15 rules to set the stage, as I understand it, the protocol  
16 for how we gain responses this morning is if you want to  
17 comment on a question, put your tent upright, and since  
18 I'm not the tallest person in the room, for those of you  
19 on my immediate left and right, please use a long arm so  
20 that I can see you and recognize you as appropriate. I  
21 would genuinely appreciate that.

22 The panel this afternoon is we are loosely  
23 calling the benefits and burdens panel. As all of you  
24 know, Congress asked us to specifically study the  
25 benefits provided to consumers by the electronic consent

1 procedures, any burdens imposed on electronic commerce  
2 by those procedures, and whether the benefits outweigh  
3 the burdens.

4 Congress also specifically asked us to examine  
5 whether there might be any suggested changes to the  
6 statute that either the Federal Trade Commission or the  
7 Secretary of Commerce could recommend to better the  
8 provisions based on what we determine to be the case on  
9 these issues.

10 So, with that in mind, I would like to start the  
11 panel. I also should note that we had a beautiful  
12 set-up at the end of the technology panel by Mr.  
13 Smithies from Selwood who actually couldn't have framed  
14 the questions any better if he had been on our payroll.  
15 So, I would also, if Mr. Smithies is in the room, like  
16 to thank him for the beautiful set-up he did for  
17 beginning this panel.

18 And on that note, I think I will turn to the  
19 first question, which is what are the benefits that the  
20 electronic consent procedures provides to consumers, and  
21 I will open the floor with that. Yes, please.

22 MS. HILLEBRAND: Gail Hillebrand, Consumers  
23 Union. One of the most important benefits of the  
24 particular part of the consent provision that's under  
25 discussion today is that it's self executing in a way

1 different from most disclosures. Mr. Smithies said,  
2 well, do consumers read these disclosures.

3 We know historically that some consumers benefit  
4 by reading disclosures, other consumers benefit from  
5 disclosures because someone else reads them, a grown  
6 child, a neighbor, a friend, an attorney, and other  
7 consumers benefit from disclosures when they don't read  
8 them, because there's a marketplace restriction on how  
9 far you will go if you know that you have to put it in  
10 writing and someone might see it.

11 But the consent provision, and particularly the  
12 reasonably demonstrate requirement, does something else.  
13 It gives lots of flexibility, lots of freedom to  
14 businesses to say how to do it, but in the end it has to  
15 work. It's a standard more than just did we hand this  
16 to you, did you read it. It has to reasonably  
17 demonstrate it, it has to work. It has to make it  
18 fairly likely that when the consumer gets the next  
19 piece, they're going to be able to open it.

20 And it's that self-enforcing feature that I  
21 think provides the greatest benefit to consumers. It  
22 is, of course, hard to measure benefit because the  
23 benefit is in the prevention. It's in the abuses that  
24 don't happen, and the harms that don't occur, and it's  
25 always difficult to even think about how to quantify



1 those, but one of the key benefits that I see is that  
2 the method of consent itself has to show that the  
3 consumer will, in fact, be able to use these kinds of  
4 documents that will be delivered in this fashion at a  
5 later time.

6 MS. SMITH: Actually, I have a follow-up to that  
7 as well. I mean, that's one of the things that we've  
8 been discussing amongst ourselves is with the provisions  
9 only having gone in effect a little less than five  
10 months ago at this point, one of the things we noted in  
11 the comments, and most of your comments actually reflect  
12 it, is there's been very little opportunity to put in  
13 practice in some ways many of these provisions.

14 And so one of the things I think would be useful  
15 to us as we make these report to Congress is if anyone  
16 has any examples, even if it's only anecdotal examples  
17 of how these provisions are working, or the benefits  
18 that you perceive, we would certainly welcome you  
19 putting them in the record today, and/or following up  
20 with us, because that is -- quantifying is going to be a  
21 particularly daunting task for us, given the amount of  
22 time that's elapsed since the provisions became  
23 effective.

24 So, if any of you in following up on this  
25 question have any concrete examples you can give us, I

1 think we would welcome that as well.

2 MS. WINN: Hello, I'm Jane Winn from SMU Law  
3 School.

4 I think one of the benefits in ESIGN is that it  
5 at least tacitly recognizes that right now today in the  
6 world of Internet commerce, there is a critical shortage  
7 of accepted standards and there are serious problems of  
8 inneroperability and obsolescence in technology, and  
9 that is a major obstacle facing anyone who wants to  
10 conduct transactions online.

11 And I think that ESIGN definitely got it right,  
12 by saying that that is not the consumer's problem. That  
13 if this is a -- this is a problem for which there is  
14 today no simple, easy, effective solution, between  
15 asking the merchant to deal with those problems, and  
16 asking the consumer to deal with those problems, I think  
17 the only rational economic choice is to ask the merchant  
18 to deal with them.

19 What I would ask is whether or not those are the  
20 only relevant players for which that problem could be  
21 assigned, that there's a missing third player, which is  
22 the technology developers themselves, and the fact that  
23 it's a burden that has to either be assigned to the  
24 consumer or the merchant, is a function of the way  
25 technology is being developed. And the Federal Trade

1 Commission might be able to play a constructive role in  
2 promoting the development of responsible standards.

3 In my earlier comment, I mentioned standards,  
4 and it become obvious as the topic of standards got  
5 passed around that it was six blind men and the elephant  
6 kind of thing. I understand that the National  
7 Technology Standards Institute is a formal government  
8 standard-developing body, but I would argue that in  
9 electronic commerce, the need for interoperability will  
10 create de facto standards, and that proprietary software  
11 solutions can be de facto standards in the marketplace,  
12 whether or not they've ever been recognized by a formal  
13 standard-developing body.

14 And so there are a lot of very informal, ad hoc  
15 processes that will play a critical role in the  
16 evolution of e-commerce that I think need to be part of  
17 the central focus here, so that it's not a zero sum game  
18 between consumers and merchants.

19 MS. SMITH: I noticed Mr. Gallagher and then Mr.  
20 Wells. Would you like to address some of it from the  
21 business' perspective on these issues?

22 MR. GALLAGHER: Absolutely. First of all, I'm  
23 Paul Gallagher, I'm the President of Fidelity Service  
24 Company. Fidelity Service Company is the transfer agent  
25 for Fidelity's retail mutual fund business, under which

1 we support currently close to three million households  
2 across the United States and roughly 15 million plus  
3 customer accounts.

4 So, my job is making sure that we can really  
5 turn ESIGN into something that is a benefit to our  
6 customers as well as to Fidelity. And I think there's  
7 no question that ESIGN has been a benefit overall in  
8 bringing some national standards and some legal  
9 certainty.

10 One of the big benefits we saw, for example, was  
11 in the whole area of retirement planning, we could  
12 finally -- previously we were constrained. We operate  
13 in 50 states, we had 50 different rules or governing  
14 bodies to contend with. ESIGN gave us national  
15 certainty that we could operate under one standard,  
16 which was uniform, it's technology neutral, and it's  
17 very simple and easy for people to use and for  
18 businesses to understand.

19 And we have seen, just on that particular point,  
20 some very real benefit on the one hand in that  
21 retirement account opening, this is the time of the year  
22 when people open their retirement accounts, with  
23 virtually no advertising from Fidelity, over 26 percent  
24 of all of our retirement accounts are now being opened  
25 online, due to customer choice, ease of use, simplicity,

1       whereas heretofore they were opening in a paper format,  
2       that took anywhere from 10 to 12 days, today it takes  
3       basically 10 to 12 minutes in completion.

4               So, that's one part that I do want to stress.  
5       We have significant other benefits across the whole  
6       range of our business.

7               I think the issue, though, however, specifically  
8       today, in terms of consent, we have seen a burden being  
9       imposed, because of ESIGN, and particularly the consent  
10      provision, and let me just elaborate. We have a  
11      situation today where we deal with customers, customers  
12      can choose to deal with us, either electronically, they  
13      can deal with us face to face in a branch, they can deal  
14      us on a phone or they can deal with us in a paper  
15      environment.

16              The mix of our business is changing  
17      dramatically, more to, at least in our case, more to a  
18      web or electronic-based environment, of customer's  
19      choice, not ours, although we're certainly not opposed  
20      to that, and what we are seeing today, we have  
21      situations today where we have customers who walk into  
22      our branches, they tell us that they would like to  
23      receive their statements and confirms and prospectuses  
24      electronically. We basically have to tell them, because  
25      of the provisions here, that we cannot set that feature

1 up for them at the time that they are sitting across the  
2 desk from us, but they must go home, log on, and  
3 re-consent.

4 Now, I think in the intent of what the bill was  
5 trying to do, we've lost our way a little bit here,  
6 because what we've done is we've now made it effectively  
7 harder. And in our practical experience, we have seen a  
8 decrease of 5,000 to 10,000 enrollments per month since  
9 we put that process in place. So that we were in full  
10 compliance with the legislation.

11 So, I think it's a point that, as we would look  
12 at it, if customers choose to deal with us  
13 electronically, and again, I emphasize choice, that, you  
14 know, clearly if they can interact and go onto our  
15 website and go through our account opening process, et  
16 cetera, they have the ability to interact with us, in  
17 that mode. If they choose interact with us in paper,  
18 that's fine, or face to face as well.

19 I would also highlight that they have the  
20 opportunity, just based on some of the discussions  
21 earlier this morning, at any time that they would like  
22 to change back to paper, that is clearly in their right.  
23 That is a phone call away, or if they -- again, if they  
24 so choose, a written letter away, to change back.

25 So, I think in summary, our -- I think, you

1 know, legislation is still in its early days, I think  
2 one of the commentators earlier this morning said, I  
3 think there are some hurdles. I think we are working  
4 through that as an industry and as an overall  
5 organization, a series of organizations, but I do think  
6 we do have to seriously look as to whether or not the  
7 consent piece really is in effect becoming more of a  
8 hurdle than really a benefit to consumers at the end of  
9 the day. Because at least in our case, we're seeing a  
10 decline in the enrollment, at least on the delivery  
11 side.

12 MS. SMITH: Mr. Wells?

13 MR. WELLS: Hi, yes, Tom Wells with b4bpartner.

14 I echo Paul's comments in that the required  
15 consent, I do not believe applies to, although it  
16 applies to all organizations, I think honorable  
17 organizations that are concerned about their brand  
18 value, would have gone through a similar process anyway,  
19 because it would have been best industry practice to  
20 make sure that the consumer can view the type of  
21 document being sent to the consumer.

22 But as to the specific question of the benefits  
23 for a consumer affirmatively consenting to receiving  
24 records, I see a benefit on the institution side,  
25 because it takes a little of the fear off of how is

1 this -- how does this operate, how do I go about  
2 employing something like this.

3 And I think as you eliminate fear, you're going  
4 to have a greater adoption rate on the institution side,  
5 and when you have a greater adoption rate on the  
6 institution side, then consumers will come along. Not  
7 everybody is like Fidelity which is an innovator or  
8 E\*Trade that takes an active role in it.

9 The second thing is that Elizabeth mentioned  
10 earlier this morning about the mailbox rule, and there  
11 are numerous rules in the physical world to handle  
12 delivery. We lack those rules electronically, and I  
13 think that earlier Keith Anderson asked about email  
14 returning and things like that.

15 It would be good for the FTC in its report to  
16 Congress to propose, perhaps, some delivery mechanisms,  
17 some security procedures for the delivery of documents,  
18 things like that, so that we don't get a disparate  
19 systems that Jane's so concerned about different  
20 proprietary software.

21 And since these rules in the mail world were  
22 developed years and years and we may not have years and  
23 years to develop those types of rules, it would be nice  
24 to accelerate that learning curve with some rules from  
25 government earlier.



1 MS. SMITH: Would you like to address that, Ms.  
2 Saunders, or Mr. MacCarthy?

3 MS. SAUNDERS: Which one?

4 MS. SMITH: I couldn't tell who wanted to  
5 respond specifically to the point that was just made,  
6 but if you want to respond to the question as a whole,  
7 go ahead, and then Mr. MacCarthy.

8 MS. SAUNDERS: Thank you. I would like to  
9 respond secondly to the question as a whole and firstly  
10 to Paul, from Fidelity.

11 I think the problem with the bill is that it is  
12 a one-size-fits-all consumer consent language, and as we  
13 were moving through the process, many of us were quite  
14 willing to devise separate rules for securities  
15 investments because we don't see the same kinds of  
16 problems in those areas as -- or we couldn't anticipate  
17 those as we do with other types of businesses.

18 So, you got stuck with rules designed to protect  
19 from -- protect consumers from activities that we  
20 don't -- I'm sure someone can think up a problem that we  
21 could use this consent to protect from in your industry,  
22 but we don't know yet what it is.

23 MR. GALLAGHER: Right.

24 MS. SAUNDERS: But it's clear -- but I would  
25 argue that even in your situation, when the consumer is

1 sitting at home, and consenting online, you're not  
2 having any problem. When the consumer walks into the  
3 branch, and wants to set up the email -- the  
4 electronic --

5 MR. GALLAGHER: Electronic delivery.

6 MS. SAUNDERS: It's one extra step. You can set  
7 it all up, it just it's not finally confirmed until the  
8 consumer either accesses the website or electronically,  
9 but everything else can be done. I mean, that is  
10 exactly why the language in the bill was added, consents  
11 electronically or confirms consent electronically.

12 So, everything else can be accomplished at your  
13 store. Or at your store front. So, I really don't  
14 think that there is that much burden, but obviously the  
15 burden to you is different than the burden to me.

16 Do I need to repeat for the benefit of this  
17 panel all of the benefits that I have articulated  
18 previously, or can I just ask that they be read into the  
19 record appropriately?

20 MS. SMITH: Do you mean in terms of your earlier  
21 comments this morning?

22 MS. SAUNDERS: Yes.

23 MS. SMITH: Trust me, we have a transcript,  
24 among other things, and we have your comments.

25 MS. SAUNDERS: Thank you.

1 MS. SMITH: Mr. MacCarthy?

2 MR. MacCARTHY: It's Mark MacCarthy from Visa.

3 I wanted to first of all associate myself with  
4 Paul's comments on the -- from our perception at least,  
5 the necessity of having that extra step for consent is  
6 open to question. So, we -- if we were to solve that  
7 problem, you know, we would look forward to a change in  
8 the -- in the legislation that would just, you know,  
9 eliminate that particular requirement, but let me get  
10 back to some of the other discussions that have gone on,  
11 you know, how you comply with this, and different ways  
12 of doing it.

13 One of the big features of the legislation that  
14 we liked was the fact that it provided for flexibility,  
15 and alternative ways of complying with the requirements.  
16 So, you know, words like, you know, standards, you know,  
17 sort of make my body sense go off a little bit, and I  
18 think what really is going on here.

19 You know, whether in the marketplace, you know,  
20 a kind of open standard develops, or whether a  
21 proprietary standard sort of wins the battle for the  
22 marketplace, is really something that the marketplace is  
23 going to have to determine, and I'm a little nervous  
24 that we may be moving in this discussion towards the  
25 idea that the Federal Trade Commission or the Congress

1 or some other regulatory body should sort of push the  
2 market towards one of those outcomes or the other.

3 We like the way the standard got set up as  
4 technologically neutral. If the marketplace pushes us  
5 towards a, you know, uniform standard for everyone to  
6 use that's an open platform where providers can compete  
7 for that open platform, so be it, but I'm a little  
8 nervous that the government may be thinking in response  
9 to some of these comments that it has a legitimate role  
10 to move the marketplace in that direction.

11 Again, flexibility is good, we like the way of  
12 doing it. The way the system is set up now, if the  
13 consumer and the merchant don't agree on a particular  
14 format, there isn't the disclosure, and so we think the  
15 problem in effect gets solved because it doesn't  
16 mismatch there, you don't have a disclosure and the  
17 legislation is clear about that. You don't have to  
18 prescribe in a regulatory fashion a uniform standard for  
19 everyone to use.

20 MS. SMITH: And just to follow up, obviously one  
21 of the benefits that was identified, not necessarily --  
22 I mean obviously as a part of comments as well, was the  
23 possibility, and I believe Mr. Wells alluded to it in  
24 particular, just a moment ago, of greater consumer  
25 confidence that might be derived from this notion that

1 having this procedure somehow or another makes people  
2 more comfortable that, in fact, they're conducting a  
3 transaction that they fully understand or will get the  
4 right information that they need in the future to  
5 understand how things are working. And certainly there  
6 were some earlier comments in the technology panel that  
7 alluded to that.

8 I have a question, does -- are there other  
9 instances like that, other than greater consumer  
10 confidence? Does somehow or other these provisions have  
11 benefits outside of the obvious consumer protection  
12 benefits? Can anyone point to us and say maybe there  
13 will be more online purchases, or people will get this  
14 greater confidence as a result of which somehow or other  
15 there will be a greater benefit for electronic commerce  
16 overall?

17 Has anybody had any experience with anything  
18 like that so that once people get confident in their  
19 ability to conduct transactions online, that it spreads  
20 out into other areas in which they would demonstrate a  
21 greater ability or willingness to conduct other  
22 transactions online? Go ahead.

23 MS. HILLEBRAND: I think there's a benefit that  
24 may develop over time, which is the reasonable  
25 demonstration requirement is going to require people as

1 they design their systems to design something that works  
2 over a broad range over the installed base.

3 I don't want to ask how many people in this room  
4 still have Windows95 running in their house, but I  
5 confess, we have it running in our house, it works fine,  
6 on the days when it's running. And what this means is  
7 particularly if we do have an economic slowdown, people  
8 will have their old machines in place for a longer time,  
9 businesses that want to acquire consent from a large  
10 number of consumers will have to design backwards to old  
11 platforms, to some extent, and as they do that, we will  
12 have less of a situation where the consumer goes on and  
13 gets part way through the transaction and gets dumped  
14 out because they don't support job outlets, they've got  
15 some other lower text system, and the incentive of the  
16 statute provides to design against not the best  
17 technology, not what we have all in our offices, but  
18 what people actually have in their homes will have some  
19 additional spillover benefit in terms of making  
20 e-commerce more available to people.

21 I wanted to comment also on the fall-off number  
22 that was given by Fidelity, because it's troubling.  
23 When you hear a number of that sort, and I would just  
24 stop and say we probably don't know why those consumers  
25 fell off. Some of them may have fallen off because the

1 process was hard to use, but they may have fallen off,  
2 because when you're sitting in the salesperson's office  
3 -- I come from California, this is our experience -- no  
4 one wants to admit that they're not illiterate.

5 No one wants to say well, I don't feel really  
6 good about getting that stuff on computer. You say  
7 sure, here's my email address. And then when you go  
8 home you're sitting there all alone on your screen, it's  
9 a little harder to get on than you thought, you have to  
10 wait in line behind three teenagers to get online, there  
11 are other practical barriers that people have.

12 Maybe your printer, you realize how seldom your  
13 home printer works with the net, and you decide you just  
14 don't want to. So we don't know what number of those  
15 people changed their minds at the point of electronic  
16 confirmation experienced a barrier, and which number of  
17 them were educated about the difficulties in their own  
18 set-ups and decided that they weren't ready for it yet.

19 MS. SMITH: Mr. Dayanim?

20 MR. DAYANIM: Yes, thanks. Well, to address the  
21 question that you posed about other benefits. I think  
22 that businesses would have taken into account the  
23 concerns, Gail, you raised, regardless of whether or not  
24 the consent provisions would have been there. The good  
25 businesses would, the reputable businesses, because

1 that's what they need to do to make themselves consumer  
2 friendly or user friendly, but what I do think that the  
3 consent provisions accomplish from a business  
4 perspective, however imperfectly, is they do give some  
5 additional assurance to the business that if it follows  
6 the procedures that are set forth in the act, that what  
7 they do will be effective. And I think in the absence  
8 of the consent provisions, there may be some question  
9 about that.

10 In other words, if there were no E-SIGN at all,  
11 that would be one extreme, where you would have no  
12 confidence that the transaction itself would be  
13 recognized as valid. If there were no provision at all  
14 for consent, then you could argue there might be a  
15 concern on the part of the business as to whether or not  
16 they obtained valid consent to effectuate the  
17 transaction where there was consent under the existing  
18 law.

19 So, I guess that's a benefit that you could say  
20 the consent provisions provide. I do want to pick up on  
21 a point that has been circulating around in connection  
22 with that, and that is that the reason that you have  
23 that benefit is that because what Congress tried to do  
24 was set a goal. They said this is the goal we want you  
25 to meet, and they didn't say -- they didn't direct



1 business as to how it should get there. And although  
2 that leads to heartburn sometimes on the part of some  
3 businesses because they're worried, you know, they want  
4 to -- they want to lower their risk profile and so they  
5 want to take as conservative a course as possible, and  
6 conversely it leads to glee on the part of private  
7 attorneys who get looked to for advice, the companies  
8 know how to comply. I think it's the right approach  
9 because the alternative is to set a standard, and when  
10 you start setting standards, among the many problems of  
11 setting standards is that in this area, technology  
12 evolves so rapidly that you end up fixing something in  
13 place, it really doesn't accomplish what you want and  
14 there might be alternatives that might even be better  
15 than that, but come down a road a month from now or a  
16 year from now, and you can't thereby accommodate.

17           And I think that -- the last point I'll make is  
18 that a lot of the pressure or a lot of the concern or  
19 support for standards that you hear today really doesn't  
20 rise from E-SIGN, it really rises from this whole concept  
21 of delivery. Because delivery is really a very  
22 different animal than E-SIGN, because when you're talking  
23 about delivery, you're talking about whether or not the  
24 person with whom you're doing business even knows that  
25 the document or the notice of disclosure exists. It's

1 really a different problem of whether they can read it  
2 once it's there.

3           And there really are distinct issues, and as  
4 already has been pointed repeatedly, in this morning  
5 Margot made the point as well, he's not attempting to  
6 grapple with the delivery issue. And there very well  
7 may be a rule for the FTC or for trade associations or  
8 for Congress to address delivery problem, both  
9 technologically, as Professor Winn points out, in terms  
10 of the way the Internet is structured and the standards  
11 that are developing, and also legally, but I don't think  
12 it's in the context of ESIGN.

13           MS. SMITH: Well, interestingly enough, I will  
14 make a plug for the other study that the Commerce  
15 Department has to do and that is is that Congress has us  
16 examining this very issue in some ways and also making  
17 recommendations to Commerce, and that is the  
18 effectiveness of electronic delivery of documents versus  
19 traditional, more traditional delivery of documents in a  
20 paper world.

21           So, in fact, there is some attempt, at least  
22 Congress recognized that this -- that that particular  
23 issue, and has us grappling with that as well to make  
24 recommendations to Congress.

25           So, I believe comments, we actually put out a

1 notice on that and had comments come in just yesterday;  
2 however, I will plug again to the extent anybody after  
3 this public workshop is interested, please feel free to  
4 continue to provide us with information, because that is  
5 an issue, again, that Congress obviously was cognizant  
6 of and wanted us to work on.

7 Now I would like to recognize Mr. Anderson and  
8 then Mr. Gallagher, believe it or not, we have from the  
9 peanut gallery a question for you, so I just thought I  
10 would let the anticipation build.

11 MR. GALLAGHER: Oh, boy.

12 MR. ANDERSON: Well, I'm going to throw a  
13 question to Mr. Gallagher, too.

14 MR. GALLAGHER: Two of them.

15 MR. ANDERSON: But let me preface this by saying  
16 I'm always hesitant, my question is going to be why --  
17 you described the necessity of someone who is in an  
18 office and says they want electronics to go home and  
19 sign on, and I guess what I'm wondering is, why can't  
20 you do it a little more simply than that, why can't you  
21 send them an email to which they then reply, which would  
22 sort of make it -- it seems like it would make it  
23 easier, and I'm wondering, since I'm not a big believer  
24 in the government knowing better than the private sector  
25 how to do things, I'm wondering why that wouldn't work.

1           I also, I guess, while I had the floor had a  
2 question for sort of Mr. Wells and Mr. Dayanim. For the  
3 people who say that there's a benefit to the consent  
4 requirement or to the demonstration requirement in  
5 ESIGN, in that it will make consumers more comfortable.  
6 If, in fact, engaging in a demonstration will make  
7 consumers more comfortable, why should we not anticipate  
8 that businesses will voluntarily adopt such a system,  
9 why do we need a law to require it?

10           MR. DAYANIM: Should I go first, or Paul, do you  
11 want to --

12           MR. GALLAGHER: I'm happy either way.

13           MS. SMITH: Go for it.

14           MR. GALLAGHER: I think a couple of things, just  
15 let me clarify one point. It's not only in the end.  
16 Again, our enrollment, you used to be able to come in,  
17 get paper, via the phone, under the SEC rules and  
18 regulations, or in the branch. And I drive home the  
19 point, I just wanted to clarify, I think Gail made the  
20 point earlier.

21           The decline is not solely from the branches,  
22 we're seeing a fairly substantial decline as I alluded  
23 to earlier, and that's coming from all those different  
24 channels. Because again, I think what we have, is we  
25 have, if you really want to call it the moment of truth,

1 we have a customer on the line, geez, can I get -- I'm  
2 inundated with paper, which is a common complaint that  
3 we hear, because of all the regulatory notices that we  
4 need to send out, et cetera, and we say you can go  
5 online. And they say well, can you do that for me.

6 Today, again, at least our interpretation  
7 internally with inside counsel is, we must, again, to be  
8 in full compliance, and we take a conservative approach  
9 on this, we direct the customer to go online themselves,  
10 log into our website and then just go in and put down on  
11 their preferences and say I want electronic delivery.

12 We had, in fact, on our old applications, up  
13 until August or so of last year, you actually could tick  
14 off on the paper application that you wanted electronic  
15 delivery. And our internal counsel advised us that  
16 based on the new law, that we would have to, in fact, go  
17 and redirect people.

18 Now, in certain branches we can do that, and  
19 some people do it, but I think again, whether it's, you  
20 know, kind of a last minute reconsideration of the  
21 issue. People are not, at least in our case, not doing  
22 that.

23 Now, to contrast that, let me just make one  
24 final point. We are seeing just an explosion again in  
25 the utilization of all of our web functionality and

1 features. Today, now roughly a quarter or 25 percent of  
2 our accounts are being opened online. That's up from  
3 virtually zero, you know, two or three years ago.

4 So, those are meaningful numbers. We're seeing  
5 lots of activity in terms of address changes, you know,  
6 just day-to-day routine maintenance, et cetera. And  
7 we're seeing an increasing number of our customers who  
8 have email access and sign up for -- at least give us --  
9 register with us their email address.

10 Now, some of them choose not to use it, some of  
11 them do, but I think in general, at least in the  
12 population that we serve, and again, it may be different  
13 than the broader population, is very computer literate,  
14 very happy to do business with us, because the focus  
15 that they're after is ease of use. Any time, anywhere,  
16 24 hours a day, they can go online, and do whatever,  
17 open an account, move money between, you know, from  
18 their account to their son or daughter's account, et  
19 cetera, whatever the various things may be.

20 So, we're seeing that demand from our customers.  
21 I think that in many ways is one of the major benefits  
22 of ESIGN that we've really realized, but I think the  
23 consent provision has been a little bit, and again, I  
24 come back to the comment earlier, I think it's more of a  
25 hurdle than it is a barrier, it's just something we need

1 to work through, because it has been only five months,  
2 and I would say, you know, we're at the early stages and  
3 at the advance, you know, very much in front of, maybe  
4 some of the broader industry or other industries in  
5 dealing with some of these issues, but in our particular  
6 cases, clients are demanding that from us.

7 MR. ANDERSON: But you have a feeling, I mean  
8 your counsel sort of said the consumer needs to go home  
9 and initiate it himself, you can't sort of prefeed it.

10 MR. GALLAGHER: We can, again, we can bring  
11 people to -- when we have kiosks in our site, I think  
12 that would suffice, but again, they'll just have to log  
13 on via the web, get into their site.

14 So, we can do that, I think, again, the issue  
15 that we see, it's all about, you know, we have people  
16 come in and literally, I mean, we have the data, people  
17 -- if it takes 15 minutes, what I call the one click  
18 view of the world. If it takes too long, click, and  
19 they're gone. And we don't want them to be gone, we  
20 want them to stay with us.

21 So, I think we lose that kind of sales  
22 opportunity, if you will, in the sense of the e-delivery  
23 piece alone. Obviously on the other side of our  
24 business, we're seeing a very positive impact, an  
25 extremely positive impact.

1           MR. WELLS: Really, I'm going to echo the same  
2 thing Ben said. One, I think that the rules of  
3 requiring consent are a benefit to the business  
4 providing the consent, the institutions, for two reasons  
5 that Ben already mentioned. One is, if there are no  
6 rules, there will be less adoption rate, and the reason  
7 there will be less of adoption rate, is because it's  
8 difficult to manage risk if there's no minimum rules  
9 involved.

10           The second thing is that, again, I go to these  
11 rules, I don't think are really going to control the way  
12 Fidelity and Visa operate, because they're a best  
13 businesses practice standard, they're concerned about  
14 brand value, they're all concerned about plaintiffs and  
15 lawsuits out there that look to a lack of rules as an  
16 opportunity to create a lottery ticket. So --

17           MR. DAYANIM: Yeah, the only thing I would add,  
18 for -- on the first point that you inquired about,  
19 without presuming to speak for Fidelity, I think perhaps  
20 one of the issues there as well was the way the consent  
21 requirement is framed, is that you have to in some way,  
22 however that's interpreted, demonstrate that the  
23 consumer is able to access the record that will be  
24 provided, and since Fidelity has a web model and not an  
25 email model, I don't think sending an email to the



1 consumer, it would be very difficult to construct a way  
2 for making that satisfied requirement without bringing  
3 the consumer back to the site where the disclosures are  
4 going to be provided. I think that may be part of the  
5 issue there, but that's sort of a Fidelity-specific  
6 issue.

7 In response to the question about why have a  
8 reasonable demonstration requirement at all, I wasn't  
9 suggesting, and I don't want myself being interpreted as  
10 having suggested that the reasonable demonstration  
11 requirement is necessary to accomplish the goals of  
12 achieving business certainty. A rule is.

13 In other words, a consent provision in the  
14 statute has the benefit of giving businesses greater  
15 certainty, as Tom just mentioned. Whatever the rule is.

16 Now, there are reasons that you would want the  
17 rule to have certain components that are separate and  
18 apart from that, consumer protection reasons and other  
19 reasons, and it just so happens that the rule that was  
20 chosen was this reasonable demonstration requirement,  
21 and as a result of that, compliance with that  
22 requirement gives businesses that certainty, but it  
23 could be anything. It could have been simply the  
24 hardware/software requirements, and if that were the  
25 rule in the statute, that would be provide businesses

1 with certainty, too, because the statute would then say  
2 if you've complied with that requirement, then you've  
3 satisfied the writing requirement and so that would give  
4 you the safe harbor that you get now with the reasonable  
5 demonstration.

6 The reason they didn't do that, the Congress  
7 didn't do that, is because they were countervailing  
8 considerations in addition to just business certainty  
9 that were at issue.

10 MS. SMITH: On that note, at one point, I  
11 believe Ms. Weinberg wanted to comment, I'm sorry it  
12 took me so long to get back around to you, but do you  
13 want to jump in here?

14 MS. WEINBERG: Sure. I put my card down because  
15 I didn't want to be redundant, but what I have to say is  
16 slightly different.

17 First of all, I would echo all of the comments  
18 that have previously been made about the benefits to  
19 consumers, and the benefits in fighting fraud and having  
20 this reasonable demonstration. NACAA is an association  
21 for government consumer protection, so our main concern  
22 in the universe is fraud.

23 Consistent with that concern, I would say that  
24 another benefit that this provision brings is that it  
25 levels the playing field for legitimate businesses. The

1 argument has been made several times that the "good  
2 businesses," quote unquote, are going to do this  
3 automatically. They want to authenticate their  
4 customers, they want to make sure that their customers  
5 are able to receive the documents because they want an  
6 ongoing communication, they want to make sure that it's  
7 a comfortable sort of format.

8 On the other hand, regardless of what law is in  
9 place, there are certain people who are not going to do  
10 anything that even approaches this, and it's sort of the  
11 ones that are in between that are more affected by and  
12 more drawn into the benefits of this law, because they  
13 will see that as more legitimate businesses have to  
14 conform with the requirements of this act, they'll say  
15 well, okay, it's the cost of doing business, yes, we're  
16 going to do this. So, that's another potential benefit  
17 to throw into the mix.

18 MS. SMITH: Ms. Harrington?

19 MS. HARRINGTON: Thank you. I have a question  
20 for Paul, for --

21 MR. GALLAGHER: I seem to be a popular guy.

22 MS. HARRINGTON: For other vendors, and for  
23 anyone listening out there, and I think that we would  
24 appreciate responsive information now or in the future.  
25 And here's my question: You suggest that abandonment is

1 some kind of proxy, may be a proxy, for burden, and I'm  
2 wondering whether since your company does business by  
3 direct mail, by telephone, in person, and online,  
4 whether you have any aggregate abandonment data for each  
5 of those media, and whether other companies, might, for  
6 example, Consumers Union, also on the business side, not  
7 on the policy side, does business in several media, and  
8 I'm wondering whether you might have any abandonment  
9 data, and also whether there's any comparative data that  
10 might be available for online abandonment rates for  
11 let's say the last, you know, one-month, two-month  
12 period compared with the same period a year ago, and I  
13 know that that abandonment suggests all sorts of things,  
14 but if we are looking at abandonment, maybe as a proxy  
15 for burden, it would be just generally useful, I think,  
16 to see some aggregate abandonment data, or if anyone  
17 knows any here, and could talk about it, I would  
18 appreciate that.

19 MR. GALLAGHER: Let me, please, maybe respond  
20 quickly. We have some very specific data regarding  
21 e-delivery, what we call e-delivery, electronic delivery  
22 of statements, confirms, et cetera, which we would be  
23 happy to share with the Commission. I mean, there is  
24 some confidentiality involved here, but we would share  
25 it with you, but I can just show, I don't know if

1 anybody can see it, it's unfortunately a relatively  
2 small graph. But you can see the decline goes fairly  
3 significantly, we kind of peak on the old SEC  
4 environment and as we went into with the new practices  
5 in the latter part of last year, you see a very steep  
6 drop-off. That's, again, when we started to withdraw  
7 off of the applications, we stopped accepting telephone  
8 consent, paper consents, et cetera.

9           So, we saw, and we see it now peaking up a  
10 little bit, which is good news, because I think, again,  
11 the people are getting more comfortable with it, but at  
12 least in our case, on e-delivery alone, forget general  
13 abandonment, because as you rightly point out, there's a  
14 whole raft of other issues in there. You have, you  
15 know, shoppers, et cetera. But these are our customers,  
16 Fidelity customers who are not enrolling, at least not  
17 enrolling in the path that we've been used to in terms  
18 of percentage of enrollment for e-delivery options,  
19 which we believe at least one contributing factor is  
20 this requirement for re-consent.

21           There could be others, and I think we're  
22 studying that as we speak, but we believe unquestionably  
23 we've seen a decrease and we think it is because it is  
24 more complex, because it's all about speed and accuracy.  
25 And increasingly about speed and accuracy, at least in

1 the business that we are in.

2 So, that's just -- in our case that's a tangible  
3 example. I think the broader issue of abandonment, we  
4 have, you know, I know broadly the numbers that we have  
5 when people come in to open an account, and, again, a  
6 lot of them are sometimes just fishing, they're looking  
7 at our site, but increasingly, it's not due to a  
8 technology issue that's inhibiting them from signing up,  
9 it's more they didn't like what they see, they didn't  
10 like the pricing, they couldn't find the fund they want,  
11 et cetera, et cetera, and off they go.

12 I have some of that data, I don't have it, you  
13 know, top of mind, but we could certainly share some of  
14 that with you, at least from our perspective we would be  
15 happy to do that on a, you know, somewhat confidential  
16 basis.

17 MS. SMITH: Mr. Buchman, would you like to  
18 contribute to this discussion?

19 MR. BUCHMAN: Yes, hello everyone, I'm John  
20 Buchman with E\*Trade Bank, we are the country's largest  
21 Internet bank, with at last count over 400,000  
22 customers.

23 I would like to perhaps step back just a little  
24 bit and make more of a global comment initially, and  
25 that's with regard to the legislation and the consumer

1 consent provisions. I think when I'm not working for  
2 E\*Trade Bank, I moonlight as a banking law professor,  
3 and one of the things that I've learned teaching banking  
4 law for over 11 years is that both legislators and  
5 courts and regulators for that matter are not very good  
6 ones to deal in the area of technology. And most of the  
7 time they recognize and realize that, but I think what  
8 you have here, is a situation where you have a very  
9 technology static piece of legislation frozen in time as  
10 of last summer.

11 And what we all have to remember is that the  
12 Internet, as we know it, has been in existence for only  
13 about six years now. And the technology is evolving,  
14 and developing very rapidly. And so you have this piece  
15 of legislation that has come at a time of the infancy of  
16 the Internet, and I think I may be somewhat optimistic,  
17 but I think in a number of years, this is going to be a  
18 somewhat academic discussion, because the technology  
19 will have moved so far beyond where we are now.

20 And I think the technology will render the  
21 consent provisions that we now have in the legislation  
22 somewhat perhaps quaint and cumbersome. But I can  
23 foresee a situation not too far down the road where we  
24 have been talking about the specific mechanics of this  
25 well, you have to go home and log on or we'll send you

1 an email and get a response back.

2 I can see where we would regard this kind of  
3 discussion a few years as requiring an in-store  
4 customer, which we don't have, by the way, to put down  
5 his or her phone number and then there would be a  
6 requirement that the notifier call that number to make  
7 sure that they can answer the phone. I mean, it's going  
8 to be on that level of why are we making people do this.

9 And I agree with Professor Winn, I think we do  
10 have a ways to go to make sure that the technology is  
11 compatible with the vast majority of the people's  
12 ability to use it. But if people look where we are now  
13 and where we were five years ago, we've made incredible  
14 strides.

15 I regard for my own business purposes, use of  
16 email to be an extremely reliable way of communicating  
17 with people, and I find the Internet to be a very great  
18 way to conduct business. And so the only unfortunate  
19 thing now, I mean I think it's a close call, I really  
20 do, as to how you could go on these provisions now, but  
21 I think as time goes on, they are going to be rendered  
22 more and more technologically obsolete.

23 MS. SMITH: Well, and I don't know that anybody  
24 in this room would necessarily disagree with you, but  
25 our problem is an immediate problem, and that is what do



1 we do now. I mean, at least from those of us at the  
2 Department of Commerce and the agency that writes the  
3 Digital Divide report, while it's a very interesting  
4 concept as to where the Internet will be three, four,  
5 five, six years from now, given it's in its infancy.  
6 We're not there yet, and so the question is how do we  
7 make these provisions work today, how do we make them  
8 work for business, how do we make them work for the  
9 consumer and what, if any, recommendations do we have  
10 for Congress to make that happen now.

11 So, again, I'm not disagreeing with you about  
12 what the future may hold, who knows what's going to  
13 happen three or four years from now, but at least the  
14 good people from the Economic Statistics Administration  
15 and the Census Bureau who helped us collect that data on  
16 where we are in the Digital Divide and NTIA, we're not  
17 there today.

18 So, on that note, I believe, Mr. Buckley, you  
19 have been waiting very patiently for your turn, and so  
20 now I recognize you.

21 MR. BUCKLEY: Thank you very much.

22 I think it's very important to recognize that  
23 the original Insley Amendment as it passed the House did  
24 not contain the must demonstrate electronically, you  
25 know, must consent electronically, must get a reasonable

1 demonstration of there ability to use. Those were added  
2 in conference committee, behind closed doors, it wasn't  
3 an open conference, for that matter, it was done all  
4 quietly.

5 And those were provisions that didn't have the  
6 benefit of a wide airing as opposed to the remainder of  
7 the Insley Amendment which was debated on the floor of  
8 the House of Representatives.

9 Those two provisions, I think, are primarily  
10 addressing the concern about predators, which Margot has  
11 articulated. If you look at legitimate businesses, they  
12 have, and I think this is an extremely important point  
13 to keep in mind, they have a need to make sure it works  
14 as well. They are going to use this -- Fidelity is  
15 using this for the purpose of communicating with its  
16 customers. If the customers can't use it, there is  
17 absolutely no point for any legitimate business to  
18 encourage customers to sign up to engage in a futile act  
19 and to have Fidelity wasting its time and money dealing  
20 with people who don't know how to do this or can't do  
21 it.

22 So, these are purely designed to deal with the  
23 predator issue. And in that context, we come back to  
24 the question which you raised at the beginning of the  
25 session this morning, which is in designing systems like

1 this, which can be hurdles, how high a hurdle it is is  
2 yet to be determined, but can be hurdles. I don't think  
3 they're ultimate barriers, but how high a hurdle should  
4 be erect to avoid the problem of predators. That's the  
5 question I think we really face here.

6 And, Margot, you're all set to answer.

7 MS. HILLEBRAND: As I am.

8 MS. SMITH: And I was about to say and all of  
9 the flags went up at one time. Mr. MacCarthy, I'll let  
10 you go first and then we'll do the round, how about  
11 that?

12 MR. MacCARTHY: I just had a quick comment on an  
13 earlier comment, and it really picks up on Jerry's point  
14 about the reason for having the provision in there, the  
15 reasonably demonstrate provision, it is designed to  
16 catch the bad guys, the predators and so on, and to some  
17 degree that is a kind of fraud that, you know, people  
18 are worried about when they're trying to protect  
19 customers.

20 But there's another kind of fraud that you may  
21 think that the provision is directed towards, and  
22 that's, you know, does the business really know the  
23 identity of the person that they are dealing with. And  
24 I think it's important to clarify that the reasonably  
25 demonstrate provision really doesn't help solve that

1 business problem.

2 What the provision really does address is, you  
3 know, does the person know how to use the equipment, can  
4 he receive the information in an appropriate form and  
5 all that kind of stuff, but it doesn't verify that the  
6 person is who he says he is, and if that's the concern  
7 that businesses might have in that area, the reasonably  
8 necessary provision really didn't address that problem.

9 MS. SMITH: Ms. Weinberg and then Ms. Saunders  
10 and then we'll go to this side of the room, how about  
11 that?

12 MS. WEINBERG: It's not just a question of the  
13 predators, though, it's also, you know, what we were  
14 talking about before in terms of building consumer  
15 confidence on the use of the web, a lot of people think  
16 oh, yeah, sure, email, that will be easy, I'll take this  
17 via email, and then when they go to open the document,  
18 they may not be able to open the document, they may not  
19 be able to access a website at home that they can access  
20 in somebody else's office.

21 Some people may be on Netscape 2 and 3, and you  
22 can't get to half the websites if you're using a really  
23 old version of some of these browsers, and you may not  
24 realize that until you actually go on. And it's also  
25 consumers who are just sort of unconcerned and don't

1 think about the implications. It's one thing to say  
2 I'll get an email, and it's another thing to say oh,  
3 this means I won't be getting paper. And people still  
4 like paper. And having that sink in is an entirely  
5 different level of awareness, and unless that's sort of  
6 in your place that it's a replacement, it's not an  
7 addition, that's going to be lost on a lot of people.

8 MS. SMITH: Ms. Saunders?

9 MS. SAUNDERS: I think it bears repeating this  
10 point that the test is to accomplish three different  
11 purposes. One, that the consumer has access to the  
12 Internet, and that probably, that purpose is the one  
13 that is most designed to protect against predators, but  
14 two, that it -- that the consumer has access to this  
15 particular type of software and can actually open these  
16 documents. And three, to emphasize to the consumer the  
17 importance of getting -- of the importance of agreeing  
18 to receiving electronic documents, so that some of that  
19 drop-off may be from consumers who realize that they  
20 will no longer be getting writings, and they may be  
21 uncomfortable with that.

22 I don't know your statistics, I wouldn't presume  
23 to say that that's always the reason. But that's the  
24 three-pronged reason for the addition to the Insley  
25 Amendment in conference, which was of this language.

1           I think we need to remember that everybody in  
2           this room, I venture to guess, has access to not one but  
3           two email accounts, at home and at work at computers.  
4           The majority of the country has no access anywhere,  
5           either at school or at work or at home. And we are  
6           designing a law that is supposed to work for everyone,  
7           forever, or until it's changed. And it's -- we just  
8           need to keep in mind that there are not only predators,  
9           there are also legitimate businesses, that for  
10          legitimate business reasons may want to avoid having the  
11          consumer get copy of a notice, the provision of which  
12          ten times out of 100 may lead to a lawsuit.

13                 And there are some notices that are required by  
14          law that when delivered to consumers may lead in a high  
15          percentage of time to the initiation of a lawsuit by  
16          that consumer. And if the business can avoid the  
17          consumer actually receiving the notice, there's a  
18          legitimate business reason for the business to avoid it.  
19          If they can still satisfy the underlying legal  
20          requirement. And that's the type of dynamic that we  
21          wanted to avoid creating with ESIGN, or try to address.

22                 MS. SMITH: Professor Winn?

23                 MS. WINN: There's been some illusions to a  
24          problem that in law school we referred to as legislative  
25          lock-in, that if you write something into a standard,

1 into a statute, that the marketplace will become locked  
2 into that particular provision in the statute, and then  
3 if the costs of switching later are too high, we'll just  
4 all have to deal with the inefficiencies that result  
5 from that. And I wanted to respond to that, that that  
6 clearly is a problem, and I think that one of the things  
7 that E-SIGN consumer consent provisions got right was to  
8 take a technology-neutral approach to try and target  
9 more the expected outcome in terms of merchant consumer  
10 dynamics and not specify a technology architecture.

11 What I thought was interesting was your comment  
12 that we have to be focused on the present and that  
13 speculating about where the Internet is going in five to  
14 ten years is not germane to the information that  
15 Congress needs from the FTC today. And I would argue  
16 that that may not be the case, that electronic commerce  
17 technology is rolled out progressively, and that there  
18 are developments taking place right now today that  
19 haven't yet been realized in transactions, but that in  
20 the fullness of time, will have a definite impact and in  
21 all likelihood what the impact will be will be to  
22 constrain specific choices that consumers might  
23 potentially be able to make, but then will be denied  
24 because of a different kind of lock-in, and we could  
25 call that kind of a lock-in market failure lock-in, that

1 when competitive markets don't work properly, because  
2 people are trying to maximize profits on a quarterly  
3 basis, they make extremely short-term decisions, and  
4 they ignore long-term complex research problems.

5 This is a very serious problem in the  
6 development of the information technology architecture  
7 that was described in detail in a book published by the  
8 National Research Council called Trust in Cyberspace, it  
9 was published in 1999, and it catalogs the different  
10 kinds of market failure that the information technology  
11 architecture is subject to.

12 So, if there is a risk of market failure and  
13 regulators take a hands-off approach and wait and see,  
14 there is a real risk to the American public that there  
15 will be spectacularly bad outcomes, and I would hold up  
16 information privacy as an example of adopting a wait and  
17 see approach, and then it's unclear to me that the  
18 problem of technology as it's implemented today can be  
19 fixed anymore in the United States.

20 I think that the question of whether the  
21 American public will have meaningful information privacy  
22 rights has already been decided because we have market  
23 failure lock-in and the switching costs to implement  
24 effective privacy protections will be too high.

25 I would argue we have the same problem with



1 mobile telephony. In the European union, people have  
2 cell phones that are cheaper than ours, that have better  
3 service than ours, and that's because they have open  
4 public standards. In this country, we have crappy cell  
5 phone service and we pay a lot for it, and I don't see  
6 that there's any likelihood that that's going to change.

7           So, what we're discussing here is the electronic  
8 contracting interface, and I think that it's true that  
9 there's a real problem of legislative lock-in, if  
10 government regulators start trying to pick and choose  
11 among technological standards.

12           God knows, I've written tons of articles saying  
13 that legislation should not refer to public key  
14 infrastructure in digital signatures for precisely that  
15 reason. So, I understand that's an issue. What I would  
16 suggest as a strategy is the gentleman, Mr. Wells, and  
17 Mr. Dayanim pointed out that reputable legitimate  
18 merchants are benefited by having a baseline  
19 established. In what terms should that baseline be  
20 established? Who about descriptions of outcomes that  
21 are acceptable and unacceptable in the most general  
22 terms plausible in light of the technology.

23           And if that sounds unrealistic, I would say  
24 that's what the SEC did in its '95 and '96 electronic  
25 media releases. It provided dozens and dozens of

1 concrete examples of ways of using electronic  
2 communications technology that were acceptable or  
3 unacceptable to regulators. And that provides enough  
4 information for technology developers so that they can  
5 agree on a common framework or baseline that's conducive  
6 to fair, efficient, reasonable consumer transactions.

7 MS. SMITH: I just want to clarify something.  
8 I'm not suggesting that what may happen four or five  
9 years from now isn't germane, I was being much more  
10 practical than that. June of this year, we are going to  
11 be reporting to Congress, okay, and so on what has  
12 happened basically in the last -- at that point, maybe  
13 seven months, backing out the printing time, okay, of  
14 any report, and so what I was suggesting was that we  
15 have a very real practical problem from the  
16 institutional standpoint at the Federal Trade Commission  
17 and the Department of Commerce in that with a very  
18 limited amount of information and a limited amount of  
19 time in which to study this issue, we have to study the  
20 issue, present our findings to Congress and make  
21 recommendations, if any, that we have on the current  
22 issue.

23 Not that forward thinking isn't a wonderful  
24 exercise, but we have actually a very practical issue in  
25 terms of what we are trying to accomplish today, not

1 what we're trying to accomplish or what the fundamental  
2 missions of the Federal Trade Commission and the  
3 Department of Commerce are in this area overall.

4 So, that was the only thing I meant in terms of  
5 we've got a practical issue today that we're trying to  
6 address and not suggesting that the overarching issues  
7 aren't important ones that don't have a future potential  
8 to them.

9 I'm sorry, Ms. Hillebrand?

10 MS. HILLEBRAND: I wanted to disagree with John,  
11 Jerry, and Margot, in slightly different places.

12 I wanted to disagree fairly strongly, John, with  
13 your characterization that the ESIGN consent requirement  
14 is a static requirement. It's an existing requirement,  
15 but it's a flexible requirement, and we heard that this  
16 morning when people said we're glad Congress didn't tell  
17 us how to do it, just that it has to reasonably  
18 demonstrate.

19 That means, I think, that in five years, if the  
20 Internet, quote, "grows up," sometimes I think it will  
21 still be an unruly teenager in five years. There will  
22 be a different set of problems, but we'll still need to  
23 get to that same result of reasonable demonstration.  
24 So, I would disagree that that's a static test.

25 I would also want to disagree that this law is

1 just for predators. I think that the -- make sure you  
2 can get online at least once, and I'm sorry if I'm  
3 overcharacterizing this.

4 MR. BUCKLEY: I didn't say the law was just for  
5 predators.

6 MS. HILLEBRAND: Well --

7 MR. BUCKLEY: I said these two provisions within  
8 the consent provision.

9 MS. HILLEBRAND: But we see these two provisions  
10 as the guts of the consumer protection in the advent,  
11 and so it's hard for me to separate the two, I  
12 appreciate the clarification.

13 This law protects something else, and I think  
14 some of you have heard Margot say something that she  
15 didn't say, and that's why I want to disagree with her  
16 slightly. It protects not just those who cant' get  
17 online, but those for whom online delivery of legally  
18 required notices is not their preferred method of  
19 delivery. It protects customer choice.

20 And when you have customer choice, you have a  
21 marketplace incentive that is not otherwise there to  
22 induce the customer, to set it up so that it's easy for  
23 the consumer so that if the customer wants to do it, to  
24 talk about it in a marketing way, not just in a lawyer  
25 way.

1           Remember, 101 deals with legally required  
2 notices. These notices are not always information that  
3 the business wants to put front and center to their  
4 consumers, and if you have any doubt about that, compare  
5 the last marketing flyer you got from your bank with  
6 your checking account terms and conditions. They're  
7 written in very different language, they're presented  
8 very differently, one is designed to catch your  
9 attention, and one is designed to put you to sleep. Or  
10 it's just not well designed and therefore it puts you to  
11 sleep.

12           So, consumers who -- it's not just consumers who  
13 are not digitally literate who might make a rational  
14 choice to stay off the net for -- or stay out of the  
15 electronic delivery of legally required disclosures. In  
16 households where there are shared responsibilities, it  
17 might be easier to have a file that people can just look  
18 at. Some people are social users of email, they might  
19 use it to communicate with relatives but would feel  
20 obligated to check it every day the way we check our  
21 mailboxes every day, if they're going to get business  
22 notices.

23           People who have been exposed to identity theft  
24 might make a very rational choice that they just want to  
25 limit the amount of information about them that is

1 stored in a variety of different databases, and might  
2 think that agreeing to receive information  
3 electronically is also going to mean it will be stored  
4 more widely and for a longer period of time.

5 And I think that's it. Thank you.

6 MS. SMITH: Thank you. I noticed -- well,  
7 actually we have one other question from the gallery, it  
8 says, have the agencies considered asking Congress to  
9 extend the report date by sufficient time to allow a  
10 better, more thorough, assessment? That's an  
11 interesting question, that would actually take a change  
12 in the law, it's a statutorily mandated date, and for us  
13 to actually seek an amendment to the ESIGN probably  
14 would give about two-thirds of the people in this room a  
15 heart attack if we tried to re-open ESIGN, the other  
16 third of you we would just hospitalize for a short  
17 period of time.

18 So, I would probably be able to say with a fair  
19 degree of comfort that the Department of Commerce at  
20 currently has not asked to extend the deadline and I  
21 would leave it up to Marianne and Eileen to let me know  
22 whether or not they've had that wild hair and felt  
23 compelled to go out on that limb. And they're shaking  
24 their head. They don't even want to go out orally,  
25 they're just shaking their heads no.

1           So, on that note, I also note I didn't ask the  
2 question I had gotten earlier, we got kind of carried  
3 away by the tide, but Mr. Gallagher, if you're ready to  
4 be back in the spotlight again.

5           MR. GALLAGHER: Absolutely.

6           MS. SMITH: There was a question from the  
7 audience, is there any legal requirement that Fidelity  
8 provide statements to its customers, quote, "in  
9 writing?" If not, why would the consumer consent  
10 provisions apply? I think that's a pretty easy question  
11 for you, so --

12           MR. GALLAGHER: I think everybody knows the --  
13 well, hopefully everybody knows the answer, yes, of  
14 course there's a requirement, an SEC requirement that we  
15 provide statements. A brokerage basically every month,  
16 mutual funds at least quarterly, depending on the level  
17 of activity. So, that's why we do it. Other than that,  
18 it's good business practice as well.

19           MS. SMITH: Mr. Buchman, you wanted to make some  
20 comment?

21           MR. BUCHMAN: Well, I was going to talk about  
22 three points that I thought were important to make, in  
23 terms of how I thought the issue could best be addressed  
24 at present. I think I am troubled by the requirement  
25 for the consent being electronic for a variety of

1 reasons, but I think the way you really go at this is to  
2 make sure that you have the informed consent of the  
3 consumer, and I think the way you do that is through the  
4 disclosures that you're required to provide.

5           And I think there is a need to give some serious  
6 thought to what kind of disclosure should be provided.  
7 But, for example, if we came up with a shimmer box kind  
8 of disclosure that said do you have or have access to a  
9 computer, do you have an email address, are you able to  
10 receive files in Adobe, are you able to go on the  
11 Internet.

12           If a person -- and a number of our accounts are  
13 opened through the mail, through a newspaper and other  
14 ads, if a person puts all of that down and says yes, and  
15 then I hereby consent to receiving my bank statements  
16 electronically, by the way, most of our customers do  
17 not. I mean, the banking environment is somewhat  
18 different from the securities environment.

19           I prefer to receive a monthly piece of paper,  
20 for example. My little confession.

21           MR. GALLAGHER: You heard it first here.

22           MR. BUCHMAN: But I do trade online, so -- but  
23 if someone has done -- taken all of those steps, and the  
24 disclosures are very clear in that regard, why should we  
25 really have to go through the extra step of the consent



1 being electronic and the reasonable demonstration? I  
2 think we have to take -- at some point we have to give  
3 consumers a little credit here, and if they tell us all  
4 these things, we should actually believe them. And so  
5 we -- that's sort of the E\*Trade approach, we, you know,  
6 we give the -- we want to empower our customers.

7 Also, I think a much better approach is the  
8 market in existing laws as opposed to the consumer  
9 consent provisions that are in the statute as now  
10 drafted. What do I mean by the market? Well, I think  
11 we have established that there are the one-shot black  
12 hats and then there are the other entities such as  
13 financial services companies that have ongoing customer  
14 relationships.

15 We don't want to violate our customers' trust.  
16 We want to do what the customers want. We don't want to  
17 pigeon hole all of our customers into receiving  
18 electronic statements if, in fact, they don't want to.  
19 They'll just leave, they'll either go to a brick and  
20 mortar bank or they'll go to another Internet bank that  
21 gives them the paper option.

22 So, we have no incentive whatsoever to steer  
23 customers in a direction that they don't want to go. We  
24 want to give the customers complete choice in terms of  
25 how they communicate with us and how we communicate with

1       them.  And it's a two-way street.

2               So, I would say trust the market.  I know that's  
3       a novel thought in some parts, but I would say trust the  
4       market for the vast majority of entities who are dealing  
5       online who have financial and many other incentives to  
6       treat the customer right.

7               And the third thing I would say is look to  
8       existing laws.  I looked at a number of the comment  
9       letters by the consumer groups, and it seemed to me that  
10      just about all of their hypotheticals were situations  
11      that could be more than adequately addressed either with  
12      existing antifraud statutes, or unfair trade practices  
13      statutes.  And query whether you really need this  
14      additional layer of law to get at this problem when  
15      there are other statutes that would more than adequately  
16      foot the bill.

17              Also, rely on the fact that we as financial  
18      institutions have legal requirements to make disclosures  
19      to our customers.  The onus is already on us to comply  
20      with the law.  So, the onus is also on us to come up  
21      with the solutions that make most sense to our business  
22      models that are reasonably designed so that we can say  
23      with a high degree of certainty, yes, we did comply with  
24      the law, because I think as a number of people have  
25      noted, there is a real risk if disclosures aren't

1 received, that we could be facing class action  
2 liability.

3 So, trust these other mechanisms to make sure  
4 that the consumer consent is an informed consent, and  
5 that they know what they're getting into when they agree  
6 to receive information electronically.

7 MR. DAYANIM: Thanks. I want to respond in a  
8 way to what John Buchman is suggesting, and I do this  
9 somewhat hesitantly. But I'll do it nonetheless.

10 I think that part of the reason that we have  
11 these divergent views is that in some sense, when  
12 representatives of an industry go up on the Hill and  
13 talk about, you know, what the law should contain, we're  
14 really talking about a different -- well, let me back  
15 up.

16 The way in which the world is structured is not  
17 simply broken down by the view points represented here.  
18 In other words, it's not just, you know, it's not just a  
19 situation where you have heavily regulated institutions  
20 like financial institutions that are reputable members  
21 of the business community and that have representatives  
22 on the Hill and it functions like this, and it's not  
23 just that you have predators, you know, where the  
24 National Consumer Law Center are going after every day,  
25 or the Federal Trade Commission for that matter.

1           What you really -- you know, there's a whole  
2 mass of businesses in the middle that, for example, some  
3 of them I advise that are small businesses and emerging  
4 businesses, medium-sized businesses, maybe not in  
5 heavily regulated industries. And for those companies,  
6 the absence of a requirement, again, setting aside what  
7 the content of the requirement is, presents an  
8 opportunity to take the path of least resistance.

9           And I know speaking as counsel to those  
10 companies, it is good for me to be able in some  
11 instances, and I don't want this to be overinterpreted,  
12 to be able to say you can't do it that way because the  
13 law actually says you have to do it this way. Because  
14 if I didn't say that, they wouldn't do what would be the  
15 best practice that E\*Trade Bank would do, but at  
16 Fidelity, they would do something else, and they're not  
17 predators, they're just businesses that, you know, have  
18 slim profit margins and that are hoping to get by, you  
19 know, below the radar screen.

20           And so, for example, to take the example, John,  
21 that you mentioned of an alternative to reasonable  
22 demonstration, that I actually think would not be  
23 sufficient, which would be simply checking off saying do  
24 you have Internet access, do you have an email address,  
25 do you have PDF, the problem with that if you don't also

1 present an opportunity to test that, which one way to do  
2 that is requiring the consent to be electronic, there  
3 may be others, is that, yeah, PDF is a fairly easy  
4 question. I mean, I think most people you can assume  
5 have -- and maybe some people are different, but I think  
6 most people you could assume would understand the  
7 question and be able to answer it intelligently.

8 But that's because E\*Trade Bank would choose to  
9 use a format like PDF, that is widely available. But if  
10 I'm, you know, business X, and I'm not predators, but  
11 I'm also not looking to present awards for best  
12 practices in the industry, and there is a software  
13 product out on the market that's regional, maybe, it's  
14 not so large, but it works, you've never heard of it,  
15 and I say do you have the ability to access, you know,  
16 product X. You may not really know how to answer that  
17 question, so the answer would mean maybe then you'll  
18 just say no and then you won't have a problem. That may  
19 be.

20 But then you could go even further and say well  
21 the question might be, product X, and people may have  
22 heard of product X in this hypothetical, version 3.0.  
23 And there the person really may not know, they may think  
24 they know, they may not know, and you may not really be  
25 interested in clarifying it for them, because you're

1     only providing the disclosure because you're obligated  
2     to.

3             So, I don't think -- I think that you do have to  
4     pair the information with the opportunity to test the  
5     information. I don't think you actually have to show  
6     that the person did test it, I think that would be going  
7     too far, but I do think you have to have some pairing of  
8     opportunity, because otherwise you open yourself up to  
9     abuse, not by creditors, and not by the top -- the cream  
10    of the crop, but sort of the vast unwashed middle.

11            MS. SMITH: And actually, I know you want to  
12    speak, but we're actually heading into sort the next  
13    realm of inquiry, that was a beautiful lead-in, and  
14    actually, I think -- and I would ask you to address it  
15    as well, Mr. Buckley, as well as giving us your  
16    comments, in the absence of the provision, it seems,  
17    which creates sort of a safe harbor in some ways for  
18    businesses who wouldn't otherwise probably go out and  
19    try to figure it all out themselves, it also probably  
20    creates a best practices situation without them actually  
21    having to develop it.

22            At the same time, you're suggesting there could  
23    be some harm in the absence of the provision, and that  
24    kind of leads us into this notion that -- and one of the  
25    principal things we're having to deal with this inquiry

1 is do the benefits outweigh the burdens.

2 You sort of conducted some of that exercise for  
3 us, in the way that you just addressed that question,  
4 but I would ask all of the panelists to turn their  
5 attention to that very issue. Do the benefits outweigh  
6 the burdens, and how you would come down on that, and  
7 basically what your reasoning would be. I mean,  
8 let's -- let's use as a given for all of us as a  
9 standard that there are some benefits to the provision,  
10 and that there are some burdens that accompany the  
11 provision, but please let me know where you come down on  
12 that side of the issue and why.

13 And Mr. Buckley, since you're the brave soul  
14 with your name up.

15 MR. BUCKLEY: Thank you. I think the comment  
16 that I was going to make leads into your answer, at  
17 least partially answers your question, and then I would  
18 like to add more.

19 Margot made the point, which I can't agree with,  
20 that in maybe ten out of 100 cases, for legitimate  
21 business reasons, people do not want consumers to retain  
22 their disclosures. And therefore they might adopt this  
23 medium as the medium that they would communicate with,  
24 so that the person cannot keep their disclosures.

25 Now, I think that -- if you look at the

1 experience with a consumer, and you have a legitimate  
2 business, the legitimate business is going to want to  
3 conduct business electronically, not just deliver the  
4 required disclosures electronically.

5           So, if you ran into a situation, in my opinion,  
6 where the sole purpose of entering into the relationship  
7 was to deliver disclosures electronically and you had no  
8 intention of doing any other business with the consumer,  
9 otherwise contracting with the consumer, sending them  
10 bills, sending them statements, doing all the rest of  
11 it, if you simply had that one purpose, you would be  
12 somewhat suspect as to what your motivation was, and the  
13 questions of fraud that are -- and there are plenty of  
14 fraud statutes that deal in unfair and deceptive  
15 practices statutes, those and yours at the state level,  
16 that can deal with situations like that.

17           So, I think you're talking about setting up a  
18 straw man when you say people are only going to use it  
19 for the purpose of deceiving people and not letting them  
20 keep the disclosures that they need.

21           The second issue is the burden, and I think that  
22 the burden, I've mentioned the fact that these  
23 provisions were added quietly and without a lot of  
24 debate, negotiated by staff and presented to Senators.  
25 I don't think that it was -- I don't think they were



1 thought through as well as the other core provisions of  
2 the consumer disclosures that are required, and that  
3 were part of the House legislation.

4 And the result is that it is not clear exactly  
5 what has to be done. The beauty of having a set of  
6 rules laid out in the statute is it gives business  
7 confidence that if they follow those rules, they will  
8 know that they have no problem.

9 These provisions, particularly the reasonable  
10 demonstration provision, have enough uncertainty  
11 associated with them that they cause businesses to pause  
12 and ask are we inviting class action litigation by doing  
13 it in a way which we believe is legitimate, but which  
14 someone else may find not to be.

15 So, there's in addition to the burden of having,  
16 you know, Mr. Gallagher's customers disappear because  
17 they don't want to do back and after having dealt with  
18 the person go back and go through the whole confirmation  
19 process, there is also the burden of uncertainty that's  
20 created by the way in which the reasonable demonstration  
21 test is worded, and I think that will slow up the  
22 process.

23 We have -- I know that there are people who are  
24 not going to participate because they have the doubt  
25 about that. So, that is an issue.

1 MS. SMITH: Any other comments? I guess I  
2 should have, as Larry gently reminded me, I guess I  
3 shouldn't have made it an either/or choice, do the  
4 benefits outweigh the burdens, or is it -- I guess I  
5 should have asked the question or is it really too early  
6 to tell. If people had an opportunity to really make  
7 that assessment in their own businesses or what they see  
8 going on in the marketplace.

9 So, I guess I should have been a little more  
10 open-ended on that, and so would ask you to consider  
11 that as well when you give us your answer on that point.

12 Ms. Saunders?

13 MS. SAUNDERS: I want to address several points  
14 which have been made. One is the disclosure only, why  
15 is disclosure only not sufficient. There's several  
16 examples in current law where a disclosure is meant by  
17 itself to protect consumers. And I'll detail them and  
18 explain why that doesn't work.

19 One is arbitration clauses, consumers are seeing  
20 mandatory arbitration clauses hidden in the back of  
21 contracts all the time, and then when they end up with  
22 some dispute with the creditor, generally, or the other  
23 business, they are forced to -- into arbitration rather  
24 than being able to go to court.

25 The effect of that, sometimes, is that they are

1 not able -- and if their home is being foreclosed upon,  
2 to even raise as a defense the violations of the  
3 consumer laws as a defense to foreclosure. The other  
4 and the more real reason why -- the actual reason why  
5 these consumer arbitration clauses have been stuck in  
6 the contracts is to prevent class actions regarding  
7 small violations of the law.

8           When a consumer has been ripped off for \$5,  
9 \$100, even a couple of thousand dollars, very rarely  
10 will that consumer have access to an attorney who can  
11 bring the action to enforce the law even if it's fraud  
12 or unfair trade practice, because there's just not  
13 enough money at stake to make it worth while.

14           So, many actors, none of them are in this room,  
15 but many actors may find it worth while in the general  
16 conduct of their business to make little small mistakes  
17 in the hopes that they don't get caught in the  
18 understanding that with the arbitration clause they  
19 will -- they can't get caught with the big class action.

20           And those are an ongoing problem that has, I  
21 think, been adequately identified, clearly not addressed  
22 yet.

23           Mortgage documents. I think everybody in the  
24 room who has ever bought a house and closed on a loan  
25 would agree that we get far too many mortgage documents

1 when we close on a home, and we're all blaming the two  
2 laws, Truth in Lending and the Real Estate Settlement  
3 Procedures Act for requiring all those disclosures, when  
4 actually the Federal Reserve Board did a study and found  
5 that a very small minority, generally less than 10  
6 percent of the papers that are delivered at closing are  
7 really required by federal law.

8 But what we've got is overdisclosure. If we  
9 disclose enough to the consumer, then we're legally  
10 protected, but 99 out of 100 consumers don't possibly  
11 read all that stuff, so the disclosures now become  
12 fairly meaningless. So, disclosure by itself has not  
13 protected consumers.

14 Finally, credit insurance. Again, the Federal  
15 Reserve Board has just come out with a proposed  
16 regulation that would treat a certain kind of credit  
17 insurance as differently because of the very real  
18 predatory characteristics of this type of credit  
19 insurance. Credit insurance currently is treated under  
20 the law as being okay to sell in a certain way, so long  
21 as the consumer checks off a little box that says I  
22 understand that I have the option not to buy credit  
23 insurance.

24 Yet if you talk to legal services attorneys or  
25 consumer agency administrators, or review the cases, you

1 will find dozens of judicial decisions where the  
2 individual consumers will say, I know it says that on  
3 the paper, but the lender told me verbally that I didn't  
4 have a choice.

5 So, disclosure by itself does not work to  
6 adequately protect consumers, either from predators or  
7 even from the unwashed middle as Ben described it. The  
8 market -- but I'm sure it does adequately protect  
9 consumers from those in this room.

10 The market does not work, there were three  
11 points, one was disclosure, two was the market should  
12 work, and three that we have existing law that will  
13 address it. Let me explain why.

14 Predatory mortgages, again, is a real problem in  
15 the market failing. It's a big problem, it's evidenced  
16 by a 450 percent rate of increase in the foreclosures,  
17 Department of Commerce and Census data shows that. In  
18 the past ten years there has been a 450 percent rate  
19 increase in foreclosures in this country. That's  
20 because the market has failed. The market and  
21 disclosure don't work to protect people against consumer  
22 abuses.

23 Access to justice is a real problem with using  
24 existing laws. Do you know what it takes to prove  
25 fraud? Assuming you can find an attorney to take the

1 case, which is a big problem if you're low income,  
2 because legal services exists for one out of 25 low  
3 income people in this country, and the federal money to  
4 provide legal services has not gone up in almost a  
5 decade.

6 You need to prove by clear and convincing  
7 evidence, rather than by the preponderance of the  
8 evidence, that there was an intent to defraud, that  
9 there was reliance and that there were damages. It's  
10 very difficult to prove fraud.

11 You need not only the attorney and the willing  
12 client, you need a client who will make a good victim,  
13 a -- will make a good witness. Not too many people are  
14 willing to get up on the stand and say yes, I was  
15 defrauded, I'm ashamed, and I'm embarrassed, but I'll  
16 stand up for my rights. It's very difficult to find a  
17 client who often -- it's very difficult for a client to  
18 actually do that. I have represented many of them, and  
19 they don't want to go to trial. It's too stressful.

20 Unfair and deceptive acts and practices  
21 statutes, UDAP statutes are very valuable in the states  
22 in which they exist, when they apply. In many states,  
23 they do not apply to lending relationships, security  
24 relationships, or any other type of industry which is  
25 otherwise regulated.

1           In many states, when they do apply, there are no  
2 attorneys fees. In many states in which they apply,  
3 they only apply to deceptive acts, not unfair practices.  
4 So, the section 5 of the FTC Act applies throughout the  
5 country, but does not have a private right of  
6 enforcement, only the FTC can bring actions under it.

7           So, we have wonderful laws, but they are not  
8 actually implementable, or able to be implemented on an  
9 even basis, and that is why we need specific consumer  
10 protections to protect consumers from the unwashed  
11 middle, recognizing the very distinct differences  
12 between electronic commerce and the paper world, given  
13 the fact that the majority of this country is not yet  
14 online. Thank you.

15           MS. SMITH: Ms. Saunders, would you say that it  
16 was safe to conclude that you believe that the benefits  
17 outweigh the burdens?

18           MS. SAUNDERS: Well, I would say if I haven't  
19 made that clear so far.

20           MS. SMITH: One of the points that -- obviously  
21 I want to get back to that, but in the mean time, we've  
22 got an email question that was actually related to a  
23 point Mr. Buckley had raised and Mr. Dayanim, and the  
24 question from the email audience is, how does section  
25 101(C)(3), which is the provision in the ESIGN Act that

1 sets forth the effective failure to obtain electronic  
2 consent or confirmation of consent relate to some of the  
3 exposures that have been discussed for conducting  
4 transactions electronically.

5 So, for those of you in the audience on any  
6 panel who don't just happen to have the ESIGN Act in  
7 front of them, that provision of the statute provides  
8 that the legal effectiveness, validity or enforceability  
9 of any contract executed by a consumer shall not be  
10 denied solely because of a failure to obtain electronic  
11 consent or confirmation of consent, by that consumer in  
12 accordance with the electronic consent provisions of the  
13 act.

14 I don't know if any of the business people in  
15 the room or any of the attorneys who represent business  
16 people have ever looked at that or advised your clients  
17 or to that, you know, or to the extent that the consumer  
18 advocates have looked at that issue as to whether or not  
19 it mitigates some of the burden.

20 Mr. Buckley?

21 MR. BUCKLEY: I would direct the questioner  
22 to -- you have all the comments online, so they could  
23 look at the comment submitted by the Electronic  
24 Financial Services Council under disproportionate  
25 penalties, responding to your inquiry, but the question



1 of if you have, in fact, failed to establish the right  
2 to deliver disclosures electronically, as Margot will  
3 tell you very clearly, you have some very severe  
4 outcomes in the Truth in Lending context.

5 For instance, if you are in a refi context, you  
6 could result in a -- a recision of the law. There are  
7 fairly severe consequences of not having effectively  
8 delivered disclosures electronically, and so I mean  
9 that's just one illustration. I'm sure that many people  
10 in the room could give other illustrations. And that's  
11 what the consequence is.

12 MR. DAYANIM: I'm sorry.

13 MS. SMITH: No, go ahead.

14 MR. DAYANIM: If I could just jump in following  
15 up on what Jerry was saying. If you look at that  
16 provision, what the provision essentially said -- well,  
17 to me, what it really does or what it primarily does is  
18 confirm the safe harbor nature of the consent  
19 provisions. It doesn't say that the legal effectiveness  
20 validity or enforceability of a contract should not be  
21 denied if you haven't actually provided the consent, it  
22 says shall not be denied solely on the basis of not  
23 complying with those steps.

24 So, it basically means that if you have, for  
25 example, or it doesn't mean this, a ramification of it

1 is, if you have, for example, provided the disclosures  
2 electronically in a way where the consumer has actually  
3 obtained them, yet you have not complied with literal  
4 language of the consent provision, either because you  
5 didn't provide the notice of the different kinds of  
6 software/hardware requirements, or if you're taking a  
7 technical reading of the demonstration requirement, you  
8 haven't met that requirement. And yet nevertheless the  
9 consumer gets the documents, gets the disclosures, it's  
10 not -- what they're saying is you're okay. I mean,  
11 that's sort of my take. And there are additional  
12 aspects of it as well.

13 MS. SMITH: Hold on just a second. Ms. Yen?

14 MS. YEN: Thank you. To answer one of your  
15 earlier questions concerning benefit versus burden, I  
16 would agree with what's already been said that from the  
17 point of view of counsel representing mostly financial  
18 services providers, therefore industry, the primary  
19 benefit here, in my view, was that it did provide us  
20 with a little bit more legal certainty and it did help  
21 override a lot of local law by giving us one federal  
22 standard that we could look to to design websites that  
23 clearly are intended to be accessed in all 50 states  
24 plus the District of Columbia.

25 So, I felt that that was, just from

1 practitioner's standpoint, probably the most significant  
2 benefit.

3 In terms of burden, there is an interesting  
4 provision in (C)(1)(b)(iv), where you have to disclose  
5 to the consumer how, following this consent process, the  
6 consumer may, upon request, obtain a paper copy of the  
7 electronic record. And I think if you read that  
8 literally, that really gives the consumer the right to  
9 receive, in paper form, any disclosure that was provided  
10 electronically, even after this rather elaborate consent  
11 process has been followed.

12 Now, the statute leaves open the possibility  
13 that a fee might be charged for that paper copy and then  
14 you look to applicable state and federal law to see  
15 whether, in fact, such a fee is permitted. And I would  
16 submit that there are numerous instances where, in fact,  
17 you probably could not charge a fee.

18 Just to give you a for instance, I believe RESPA  
19 says you can't charge for the cost of preparing a Truth  
20 in Lending disclosure or a RESPA settlement statement.  
21 So, that would call into question one's ability to  
22 charge for providing it in paper form.

23 I think another possible burden is that after  
24 you have obtained the consent and the reasonable  
25 demonstration, if the -- for example, using the web

1 model where you're putting all of your disclosures up on  
2 a secure website, if you decided to change any aspect of  
3 your hardware or software that you used for those  
4 disclosures, you would have to go back to your customer  
5 with a new disclosure explaining the new hardware and  
6 software requirements and then get a new reasonable  
7 demonstration, which I think is clearly -- I mean  
8 obviously that's got some benefits associated with it,  
9 but it also has some tremendous burdens. And if you've  
10 got a nonresponding customer, who just because of  
11 inertia or being really busy with work and out of town  
12 on business, doesn't get back to you, you don't have  
13 consent to use that new hardware/software configuration,  
14 which I think is an issue.

15 MS. SMITH: Ms. Hillebrand?

16 MS. HILLEBRAND: I would like to respond a  
17 little more to the email questioner. I read the section  
18 on the effect of failure to consent somewhat more  
19 narrowly. I think that was copied out of UETA, and  
20 there may be some legislative history surrounding it  
21 there that we could submit later, but it doesn't say  
22 that the consent remains in effect or that the  
23 disclosure or the legally required notice remains in  
24 effect, but it says simply that the contract executed  
25 with the consumer is not going to be denied, in fact,

1 solely because of that.

2 So, if you have, for example, a loan document  
3 and associated legally required disclosures, they're  
4 saying we're not going to set aside the contract and say  
5 you don't have to repay the money, but, in fact, there  
6 may still be a Truth in Lending violation if those  
7 disclosures were not -- the consent wasn't garnered  
8 properly.

9 So, I think that it's overreading it to say that  
10 it's kind of a no-harm/no-foul provision. I think what  
11 it's saying is the failure -- that the failure to get  
12 the consent affects whether or not those items that  
13 would have been consented to were, in fact, provided  
14 electronically, but it doesn't go to the validity of the  
15 underlying contract, unless failure to deliver those  
16 notices in some other way would have affected the  
17 contract, but ESIGN doesn't add an extra way to  
18 undermine or attack a contract. And I think that's all  
19 that section does.

20 MS. SMITH: But to clarify that question as  
21 well, they seem to be -- the questioner seems to be  
22 asking whether or not this mitigates burden in some way,  
23 to the extent that he says how does this relate to some  
24 of the exposures, and by exposures, I'm assuming he  
25 means legal liability kinds of issues. And maybe I'm

1 misreading the question, but I have a feeling that  
2 that's what they're getting at, doesn't some way having  
3 the fact that this provision says that the contract  
4 won't be rendered ineffective just by virtue of the fact  
5 that the consent provisions weren't necessarily  
6 followed. Does that in some way have an effect on  
7 people's assessment on what legal liability issues are  
8 with respect to that particular issue.

9 Now, again, that's my reading of the person's  
10 question, but that seemed to go to this notion of  
11 benefits and burdens.

12 MR. DAYANIM: I will just saying that actually  
13 it's because of what Gail just said, that I would have  
14 been happier if the provision weren't there at all,  
15 because I think the provision is a safe harbor anyway,  
16 the consent provisions, and by having this provision in  
17 there that just says contract, it does give rise to the  
18 possible implication that she's alluding to, although I  
19 think it's wrong, I don't think that is the way to read  
20 it, I do think that because of the way it's worded, and  
21 this goes back to it's not being perfect, and the point  
22 being that was made a moment ago about subsequent  
23 consent, is another instance where this is not perfect.  
24 That's also a tremendous burden that I think is probably  
25 unwarranted, but in this particular case, I think it

1 gives rise to the argument that Gail is making, which  
2 creates a problem.

3 MS. HILLEBRAND: Well, it's argument under the  
4 text of the statute, which talks only about the contract  
5 itself not being -- I would like to disagree with you at  
6 the appropriate time on the safe harbor issue more  
7 generally.

8 MS. SMITH: Hold on, we're going to go back  
9 around this way, because all of the sudden I turned my  
10 back for a second and all of the name tags came up.

11 Go ahead, Larry Campbell.

12 MR. CAMPBELL: Hello, I'm Larry Campbell from  
13 the Commerce Department. I guess it's really just an  
14 observation, and subsequent question for our  
15 participants.

16 In an ideal world on the question of whether the  
17 benefits outweigh the burdens, I guess an economist  
18 would love to be able to put a dollar value on both. We  
19 would somehow be able to value the dollar value of the  
20 harms avoided to the consumers and weigh it against the  
21 dollar value of the cost of perhaps some lost business  
22 or the extra -- certainly the transaction cost of  
23 providing the extra step for the demonstration in one  
24 form or fashion.

25 At least from my reading of the submitted

1 testimonies and the comments this morning and now, I  
2 don't think we're going to be able to get there by June.

3           So then that leaves us still, though, with the  
4 test of the -- using the language of the law of the  
5 weighing, I think, in my motion, in my mind, is the  
6 scale. How do you weigh, sort of I would guess a fair  
7 characterization might be the intangible benefits and  
8 the tangible but hard-to-quantify costs.

9           Certainly when the law was drafted initially,  
10 however it came to be drafted, the final agreement on it  
11 had in the minds of the people who put it together, a  
12 weighing of these considerations and somehow out of that  
13 process came the text that's before us, and the test  
14 that's before us.

15           So, in the absence of lots of hard data on both  
16 sides, although we have a few examples, another way of  
17 putting the question might be has enough transpired in  
18 the initial roll-out of the people operating under this  
19 law to change any of the thinking that went into the  
20 original establishment of the test. I'm just trying to  
21 get a notion of incremental -- how any incremental  
22 experience may have changed any participants' minds, or  
23 do you kind of come to the sense that there are  
24 definitely categories of concern on both sides, but  
25 there just may not be enough experience to draw a hard



1 conclusion at this point? Just a question and an  
2 observation sort of.

3 MS. SMITH: Keith, do you want to go for it or  
4 should we turn to Mr. MacCarthy?

5 MR. MacCARTHY: Whatever you want.

6 MR. ANDERSON: Well, I just wanted to respond  
7 actually or use the opportunity of something Mr. Buckley  
8 said to maybe turn the discussion a little bit.

9 You made a statement that you would consider  
10 anyone who was just making disclosures electronically,  
11 but not actually doing sort of continuing business, to  
12 be suspect. And I think that that may be because of the  
13 industry you represent and the industry that's  
14 represented here. I mean, I see a whole -- I mean, I've  
15 been trying to think of kinds of issues where ESIGN  
16 could arise, and it seems to me there's a whole flock of  
17 other kinds of transactions where it could arise that we  
18 just really aren't talking about today very much, and  
19 maybe we could get a little bit of reaction.

20 I mean, one it seems to me is actually almost a  
21 financial services transaction, and it's one that we've  
22 actually seen, I believe it's Eddie Bauer and Spiegel  
23 will allow you to apply online for a credit card. Now,  
24 I don't think there's any question there, I have not  
25 looked at it in depth, of getting statements online.

1 But the question is you can apply on line, they want to  
2 give you your Truth in Lending, your APR notices online  
3 at the time you apply. So, that's notice  
4 electronically.

5 Another example that I thought of that  
6 applies -- well, I can use an example that's taken  
7 from -- a couple of examples actually taken from FTC  
8 law. If I call Land's End, to make up an example, and I  
9 order something, and they don't have it in stock, they  
10 have to give me an estimated date, and we then require  
11 that if they find out they can't ship by the date, they  
12 have to notify me.

13 It strikes me that a really good use in many  
14 instances of email would be to notify me by email,  
15 assuming that I've got email, that I will agree, et  
16 cetera, et cetera. Similarly, and this is a related  
17 example, but perhaps somewhat different. I learned in  
18 preparing for this conference that we have something  
19 called jewelry guides at the FTC, and that one of the  
20 provisions of the jewelry guides is that if I'm selling  
21 you a gemstone that has had some special treatment done  
22 to it, and that you're going to have to do this again  
23 periodically, or you're going to have to do something to  
24 your gemstone periodically to keep its appearance up, I  
25 have to tell you what that is.

1           Again, if I call on the phone, say, to order,  
2           and want to buy a gemstone, it may make good sense for  
3           the jeweler to be able to refer me to his website, his  
4           or her website, that would show me where the information  
5           is.

6           All of these, I guess, the point is, are  
7           instances in which you're just doing disclosure, you're  
8           probably doing one-time disclosure, and frankly I'm not  
9           sure, particularly in the second and third cases, how  
10          you comply with ESIGN -- how you can make use of ESIGN  
11          or whether ESIGN poses big burdens in those instances.

12          MS. SMITH:   Mr. Buckley?

13          MR. BUCKLEY:  Thanks, Keith, because I think you  
14          do point out that I represent people in the financial  
15          services industry, and in those industries, usually the  
16          disclosures are mandated by federal statute, and but  
17          there's a contemplation of an ongoing relationship.  You  
18          know, that you're going to have an account relationship  
19          of some kind or an insurance policy relationship or some  
20          other type of relationship.

21          In the cases that you mentioned where there  
22          would be single, one-time disclosures, it may well be  
23          that the burden of complying with ESIGN would be so  
24          great that you would not bother to do it electronically.  
25          I mean, the jeweler may either say hey, listen, I'll

1 take the chance that they are going to get it, and I  
2 don't think people are going to come after me for their  
3 dull jewelry because it's not properly sparkling. I'll  
4 just send it and rely on the fact that ESIGN is a safe  
5 harbor, but I feel like I can communicate electronically  
6 with my customers in this context without too much fear  
7 that I am going to be subjected to FTC enforcement  
8 activity. Maybe I'm wrong.

9           You know, the examples you give of one time are  
10 situations in which consumers are not likely to be  
11 abused. And where, you know, I -- do you have -- you  
12 know, I'm just trying to think of where is the example  
13 of someone who is deliberately sending this for the  
14 purpose of avoiding the person able to keep the  
15 disclosure? That's the concern I was trying to address.  
16 Not the possibility that, you know, somebody, you know,  
17 I don't think that the jeweler is trying to get around  
18 the requirements of ESIGN, they may find them too  
19 burdensome to bother with and say hey, you know, I'll  
20 send it on paper, I'll do something else, but where is  
21 the example of the person who is going to be defrauded  
22 or hurt in a significant way?

23           MR. ANDERSON: Oh, I'm sure, I don't have one  
24 off the top of my head.

25           MR. BUCKLEY: And neither of us have thought it

1 all the way through, I grant you, and, you know, I  
2 hadn't thought as far as you had, so I didn't mean to,  
3 you know, put you on the spot, but --

4 MS. SMITH: Mr. MacCarthy, do you want to try to  
5 address some of these issues?

6 MR. MacCARTHY: Just back on the, I guess for  
7 the record, the benefits and burdens, we're with Paul  
8 and John over there on that issue, and consistent with  
9 our filing. I mean, we didn't think that the particular  
10 requirement for reasonably demonstrating consent was  
11 necessary to begin with, and to put it in your terms of  
12 the timing involved, nothing that's happened since the  
13 legislation has gone into effect has really changed that  
14 judgment. I agree, it's short.

15 There's not a lot of time to have gathered a lot  
16 of information, but we don't think our initial judgment  
17 has been proved wrong in that respect. And that leads  
18 me to another point I want to make, which is to respond  
19 to some of the suggestions, you know, some explicit,  
20 some more by way of just sort of off-handed comments,  
21 that maybe things would be better off if a regulatory  
22 agency sat down and tried to clarify the requirement, to  
23 go through a series of examples, and, you know, say this  
24 one works and this one doesn't, and, you know, let's  
25 just go through 50, 60 or 100 examples and make sure

1 everyone knows what the rules are.

2 I would urge you to resist that temptation.  
3 That at this point, it really is premature to begin to  
4 settle down the technology and the experimentation that  
5 is possible in the market by coming up with a list, even  
6 if it's not described as exhaustive, it would tend to  
7 freeze the marketplace, people would tend to say let's  
8 see what the list says, instead of trying to go out  
9 there and doing it in the best fashion that they could.

10 You know, if this had been in place for three or  
11 four years, and people had clearly demonstrated problems  
12 and there was some recognition that there was some  
13 obscurity here that had to be clarified, maybe we would  
14 be in a different situation, but right now, the idea  
15 that we need to have an exhaustive list of examples I  
16 think is premature.

17 MS. SMITH: I guess the problem, and I think  
18 Larry alluded to it, since the consumer consent  
19 provisions are in existence, one hopes that, in fact,  
20 the problems don't arise because the consumers are, in  
21 fact, in a position to -- or the companies are out there  
22 implementing it, and in fact people are providing  
23 consumer consent in a fashion that reasonably  
24 demonstrates that they can access the information and  
25 they're getting the legally required notices, and we

1 don't ever have a problem.

2 So, I think we're in a little bit of a quandary  
3 in the situation that the -- we will hope, and I'm sure  
4 the Federal Trade Commission hopes, that there will  
5 never be an instance of consumer fraud from a company  
6 that is actually implementing the consumer consent  
7 provisions as they're written today.

8 So, in some ways, the fact that the statute is  
9 in place makes our task a little more difficult in terms  
10 of, you know, looking at this issue in three or four  
11 years, one would hope that some of these problems have  
12 been avoided.

13 Now, on the other hand, we still have the task  
14 to do. So, I appreciate your comments, but I would ask  
15 people to think, you know, given what we have in front  
16 of us now, which are the consumer consent provisions,  
17 what information is out there, given this very short  
18 period of time. Again, we're willing to take anecdotal  
19 evidence, of, again, whether the benefits outweigh the  
20 burdens.

21 I'm sorry, I'm not meaning to ignore this side  
22 of the table. Ms. Hillebrand?

23 MS. HILLEBRAND: Of course, we think that the  
24 benefit of consumer choice and the benefit of a  
25 technology that demonstrates consumers can get the

1 information outweighs the burden on business, and maybe  
2 it's too easy for me to say that because I haven't seen  
3 your numbers, I don't know what it costs you to put that  
4 into place, but I think that if you were asking this  
5 question slightly differently, if you were asking the  
6 question that comes before this question, which is, is  
7 E-SIGN worth having for American business, even with the  
8 cost of this particular consent requirement, you would  
9 get a resounding yes from around the room.

10 The way that the legislation is structured,  
11 you're kind of asking that question but you're also  
12 asked to focus more narrowly. If you ask a business  
13 would you like to get rid of this requirement, they will  
14 often say yes because it gives more flexibility for  
15 future decisions. Sometimes that's short-term thinking,  
16 sometimes it's long-term thinking.

17 I suggest to you in this case it would be short  
18 term thinking to eliminate those requirements. One  
19 reason we didn't see a public furor when E-SIGN went into  
20 effect, I got a lot of media calls that just said won't  
21 this be bad for consumers, won't they be stuck on the  
22 net when they don't want to be there. And I told every  
23 one of those reporters, by and large that's who was  
24 calling me, consumers will have a choice, and the choice  
25 will work, and it's these two provisions, the electronic



1 nature of the consent or confirmation, and the  
2 reasonably demonstrate that put me at rest that  
3 consumers will have a choice that will actually work.

4 So, one of the benefits already, I think, has  
5 been some level of public acceptance. How much, we  
6 don't know, because no one is measuring it.

7 In the long term, there's the consumer  
8 confidence benefit, which will be real and will build  
9 over time. Anyone who's known someone who's been a  
10 victim of identity theft knows, you just have to hear  
11 one horror story to wipe out ten good experiences that  
12 you hear from other folks.

13 So that the prevention aspect, it's not enough  
14 to wait for fraud law, because fraud is dealing with  
15 problems after they occur. The real consent requirement  
16 of this type prevents the problems before they occur,  
17 and that's a tremendous difference.

18 I would also note that state legislatures around  
19 the country are expressing their own view about the  
20 value of the consent requirement by placing into their  
21 UETA bills, many of them passed UETA before ESIGN,  
22 they're just not touching it, which means we think in  
23 the state you will have both UETA and the ESIGN consent  
24 requirements, but those who are looking at UETA for the  
25 first time after the passage of ESIGN, many of them are

1 adding provisions that say this is not intended to  
2 modify or supercede section 101(C).

3 Another indication that, in fact, state policy  
4 makers think this is important, that has occurred in  
5 bills already that are moving in Connecticut, Illinois,  
6 New Jersey, Vermont, it's law now in Tennessee and North  
7 Carolina. So, other police makers as well see this as  
8 important.

9 And finally there's been this talk about the  
10 value of certainty for business. These two parts of the  
11 consent provision provide valuable certainty for  
12 consumers. And Professor Winn said it in her opening  
13 remarks. Who is in a better position to design for the  
14 uncertainty? The consumer who does it once and has to  
15 take the technology that's offered to them as a  
16 go/no-go, I'll use this product or not, or the business  
17 that has some choices about how to develop that consent  
18 process.

19 So, for all those reasons, long-term confidence,  
20 chief among them, we think that the benefits do outweigh  
21 the burdens, and I also was quite struck in the prefilled  
22 comments that many of the industry folks were saying  
23 exactly what we at Consumers Union said, we would like  
24 to see NTIA and the FTC recommend to Congress that there  
25 be no changes to ESIGN.

1           Now, I could give you a long list of things that  
2 I would like to see differently, but let's give it some  
3 time to work, and that's where we are and that's where  
4 we hope you'll be.

5           MS. SMITH: Thank you. Professor Winn, any  
6 comments?

7           MS. WINN: Hello. I can tell that you are  
8 hoping for comments from industry people, but yet you  
9 keep getting comments from people who --

10          MS. SMITH: All comers.

11          MS. WINN: I was going to say, as far as I can  
12 tell, if we're looking at the benefits and the burdens,  
13 the burdens on merchants, not only is there the problem  
14 that it doesn't seem like we have any metrics we could  
15 use to start calculating, it seems like there's  
16 different kinds of burdens, you would want to separate  
17 out different kinds of burdens.

18                 The one that I started talking about at the  
19 beginning was sort of an assessment for infrastructure  
20 development. The fact that the infrastructure is in  
21 flux, and that's a problem we all have to deal with and  
22 that burden has been allocated to the merchants.

23                 It seems to me like another burden that's been  
24 allocated to the merchants is something we could think  
25 of as a sort of Aunt Sally tax, which is Margot gave a

1 very compelling description of Aunt Sally who is frail  
2 and infirm, but not completely impoverished, because the  
3 predatory high pressure salesman is interested in going  
4 to her house and prying some resources loose from her.

5           And so that's a very serious problem that needs  
6 to be addressed, and we only have this one provision in  
7 the statute that doesn't distinguish between ethical,  
8 reasonable merchants who are playing the game for the  
9 long term based on their reputation, and the one shot  
10 black hat players. And given that Congress has gotten  
11 itself into the business of basically creating federal  
12 commercial law, I would like to impose on everyone to  
13 share something that Carl Llewelyn wrote in 1953 about  
14 drafting commercial statutes. He said, "You all have a  
15 hangover from law school, you feel that the proper way  
16 to draw a statute is to mark it out as if it were  
17 written for dumbbell judges whom you are trying to  
18 corral. Of course that isn't the way to write good law.  
19 The way to write good law is to indicate what you want  
20 to do, and you assume, within reason, that the persons  
21 the law deals with will try to be decent, then after  
22 that you lay down the edges to take care of the dirty  
23 guys and try and hold them in, which means every statute  
24 ought to have two essential bases, one to show where the  
25 law wants you to go, and one to show where we will put

1     you if you don't."

2             MS. SMITH: Professor Winn, I know you won't be  
3 surprised when I tell you that probably won't appear in  
4 our report to Congress, the authors of this provision.

5             MS. WINN: So, what I was going to say was Mr.  
6 MacCarthy and I obviously have a philosophical  
7 disagreement about the usefulness of examples, I think  
8 we can predict based on the experience of a lot of forms  
9 of electronic commerce, like EDI contracting, that we  
10 are going to wait a long time before we get any good  
11 litigated cases that will provide the kind of concrete  
12 examples that practicing attorneys love to chew on.

13             And so what I'm suggesting is your mandate in  
14 the statute is to report to Congress on a variety of  
15 things, one of which is whether revisions in the statute  
16 are needed, and so what I'm asking is, is there anything  
17 less than a revision that can be offered that will help  
18 to distinguish between the white hat merchants who  
19 perhaps could pay less of an Aunt Sally tax, with some  
20 clarification, who could be given some guidance in  
21 designing sort of, you know, E-SIGN consumer protection  
22 provisions light, and other contexts where there's  
23 perceived to be a greater risk.

24             That's what I'm asking in terms of coming up  
25 with lists of examples.

1           MS. SMITH: I don't think we have made up our  
2 mind. I mean, I think at this point all of us still  
3 have an open mind about what will go in this report to  
4 Congress. This is only, in some ways, the second step  
5 that we've had in gathering information. The first was  
6 a request for comment, we also did I think in  
7 anticipation of this public workshop, did an awful lot  
8 of industry, consumer group, interested party outreach  
9 to try to elicit as much information as we possibly can.

10           I mean, the public workshop today has been a  
11 font of information, but as we, I think, every moderator  
12 has said from the beginning, we will not back no useful  
13 information up until the time we go to publisher.

14           So, I think that to the extent that there's  
15 further information that any of you or anybody out in  
16 the public has that can contribute to the debate or help  
17 us, we would like to have the best product possible to  
18 give to Congress. In recognition of the limitations we  
19 have, you know, in dealing with the time, the amount of  
20 information that's really out there, the sort of  
21 changing nature of technology in these issues, but I  
22 think it's safe to say that we are keeping an open mind  
23 and would welcome all information and suggestions that  
24 we can, like I said, up until like the practical  
25 limitation of going to publication.

1           And again, while we have a short-term goal of  
2 getting this report to Congress in June, that's not to  
3 say that the Department of Commerce and the Federal  
4 Trade Commission won't continue to look at these issues  
5 and the policy implications of them. So, I don't think  
6 today is the be-all and end-all and it wasn't intended  
7 to be on any of our parts. All right, thank you.

8           Mr. Gallagher?

9           MR. GALLAGHER: Yeah, I would just echo Gail's  
10 comment. I think you look overall at E-signature, I  
11 think, you know, in the midst of a rapidly changing  
12 environment, I think the E-signature legislation has  
13 done exactly what we intended it to do, which is to  
14 facilitate electronic commerce. I think there's no  
15 question, I don't think anybody around the room would  
16 disagree with that.

17           I think also although we kind of disagree on  
18 some of the ins and outs, you know, nobody is  
19 necessarily disagreeing that notice and consent in some  
20 form is necessarily -- you know, that's probably a  
21 benefit.

22           I think where we come down very clearly is,  
23 again, the requirement that it's only in the electronic  
24 form is really where it becomes a little -- or at least  
25 appears to be at this early stage a disincentive, so

1       therefore it's kind of counterbalancing the positive  
2       impact of the overall legislation.

3               I think there's no question overall, you know,  
4       we're in the right place, we're going in the right  
5       direction.

6               And then just one final comment, I would just  
7       echo Mark's point. I think trying to regulate and, you  
8       know, have a universal regulator, if you will, if there  
9       is such an entity to kind of come up with all the  
10      requirements they may come up with. This is an  
11      environment changing literally day by day, not minute by  
12      minute. So, I think, you know, let's live with it for a  
13      while, see where we come out. I think there are, you  
14      know, I think we already talked about here, I think the  
15      law gives us enough flexibility so that organizations,  
16      you know, that are highly regulated and want to comply  
17      will do the right thing. And I think also hopefully it  
18      will disincite those black hats, if you will, who are  
19      going through not act in accordance with the law, and  
20      will choose therefore not to do business that way.

21              And I think longer term in the marketplace,  
22      given the way that the market is going, will say that  
23      that will be -- they will have an economic necessity to  
24      provide an electronic medium I think more and more as  
25      more and more people become online and get more



1 comfortable with electronic interactions.

2 So, I think if they were acting in a  
3 disingenuous way, I think time as well as the  
4 marketplace will catch up with them.

5 MS. SMITH: Ms. Yen?

6 MS. YEN: Thank you. I just wanted to sort of  
7 draw us back to the fact that this statute is really  
8 very limited in scope. It applies to information that  
9 otherwise would have to be in writing, and it has to be  
10 information that relates to a consumer transaction.

11 Now, if you focus on the writing requirement,  
12 most statutes of frauds allow oral contracts to be  
13 enforced outside of the real estate realm. So, and any  
14 contract that I think is capable of being fully  
15 performed within a year or something is typically  
16 allowed to be verbal.

17 So, most of your purchase sale contracts outside  
18 the real estate realm would not be subject to this.  
19 Moreover, you need to have the writing requirement apply  
20 to a transaction so the Federal Reserve has stated that  
21 in their view that merely applying for a credit card is  
22 not yet a transaction.

23 So, in Keith Anderson's example of applying for  
24 a credit card, that would also be outside the scope of  
25 this statute.

1           As far as the jeweler example goes, that is a  
2 beautiful situation where I assume the jewelry itself  
3 that is being purchased has to be shipped to me, that is  
4 the perfect opportunity to enclose the jeweler's guide  
5 with the jewelry. If as an additional service to the  
6 consumer you also want to make that guide available on  
7 the jeweler's website, that's terrific.

8           But again that would be outside of ESIGN because  
9 that would be a supplemental web copy of something that  
10 was presumably enclosed with the gemstone, shipped to  
11 me.

12           So, I'm not sure that we're actually dealing  
13 with a statute that has as broad applicability as you  
14 might initially think.

15           MS. SMITH: Your last chance, any final comments  
16 before we wrap up? Well, on that note, I would like to  
17 tell you again thank you very much for your  
18 participation, we really appreciate it, got some very  
19 good information.

20           You've got a 15-minute break and I would urge  
21 those of you who have not had an opportunity to go  
22 upstairs and see some of the technology demonstrations,  
23 they're still going on in Room 532. Thank you again.

24           (Pause in the proceedings.)

25           MS. HARRINGTON: Many of you have said why don't

1 you turn on the air conditioning, well, here's the  
2 answer to that question, after about 394 years of  
3 receiving our air conditioning from the Archives  
4 Building across the street, the Archives folks announced  
5 that they need every bit of cool air that they have to  
6 preserve the national treasurers, and so now we're on  
7 our own here at the FTC, and we're building a new air  
8 conditioning system on the roof, but it's just not done  
9 yet. So, yes?

10 UNIDENTIFIED AUDIENCE MEMBER: Maybe we could  
11 lower some of these lights.

12 MR. HARRINGTON: Well, we will ask our video  
13 people, they are -- yeah, we'll see if we can dim them  
14 just a little bit. But I apologize, and if we don't get  
15 our new chilling system finished soon, you will see new  
16 meaning to casual dress here at the FTC. No, it's going  
17 to be tank tops and shorts. Okay, I think that's about  
18 as dim as we can go.

19 Well, this is the part of the discussion today  
20 that I've been most looking forward to, because it gives  
21 all of us, I think, a chance to set aside the task of  
22 understanding some, perhaps, ambiguous provisions in the  
23 statute, it permits us to set aside differences about  
24 burdens and benefits and allows us to kind of blue sky  
25 as well as talk about what is real, and the subject, of

1 course, is best practices.

2 I think that we've had a discussion that leads  
3 right up to this throughout the day. We have a pretty  
4 good understanding of what we think is involved in many  
5 instances, at least, for obtaining a reasonable  
6 demonstration of the consumer's consent, but what are  
7 the very best ways that we see businesses going about  
8 seeking consumer consent in a way that constitutes that  
9 reasonable demonstration, are these different best  
10 practices that we either see or envision as looming on  
11 the horizon, ones that need to vary, according to  
12 business sector, are there some common denominators that  
13 we can agree to that we should look for in best  
14 practices, and particularly, those of you from the  
15 business world who are using and implementing the  
16 license that ESIGN provides, what are your best  
17 practices, or where do you see yourself wanting to go.

18 Jeff, we're going to start with you, because  
19 nobody has their tent up, and you're smiling nicely.

20 MR. WOOD: That will teach me.

21 MS. HARRINGTON: So, what is your sense? You're  
22 at Household Bank. Where do you see your company going,  
23 what, in your view, would be best practices for online  
24 consumer financial services?

25 MR. WOOD: Thank you for the entry. We have a

1 number of -- we have about 39 different websites  
2 throughout the company, and we have a lot of different  
3 functions that are conducted different websites. In  
4 terms -- and not all of them, in fact hardly any of them  
5 actually use the E-SIGN provision with the, you know,  
6 reasonable demonstration of consent. In other words, a  
7 lot of the websites are for purely marketing services,  
8 for our customer care, which is after the fact, which is  
9 not really governed by E-SIGN, or our application  
10 purposes.

11 But in the case where the customer actually does  
12 go online and conduct a transaction, you know, some of  
13 these were kind of addressed in the comments and in some  
14 questions, you know, the disclosure really needs to be  
15 clear and conspicuous, in terms of kind of mechanics.  
16 We've said that the customer needs to click, I agree, or  
17 I submit or I consent at the bottom of the disclosure.  
18 So, you have to kind of scroll down, and then at the  
19 bottom you hit the submit or I agree or I consent, I  
20 can't remember exactly what it says, after having read  
21 through the disclosures that are set forth in the  
22 statutes.

23 MS. HARRINGTON: Now, does your company do sort  
24 of one scroll down screen and how do you, if you do, how  
25 do you vary type size font, you know? I mean, I have to

1 say as a consumer, when I go to a website, and am  
2 confronted with what if I printed it out might amount  
3 to, you know, 16 pages of information, and asked to  
4 click that I have consented, I find that to be  
5 overwhelming, so that wouldn't in my mind be a best  
6 practice.

7 How do you do better than that, or how do you  
8 see yourselves moving to do better than that?

9 MR. WOOD: It all I guess depends on what you're  
10 talking on what the -- you know, what happens when on  
11 the website. And that is a problem. And one  
12 suggestion, which we in our lawyer department don't  
13 particularly like, but one suggestion is to use the  
14 scroll box, which is a little box, it's on the webpage,  
15 there's a scroll box, the document is included within  
16 the scroll box and you can kind of see the first  
17 paragraph, and then if you want to see every other  
18 paragraph, you can see every other paragraph, so instead  
19 of the page being this long, it's this long, and then  
20 there's a scroll box within it.

21 You know, that's used for some purposes, but  
22 it's not used for the consent disclosure. Okay, like  
23 for -- and then in other cases, as a privacy statement,  
24 for example, we wouldn't force someone to read through  
25 the entire privacy statement, there's a link to it, but

1 that's pre Graham-Leach-Bliley. You know, as of July 1,  
2 we're in the process of evaluating and changing that.

3 So, I think if my comments over the last few  
4 minutes have said anything, I think what they've said is  
5 that we have a number of different disclosure rules and  
6 laws and concerns, and, you know, they're complex, and I  
7 think you need to as a counsel or as a business person  
8 you need to look at what the purpose of each disclosure  
9 and then, you know, act accordingly.

10 You know, I also -- self-serving, I want to  
11 respond to the study that was quoted about disclosure in  
12 the real estate mortgage transaction that only 10  
13 percent of them are federally required. That may or may  
14 not be true, but one thing is true, that the other 90  
15 percent are there because some lawyer thought there was  
16 a good reason. Have them, and that might be because of  
17 a risk aversion or litigation concerns or --

18 MS. HARRINGTON: Well, would a best practice not  
19 include having your lawyers write the material that  
20 appears online? Seriously? I mean, would a best  
21 practice involve having the marketing department play a  
22 very aggressive role? Or somebody? We call them the  
23 marketing department here, the people who do consumer  
24 education, but --

25 MR. WITTE: Do you mean best practice sell or

1 best practice stay out of jail?

2 MS. HARRINGTON: Pardon me?

3 MR. WITTE: Best practice sell or best practice  
4 stay out of jail?

5 MR. WOOD: Seriously, I think that there needs  
6 to be a combination of disciplines and the compliance  
7 department, the legal department, the business person,  
8 the technology people are crucial. If you have good  
9 technology people, you're five steps ahead.

10 MS. HARRINGTON: Okay. Wendy?

11 MS. WEINBERG: Well, I know you're being  
12 facetious about having, or maybe you weren't, about  
13 having the marketing department write your material  
14 instead of the lawyers, but I think that's something, if  
15 we're talking about best practices, that really beyond  
16 the plain English requirements that you would want to  
17 have in your regular consumer education materials, it's  
18 an even more extreme onus on anybody who has a website  
19 to make the material comprehensible. I don't know  
20 anybody, myself included, who actually reads those  
21 disclosures, you click through to I agree, and it could  
22 say you've agreed to kill yourself in five minutes, and  
23 you're like yeah, fine, fine, fine.

24 And so I think that first of all, it does need  
25 to be plain English, and it would be nice if it was



1 formatted so that it was hyperlinked and you could look,  
2 you know, it would say notice, and you would hyperlink  
3 to the notice question if that's what you're interested  
4 in, or if you're talking about a big contract which  
5 you're going to be getting under ESIGN rather than  
6 getting a paper copy, it's one thing to flip through and  
7 looking at the headings, for the few of us who are  
8 actually going to look through, and to find the heading  
9 that says, you know, on the back page that this is  
10 actually the total amount that you are going to pay, and  
11 it's another thing to have hyperlinks that take you  
12 where you need to go.

13 The other thing, just sort of generally, that  
14 would be useful, I have some fear, a few fears that I am  
15 going to share with you. One of them is that consumers  
16 consent to receive all these electronic documents, they  
17 put them on a separate file on their computer, and then  
18 either a virus takes out their computer, their hard  
19 drive crashes, or they lose all of their resources and  
20 give up their computer, and this happens so quickly due  
21 to some family emergency that they don't get to do their  
22 back-up drives, which would probably be useless anyway,  
23 because they have no place to put them in.

24 It would be nice as a best practices if  
25 consumers got, at least once, a written, a paper

1 statement which summarizes the agreement, maybe the  
2 essential terms of it, and a minimum there was something  
3 that gave a real life address and telephone number for  
4 the company. You know, it's one thing if you have a  
5 file and you say oh, yeah, I think I had some agreement  
6 with somebody to pay something for something, and it's  
7 another thing if you have at least one piece of paper so  
8 then you can call up and say what do I owe you, for  
9 what?

10 Another big concern that I have, and we've  
11 talked a little bit about authentication, but for  
12 accounts where there is more than one person on the  
13 account, I have trouble seeing how you could ever get  
14 proper authentication that both users under the account  
15 have actually agreed to something.

16 When you have a husband and wife on an account,  
17 or a mother and, you know, a parent and child, we all  
18 know thousands of stories of the bad spouse and the bad  
19 parent or the bad child, and usually most of the  
20 authentications that I am aware of, a family member  
21 would have access to.

22 So, you know, the bad spouse who's undergoing a  
23 divorce with the good spouse would be able to provide  
24 the mother's maiden name, would be able to provide  
25 information on the last tax return, meanwhile

1 transferring all the assets in this joint account to  
2 some place where the other spouse doesn't have access to  
3 it.

4 Similarly, there's a lot of abuse, you know, by  
5 younger people of ailing parents, or vice versa, parents  
6 of younger kids. And I am troubled about how you could  
7 ever receive authentication when they're both using the  
8 same family email account.

9 MS. HARRINGTON: Jane and then Virginia.

10 MS. STAFFORD: Well, we have only a limited area  
11 where we're using the ESIGN, and quite frankly, I still  
12 think we've overcrossed the area because we back up a  
13 lot of it by paper still. Our customers still like to  
14 receive paper statements, lots of them still like to  
15 receive checks, and, you know, but we have elected to --  
16 and I think it's the proper interpretation of the  
17 statute, although some things I heard this morning tell  
18 me people are approaching it a little differently --  
19 elected to put our ESIGN agreement separately from any  
20 other agreement that it governs.

21 So, if you wanted to print it, you wouldn't have  
22 16 pages, you would have maybe, depending on what type  
23 size your computer is printing, a page and a half, for  
24 just that electronic disclosure. It describes what you  
25 are agreeing to in the sense of what records you are

1 going to receive, but it's a separate disclosure, and it  
2 requires a separate click-through before you get to the  
3 underlying agreement that that governs, which requires  
4 another click-through to get into the authentication  
5 process of who you are.

6 So, and now if you printed the second agreement,  
7 I can assure you it goes on for pages, because it is a  
8 standard banking agreement, deposit agreement,  
9 regulation agreement, et cetera, and it's got all the  
10 stuff in it, including a name and address. And we do  
11 encourage you on the site to print that, although our  
12 online banking agreements, even as they are revised,  
13 remain on our websites in a different place, so you can  
14 actually go back and see what you agreed to in 1999.

15 So, even if you didn't keep a copy, it would be  
16 there. I think that's probably overkill, but we think  
17 that that's customer friendly, and hopefully.

18 As far as you know, I think as far as  
19 authentication, I think that's always been an issue,  
20 it's an issue today in anybody who has an on-call  
21 process where you can go in and give an account number,  
22 a social and the last deposit, and you can get the  
23 record over the telephone. If you have a PIN, if you  
24 have access to the PIN, it's written on the back of the  
25 plastic, you can go into an ATM and pull all the money

1 out.

2 The best security we have put in there is that  
3 in order to have access to an online banking, only the  
4 accounts that belong to both people can be together.  
5 So, you can't use -- if you had a single account in your  
6 name and there's a joint account, we don't put them  
7 together, and we don't use email as an access device.  
8 Ours is HTML-based so you have to go in through the  
9 Internet system. And that seems to have -- we hope that  
10 closes a lot of doors.

11 I will address one thing that Paul brought up  
12 earlier, however, in terms of the customer coming in,  
13 when we installed ESIGN, we also were installing a new  
14 online banking process, this whole new version of our  
15 online banking. And the first group that went on were  
16 our own employees and we got complaints sideways to  
17 Sunday as to why they had to now click through twice  
18 just to get to their verification process, but it's a  
19 one-time event, unless you're changing your agreement,  
20 whereupon you have to go back through again, we haven't  
21 changed it yet, and we have not seen any diminution that  
22 I can tell of people.

23 We do have a process in our branches where you  
24 can actually sign up for the process. We authenticate  
25 you all the way through, however you still have to go on

1 and click through the agreements. So, we have t  
2 continued to have relative even flow of people coming  
3 into our online banking system. So, maybe it's an  
4 elimination process, because we haven't eliminated any  
5 paper, even on the investing side where we don't have,  
6 you know, we have limited investing capability that's  
7 truly electronic. I still think the paper is still out  
8 there. So, maybe that's the customer's reaction is, I  
9 still really want the paper and a lot of customers still  
10 do.

11 MS. HARRINGTON: So, if I could just highlight a  
12 couple of your possible best practices. One is to  
13 remember that the ESIGN disclosure goes only to  
14 obtaining consent to receive records electronically, and  
15 making that disclosure a discrete and separate event may  
16 be a best practice, because it enables it to stand alone  
17 and for the consumer to see it. And another is to have  
18 paper redundancy.

19 MS. HILLEBRAND: Now interestingly enough, in  
20 our letter, we recommended that we abandon that separate  
21 process because we were seeing customer resistance to  
22 the double click-through, but on the other hand if  
23 you're talking about not having a customer print a  
24 15-page agreement which contains an ESIGN agreement  
25 somewhere at the top of the box or something like that,

1 that is the other alternative.

2 MS. HARRINGTON: Is there anyone from the  
3 business side who disagrees with the notion that having  
4 a separate ESIGN -- discrete ESIGN consent disclosure  
5 might be a best practice? Mark? I just would like to  
6 hear a different view on that.

7 MR. BOHANNON: Eileen, I'm not sure my comment  
8 is a disagreement, but I think it's important, and this  
9 is a useful place to do so, to remember that this  
10 discussion is -- very much today this particular  
11 discussion is occurring in the context of very well  
12 defined financial services, laws, and regulations.

13 So, I caution that -- and this is part of your  
14 question, that we not reach broad conclusions that apply  
15 to every sector, because quite frankly I think we're all  
16 still trying to understand how the narrow scope of ESIGN  
17 may apply in other sectors.

18 So, I don't disagree with you. I just think we  
19 need to be careful about making generalizations, because  
20 I think that financial services is a place where there  
21 has been decades, in many cases, of work about meeting  
22 the variety of legal requirements that a notice or some  
23 other part of the transaction be in writing, and that  
24 may not, in fact, be replicated in other areas.

25 So, I caution about reaching the conclusions

1 outside of the particular legal context in which this  
2 discussion is occurring.

3 MS. HARRINGTON: Okay, we'll have Virginia and  
4 then Bruce who I know needs to leave in a minute to  
5 catch a plane. Virginia?

6 MS. GOBATS: Just so that I don't forget, this  
7 issue -- I'll say it first, but then I wanted to comment  
8 on another issue. One consideration that might be given  
9 is to include the privacy policy at the same time,  
10 because the question that the investors have is now that  
11 I'm giving you my email, what are you going to do with  
12 it? So, since it looms large in their minds, you might  
13 also want to deliver that privacy policy in the same  
14 process.

15 But on the subject of giving people a clear  
16 understanding of what we're offering, and what they're  
17 agreeing to, we recommend a number of things, and we've  
18 seen them all done. One is that you can have buttons on  
19 the bottom of the screen, for example, that click to  
20 important considerations, or that click to frequently  
21 asked questions, and there you can get that jump, you  
22 know, jumps to the kinds of issues that are really on  
23 the minds of the investor.

24 Another is that, just an observation, that  
25 nobody was thrilled with rewriting prospectuses to do



1 simplified prospectuses, but they're really nice. And I  
2 think, you know, a lesson we learned about that  
3 simplification process, you know, the plain English  
4 process, really needs to be applied here. And, you  
5 know, we monitor maybe 50, 50 top sites a day to see how  
6 they're dealing with consent, and it's getting better, I  
7 mean it's getting closer to plain English.

8           The other thing is that in the buttons if  
9 somebody clicks yes to something, not only to say what  
10 it is you're clicking yes to yet, but then also say you  
11 can change your mind, right there, where they say yes,  
12 you say, and remember, you can always change your mind.  
13 Or, if you need a hard copy, call us, and give them a  
14 method of getting the hard copy.

15           So, there are a number of best practices that  
16 make it less onerous, the idea that the document may be  
17 a long document, take forever to scroll down through or  
18 take forever to print.

19           Also it can be -- it can be used as a stuffer,  
20 the back side of a stuffer can -- and have the consent  
21 agreement on it, and the front side says why you would  
22 want this, what all the benefits are, and if you're  
23 interested in it, let us know, here's a BRC.

24           So, there are a number of ways that you can keep  
25 educating people in a way that's not so punishing.

1           And then the last thing is that there's an issue  
2           that really is kind of a technical issue.  If you're  
3           sending somebody from your website away to another site  
4           where they're consenting, you have to be moved, and now  
5           they're out there seamlessly, to somewhere where they're  
6           consenting to that consent site.  There are some  
7           considerations about just how long it takes to click  
8           through.  If it takes too long to click through, they  
9           may time out on the website.

10           So, you really have to consider streamlining it  
11           for a number of reasons.  One is that, you know, that I  
12           would consider your issue at Fidelity to be a  
13           streamlining issue.  They tell you in the office, you  
14           know, that I would like to get electronic delivery, and  
15           then five hours later I need you to remember to log on,  
16           forget it, I mean I would never remember it.

17           But those are my comments.

18           MS. HARRINGTON:  Thank you.  Bruce?

19           DR. BROWN:  We have several customers that are  
20           worried about the mortgage closing, and in that arena,  
21           they, together with the secondary market who is the  
22           receiver of those promissory notes would like to have  
23           the promissory notes rewritten so that the electronic  
24           consent disclosure is in those notes, as well as, as I  
25           demonstrated earlier, on the screen.  And so they are

1 suggesting rewriting most of the statements that have  
2 appeared on paper now for the electronic form to include  
3 the consent explicitly listed in there that as one of  
4 the clauses of the contract, that by signing this  
5 digitally, you are consenting to it.

6 MS. HARRINGTON: But there would be some  
7 redundancy, your suggestion is that there would also be  
8 separate and on the screen?

9 DR. BROWN: Oh, it's redundant. Yes, separate  
10 and on the screen, but they are also rewriting their  
11 contract so that it is explicitly in those contracts.

12 MS. HARRINGTON: Thank you. Margot?

13 MS. SAUNDERS: Well, I have some best practices  
14 to propose.

15 MS. GOBATS: Why are we not surprised?

16 MS. SAUNDERS: Aren't you surprised?

17 Whenever the parties are dealing with each other  
18 in person, I think the best practice would be to hand  
19 the required disclosures to the consumer. If the  
20 consumer doesn't want them and the consumer requests  
21 them to be provided electronically in addition, that's  
22 fine, they can be provided electronically in addition,  
23 you don't even need the electronic consent in that case,  
24 because you've satisfied the underlying law's  
25 requirement of providing the -- you've satisfied the

1 underlying law's requirement by providing the paper.  
2 You are simply providing another service to the consumer  
3 by providing it electronically as well.

4 So, you wouldn't need the electronic consent,  
5 and in that way you tremendously address some of our  
6 most serious concerns with ESIGN. Electronic  
7 documents --

8 MS. HARRINGTON: Can I clarify, because that  
9 seems to be at variance, I think, with a point that Paul  
10 was raising earlier, and it gets us back to our first  
11 discussion of the day, legal issues, but are you  
12 suggesting that in the situation that Paul raised, where  
13 the customer comes into the branch to open an account  
14 and wants to receive the disclosures electronically --

15 MS. SAUNDERS: We're talking about two different  
16 things.

17 MS. HARRINGTON: Okay, I just want to clarify  
18 that, because -- okay, if you could address Paul's  
19 issue, too, if you've got a best practice for that.

20 MS. SAUNDERS: There are two types of  
21 disclosures we're talking about. One is the disclosures  
22 that are required to be provided to the consumer at that  
23 moment. When you buy a car, when you sign the contract  
24 to purchase the car and to finance the car, Truth in  
25 Lending and state law requires the retail installment

1 sales contract and various title documents, and the  
2 Truth in Lending contract to be provided.

3           There is no reason not to provide -- not to hand  
4 the consumer those documents when they're standing right  
5 there. If the consumer says I really would like these  
6 online, I'm not a paper person, there's also no reason  
7 not to electronically transmit them or post them to the  
8 website to do a service for the consumer for that, but  
9 you don't need to have the electronic consent for the  
10 provision of those documents, because the electronic  
11 delivery of the documents is not what you have used to  
12 satisfy the underlying law of providing the documents,  
13 it's the paper.

14           Now, if that consumer wants to continue the  
15 relationship online, and have all of -- if there are any  
16 notices related to the car, warranty to come to him  
17 online, or the notices related to the financing  
18 document, if there's a change of terms, if there's  
19 variable rates involved, or if there's a repossession,  
20 an acceleration of the note, that agreement would need  
21 to be -- the agreement to receive those writings would  
22 need to be electronically consented to, but could easily  
23 be electronically affirmed, or rather the consent to  
24 receive electronic record could be confirmed  
25 electronically at a later time. So that it was a self

1 effectuating process. And if you provide paper to  
2 people before they walk out the door, you will cut down  
3 on all of the -- most of the allegations of fraud that  
4 we are so concerned may result from this combination of  
5 e-commerce with the physical world.

6 Does that address your question, Eileen?

7 MS. HARRINGTON: Yes, thank you.

8 MS. SAUNDERS: The next is I would propose that  
9 when electronic documents are provided to consumers to  
10 access and retain, they should be provided in some kind  
11 of locked format. Not in a format which is easily  
12 mistakenly changeable by the consumer.

13 Thirdly, I would propose that paper copies of  
14 electronic documents previously provided should be  
15 provided to the consumer upon request, and we have never  
16 objected to a cost -- to a price being charged for this,  
17 so long as the price was reasonable and close to what  
18 was actual, not -- and the price charged for the  
19 provision of paper should not be used as a punishment to  
20 the consumer for switching back to paper, nor should it  
21 be used as an incentive to -- well, it just shouldn't be  
22 used as punishment. It can, and should, understandably,  
23 reflect the actual difference in price and cost to the  
24 business for providing paper, rather than providing  
25 electronic. We understand that.

1           The consumer should be allowed to switch back to  
2 paper, as I think Fidelity and several other  
3 organizations here have said that they allow, upon  
4 request. Now, that raises the interesting problem of  
5 what happens to those transactions, ongoing transactions  
6 where the price is based on the expectation that there  
7 will be an ongoing electronic relationship only, and I  
8 think that there has to -- that it's better for the  
9 parties to deal up front with what happens when one  
10 party loses access to electronic and work that out.

11           And I would propose that the price be changed to  
12 be a reasonably increased price to the consumer, but  
13 that's -- in any event, the distinction or the -- it  
14 should be automatic -- it should be figured out at the  
15 beginning of the relationship. Because there are some  
16 consumers, as the Department of Commerce has noted in  
17 its excellent survey, Digital Divide, that have gone off  
18 the web and because their computers have broke, or  
19 because their situation has changed.

20           In that same vein, there should be an automatic  
21 switch to paper notices, either temporarily or  
22 permanently, when the consumer has failed to respond to  
23 electronic notices. I think we have to recognize that  
24 there is a real distinction in the receipt of electronic  
25 notices. I think the numbers are 35 percent of the

1 country is online from home, and everyone, and those  
2 computers at home are probably much less -- much more  
3 likely to break, people are -- when people are on the  
4 edge, they often cannot fix them, and if they're going  
5 through a life crisis, they may not remember to email  
6 everybody and go to the library to pick up their email.

7 So, there should be some -- a best practice, at  
8 least, should be a switch to paper when there has not  
9 been a reply or a response from an electronic notice  
10 that would be expected.

11 And I think that a best practice should also  
12 include that a consent is not considered adequate, it's  
13 not considered to be -- an electronic consent would not  
14 reasonably demonstrate the consumer's access to  
15 information if the consumer consented at the business'  
16 computer.

17 I see some -- but that -- that is especially, if  
18 the consumer does not have his own email address.  
19 Obviously. So, if the business is establishing the  
20 email address or the business is providing the consumer  
21 the computer, that consent should not be considered  
22 adequate. If the transaction is otherwise impersonal.  
23 Thank you.

24 MS. HARRINGTON: Thank you. Paul?

25 MR. GALLAGHER: Well, I'm happy to say, Margot,



1 I think we comply with almost every single one of your  
2 requirements.

3 MS. SAUNDERS: Not surprised.

4 MR. GALLAGHER: I'm glad to hear that.

5 I think the only one is the consent to business  
6 is kind of the thing, the point I was alluding to  
7 earlier, but I was just going to comment a little before  
8 on just maybe a couple of -- bring together a couple of  
9 different points.

10 I think the general move to try and get to more  
11 simplified concise language is we're all trying to get  
12 there. There's nothing better that I would like to do  
13 than to have it in a few paragraphs. Unfortunately,  
14 being in the business we're in, we've got a lot of other  
15 people who have a say, like SEC, NASDI, NYSE, IRS, et  
16 cetera, let me continue to go down the list the people  
17 who all have at this point in time varying requirements  
18 of what we need to do. So, I think we're getting  
19 better, but I think it's probably going to be some time  
20 until we can really get it into a two paragraph  
21 disclosure, which is something I think we would all like  
22 to see.

23 I think also, again I can speak in terms of what  
24 we, Fidelity do, in terms of the authentication process,  
25 which I think someone raised earlier, we're very

1 cautious when we have a joint account that we really  
2 need consent from both parties before we're going to  
3 suppress something. Particularly an e-delivery. And if  
4 we do, in fact, suppress it, we send written  
5 notification to the other party that it has, in fact,  
6 been suppressed, so we kind of cover both bases.

7 So, I think in general, we're all moving in the  
8 right direction, but I do think what we would like to  
9 do, I think ideally from a business practice point of  
10 view, is to have a simple disclosure, which is short  
11 enough, yet adequate enough to cover all the things we  
12 need to do, and not necessarily a separate disclosure.

13 Again, I come back to my points earlier today,  
14 the customers at least that we're dealing with in the  
15 financial services world, and particularly in the  
16 brokerage, in the mutual fund world, are usually looking  
17 for speed and accuracy, so they want it now, and they  
18 want to conclude it now. I think generally it's a more  
19 highly informed group of individuals in terms of knowing  
20 because it's money at stake, so there's a higher degree  
21 of, if you will, involvement in the transaction.

22 So, I think we're all moving in the right  
23 direction, but I think we have to be careful that we  
24 don't put on yet another requirement that's going to,  
25 again, force people or require people to do even more

1 work when they're looking again to do simple work. What  
2 we say internally is people are looking for ease of use  
3 and being able to move quickly.

4 So, I think now that those are just comments  
5 that I would like to add in terms of the overall  
6 discussion.

7 MS. HARRINGTON: Okay, thank you. Bob, best  
8 practices?

9 MR. WITTE: Okay, thanks. I guess I have a few  
10 things, some responding to what's gone before in a  
11 specific question, and then maybe stepping back a little  
12 and addressing this from a slightly different angle.

13 As to -- I guess I just want to observe Margot's  
14 best practices include some things that are actually  
15 required by ESIGN, for example the notion that you have  
16 to be able to withdraw your consent, and that the  
17 consequences, any adverse consequences of withdrawing  
18 your consent are both items that need to be disclosed as  
19 part of the preconsent, you know, ESIGN. So, ESIGN is  
20 at once requiring disclosure and imposing a substantive  
21 requirement that it be withdrawable. And so --

22 MS. HARRINGTON: Well, this could mean that the  
23 Commerce Department and the FTC could report back to  
24 Congress that they were brilliant in drafting a portion  
25 of the statute, because it encompassed a best practice.

1           MR. WITTE: Margot's problems are all taken care  
2 of. Well, I mean I think in fact that there's some  
3 truth to that. A good portion of the disclosures that  
4 are called for, and we haven't spent any time because it  
5 has really been within the narrow focus of the request  
6 for this workshop, but we haven't spent much time on the  
7 other elements of 101(C), which are the disclosure  
8 requirements, which are quite specific, which have to be  
9 clear and conspicuous, and their, you know, best  
10 practice does tend to merge with complying with the law.  
11 You know, in other words, it has to be clear and  
12 conspicuous, and what is going to satisfy that  
13 criterion, especially in the risk adverse environment  
14 that at least our clients operate in.

15           As to the question of -- and I know this was,  
16 indeed, probably said facetiously, but it's worth coming  
17 back to. My response was facetious, too, about whether  
18 it should be the marketer or the lawyer. In fact,  
19 though, I think you really want to have a team of the  
20 people who know what the law says and can apply that in  
21 a way that -- and point out that maybe this does or  
22 doesn't comply, people who know what technology can do,  
23 and, of course, people who are oriented towards what  
24 cannot be ignored, which is the goal of actually getting  
25 it out there in a way that people can understand and

1 use, which is what marketing people can, in fact, do.

2 Do I to get closer to the mike?

3 So you need a team, okay? And when you put that  
4 team together, I think you notice that there are  
5 different kinds of notions about what is best practice,  
6 depending on which best practice you mean. There is a  
7 best business practice, which has a lot to do with  
8 making sure that your customers are satisfied, that your  
9 customers -- and again, I am focusing on a relationship  
10 environment, but I think it was a point well made in one  
11 of the earlier panels, there's limits to what you can do  
12 for the guy who is really trying to come in and rip you  
13 off and doesn't expect to ever be seen again. There are  
14 going to be some of those guys, and they're bad guys,  
15 but for people, at least in the financial services  
16 industry, where you're talking about a relationship,  
17 that's not it at all, and at least not 99.9 percent of  
18 the time, and so you've got a business practice of  
19 wanting to keep the customer satisfied, sending  
20 information out into the ether that they never get and  
21 then are held responsible for is not a good formula for  
22 doing that.

23 So, satisfying substantive common sense  
24 requirements of getting disclosure successfully to  
25 people in a manner that they can understand is indeed

1 the best practice. And there are ways of addressing  
2 that, but the ways of addressing that may be different  
3 than the ways of best legal practices for complying with  
4 what we have here, which is a statute that sets out very  
5 specific criterion -- I'll come back, of course, to our  
6 favorite but also the focus of this whole workshop,  
7 which is the reasonable demonstration test.

8 Having that reasonable demonstration test,  
9 having the electronic consent requirement, change what  
10 our best practice is. And, you know, the fact is that  
11 reasonable law makers can differ, and obviously have  
12 differed, as to what really would be a best practice for  
13 obtaining an informed consent from consumers.

14 The Securities and Exchange Commission, not  
15 known for being shy about trying to protect investors,  
16 that's their entire mission, has for a long time had the  
17 set of guidelines for the electronic delivery of  
18 information. Which have really been quite successfully,  
19 or at least so believes the SEC and so believes most of  
20 industry that's affected by the SEC, and the SEC's  
21 guidelines do not require either electronic consent or a  
22 reasonable demonstration test. And as a matter of fact,  
23 they don't even require consent, if you can prove actual  
24 delivery, actual access to the relevant document.

25 Now, is this because they're not dealing with

1 aluminum siding salesmen? Well, probably not. I mean,  
2 they're, as much as I hate to say it, but there have  
3 been known to be some bad actors in the securities  
4 industry. Is it because they're dealing with a  
5 regulated entity, with regulated entities over whom they  
6 have continuing authority? Maybe. But it may also be  
7 because they just think that maybe that isn't necessary  
8 as a best practice for actually obtaining an informed  
9 consent.

10           And then there's the question of what's best  
11 practice for compliance with this consent requirement on  
12 the one hand, and what's best practice for getting the  
13 actual underlying substantive disclosure out there to  
14 the investor or customer, whomever it may be. And let's  
15 remember, the whole point of this consent requirement,  
16 the only applicability of this consent requirement is in  
17 a situation where the law requires that some  
18 information, may not be a disclosure, really, but  
19 information be provided to a consumer in writing.  
20 Absent that, no rule.

21           Interesting, though, that there's some reason to  
22 believe that complying with the rule may tend -- the  
23 best practice for complying with the rule may tend to  
24 have you provide the underlying disclosure, substantive  
25 disclosure, in a way that isn't best, and I would

1 commend you in this respect to the very thoughtful, I  
2 thought, submission that Jerry Buckley made. I would  
3 also commend you, of course, to the Investment Company  
4 Institute's submission, but I think Jerry made a very  
5 excellent, excellent point, which is that the cause, the  
6 self-validating paradigm that I mentioned earlier this  
7 morning, is one that's kind of a no-lose compliance with  
8 the reasonable demonstration test, and is easily  
9 satisfied by HTML, frequently, tends to push people  
10 towards using an HTML system for providing the  
11 underlying disclosure. That may or may not be the best  
12 way to disclose the relevant information.

13 Is it best, for example, to get a prospectus in  
14 HTML format or some other format that's some other form  
15 that you can easily read on the Internet in the kind of  
16 text that you frequently see there, for those of you who  
17 looked at least the old Edgar submissions may think not.

18 It's a very -- can be a very poor way to  
19 actually present information to the investor. Maybe in  
20 many cases it may be perfect, okay, but in many cases,  
21 it's going to be poor.

22 In contrast, a PDF document, which is  
23 essentially replicating on the screen, complete with  
24 graphics and everything else, all the things that your  
25 marketing and other people -- and more than marketing,



1 the same team, the legal, the marketing, the technical  
2 and so on and so forth, are put together as a way of  
3 presenting the substantive disclosure, and I'll come  
4 back to the prospectus, okay, which is an easy example  
5 that we can relate. It may be best to present it in PDF  
6 form, but doing that requires a more cumbersome consent  
7 mechanism. And it also, by the way, since I get ahead  
8 of myself.

9 So, it may not be that those two best practices  
10 are consistent with each other, and you may choose to  
11 sacrifice the substantive disclosure quality in order to  
12 accomplish compliance with the consent requirement. And  
13 by the way, it may cost you more, too.

14 One of the things that some of my clients have  
15 pointed out to me is hey, we want to put this prospectus  
16 in PDF, because that really doesn't cost anything, but  
17 if we have to go to the printers, the financial printers  
18 and have all of our hard paper prospectuses, which after  
19 all do have to be in the real world, not everybody does  
20 business electronically, so you do have to have a hard  
21 copy prospectus and annual reports and everything else  
22 for the most part, have them put in HTML and they are  
23 going to charge us so many dollars per page, and so many  
24 is no small matter and neither are the number of pages.

25 So, it turns out that it's more expensive, but

1 it may be something that's necessary in order to assure  
2 compliance with the rules.

3 So, best practice is a relative thing. It  
4 depends on what you're providing, and it depends on what  
5 rule you're trying to comply with.

6 MS. HARRINGTON: Thank you, Bob. Gail, and then  
7 Jeff, did you want -- okay, Gail and Jeff.

8 MS. HILLEBRAND: I would like to comment on some  
9 of the practices that have been identified throughout  
10 the day that are already in use that we consider to be  
11 among best practices, and then on some other practices.

12 I heard over here, revision, keeping the old  
13 versions accessible for the customer, that's valuable  
14 and important because people are going to think of that  
15 website as their filing cabinet, if they got it there  
16 once, they're not going to think, gee, it won't be there  
17 next year. And I have had complaints from people who  
18 have said, I can't get the privacy policy that I signed  
19 up under because only the new one is up there and it's  
20 different from the old one, so that's been an existing  
21 issue already.

22 Telling the consumer right on the bottom of the  
23 form, this is more important I think for the underlying  
24 contract even than for the electronic consent piece.  
25 Print this out. Print this and keep it. Reminding the

1 customer in various places that that will be of value to  
2 them as a useful practice.

3 We heard that somebody this morning said we  
4 checked to see if the account statements are being  
5 accessed, or we're working on the technology to check  
6 and see if they're being accessed. A useful practice  
7 there would be to kick that system back to paper, or  
8 supplemental paper, if the account statement is not  
9 opened, say, two times in a row, a periodic statement.  
10 So, maybe it's quarterly, maybe it's -- three times is  
11 what you do?

12 MR. GALLAGHER: Yes.

13 MS. HILLEBRAND: I like two. Because it  
14 suggests something is done wrong in the system, maybe  
15 access has been lost, maybe the customer is in the  
16 hospital, maybe for some other reason they have password  
17 fatigue and they have forgotten all the different  
18 passwords they set up in all the different places, and  
19 they're just not checking anymore. So that's useful.

20 Default to paper may turn out to be a temporary,  
21 a three to five-year kind of solution as people adjust  
22 to these systems, but it will still be valuable for  
23 building confidence during that time.

24 The comment about the marketing departments, I  
25 think, whether it's the marketing department or

1 somewhere else, someone needs to pay attention to  
2 designing not only the consent document, but also the  
3 underlying contract terms and provisions, to be  
4 accessible to people, for the complexity of the length  
5 of those terms and conditions to be commensurate with  
6 the kind of transaction and to be designed to get your  
7 attention. And we lawyers haven't done the best job of  
8 that, so open the door and see what happens with the  
9 marketers.

10 I would direct you to a paper that's in  
11 preparation now by the American Bar Association, a  
12 section on cyberspace law and a section on business law.  
13 They have a task force, I think it's Task Force on  
14 Consumer Issues. And they've got a set of best  
15 practices. It's designed for business lawyers to tell  
16 their clients here's the way to have your click-through  
17 contracts stand up in court.

18 But many of the practices that they recommend  
19 are practices that also will be beneficial to consumers.  
20 For example, not just having the I agree box with a hot  
21 link or hyperlink over to the text, but having the text  
22 show up before the customer clicks I agree. And that I  
23 think is scheduled for publication in The Business  
24 Lawyer in the next issue for comment, it's not a final  
25 document.

1           Some other things we need to do, we all will  
2 benefit from, together, we need a system for email  
3 forwarding, for those people who would like to have  
4 their email forwarded. Not everyone wants that.  
5 Sometimes you close your account because you can't get  
6 off the junk mail list. You really don't want that  
7 stuff to be forwarded to you.

8           But there probably would be a need for something  
9 like the DMA service, only it's please send me this  
10 material instead of please stop sending me this  
11 material. Or maybe we need both actually. There is a  
12 need to look at commercially available junk mail filters  
13 and whether they're going to filter out notices that  
14 consumers need to get.

15           I think one of the problems in this area is that  
16 if the notice is your credit card didn't go through on  
17 Amazon, your books won't be shipped. Chances are if the  
18 books don't show up in the mail, I'm going to go online  
19 and try to find out what happened. And that part is  
20 going to work. It's the notice that comes a year later,  
21 and maybe it will say please use your product that you  
22 bought last year in this fashion notice. Maybe it's a  
23 warranty claim, maybe it's a secret warranty, no offer  
24 to replace, it's not quite a recall, it doesn't fall  
25 under the E-SIGN paper exemption, but it's information

1 that the customer not only needs, but is not expecting.

2 And for those, the stale email address is going  
3 to be a real problem, because consumers are not going to  
4 get that information, and ESIGN does place a burden on  
5 consumers to notify everyone to whom they have given  
6 their addresses or legally-required notices.

7 I assume Congress put the burden there because  
8 industry didn't want it and that was a choice they made,  
9 but we all need to recognize it's not going to work.  
10 We're not -- I don't think anyone in this room today  
11 could come up with all the places where they've already  
12 given their email, if we had to go out and notify all  
13 those people.

14 You notify the post office once, there's no  
15 similar system here for notifying or for keeping them up  
16 to date. There's been news recently about disappearing  
17 email, and I would suggest that your report might urge  
18 companies not to use disappearing email for legally  
19 required notices, because we do regard our computers as  
20 our filing cabinets and we won't always print them, and  
21 if it disappears, some of us are going to be very  
22 surprised.

23 And finally there's a real need for the  
24 description that is outside -- the plain language  
25 description, which is outside the click-through, to

1 describe what's really in there. And I want to give you  
2 an example of what happened to me on Saturday.

3 I went to a very reputable, well, highly  
4 regulated well-run company site, mutual fund site, and  
5 saw that in order to access my own information, in a  
6 personalized way and see those little pie charts and so  
7 forth, I had to click through the consent, and that  
8 may -- the consent to the website terms, and that made  
9 perfect sense to me, I was willing to do that.

10 But I thought I would print them out and have a  
11 look at them first. So, first I had to switch to  
12 another computer because our DSL fiasco has resulted in  
13 only one working printer in our house that's connected  
14 to the Internet, and this does happen, people are  
15 sometimes online and then they're not, or they're  
16 partially online and then they're no.

17 And I was very surprised to find that the terms  
18 and conditions for use of the website, for accessing my  
19 information on the website also consented to receiving  
20 all my statements electronically.

21 Now, the information that surrounded the I agree  
22 button did not say E-SIGN consent, did not say get your  
23 statements electronically, didn't even say save trees,  
24 cut down your mail. It just said, do you want to use  
25 our website service, and I would suspect many consumers

1 would click I agree without knowing that they were also  
2 agreeing to receive these important statements  
3 electronically. So, there's plenty of work to do.

4 All I know is they're out there doing it,  
5 because I sent them an email saying does this really  
6 mean what it seems to mean, and they said yes, but your  
7 employer has an arrangement with us for 401k, we have to  
8 send you paper, so it doesn't apply to you. Suggesting  
9 that they think they'll apply to other folks.

10 MR. WITTE: But you weren't the consumer?

11 MS. HILLEBRAND: I sure felt like the consumer.

12 MR. WITTE: You felt like the consumer, but they  
13 didn't -- you know.

14 MS. HARRINGTON: Okay, we just have about ten  
15 minutes until we're going into the public portion.  
16 Jeff?

17 MR. WOOD: Thank you. I found it very helpful  
18 today to listen to everyone's comments, and I just  
19 wanted to say that everyone has been very forthcoming,  
20 and these ideas particularly in this session have been  
21 very good.

22 It occurred to me that some of the best  
23 practices do go to what Margot shared earlier with a  
24 list of concerns when comparing the e-commerce world  
25 with the print world, you know, with a list of benefits



1 and not burdens, but disadvantages, and I kind of went  
2 through and I was thinking, you know, the e-commerce  
3 world has many benefits when taken with the best  
4 practices, offset most, if not all, of those concerns.

5           The e-commerce world can provide tremendous  
6 service with the customers, it can be instantaneous,  
7 versus if you, for example, companies do business by  
8 phone, like we do, in many cases, you have to wait three  
9 or four days for the document to get there in the mail  
10 before you can sign up and get your check or get your  
11 amount or whatever, whereas on the Internet it can be  
12 instantaneous. That's a tremendous value to customers.

13           The document can be retained permanently versus,  
14 you know, the document that's printed is, you know, at  
15 risk of loss in a hurricane, or not really -- I'm not  
16 really that concerned about natural disaster in my  
17 house, it's the not knowing where everything is because  
18 I have so much paper, like any other lawyer, you tend to  
19 keep paper. I refinanced my mortgage recently and I  
20 needed to find a copy of the previous mortgage and I  
21 just plumb couldn't find it.

22           Now, had I had an e-documentation of my earlier  
23 transaction, I could have theoretically, had there been  
24 a best practice, I could have gone to the mortgage  
25 company and said I would like a copy of my mortgage,

1 they could have emailed it to me within ten seconds,  
2 then I could have sent it on and I would have been done.

3 So, I would propose as a best practice, that  
4 kind of very safe retention practices, you know, is a  
5 concern, and I totally agree with Margot about  
6 alteration of the documents. I think that the  
7 technology is there so that documents are not altered  
8 and so that they're retained for an appropriate period  
9 of time, whatever that is for the transaction or the  
10 document.

11 That really is better than paper, which not only  
12 can be lost or destroyed or stolen, but it also can be  
13 altered, and, you know, we've had cases where documents  
14 have been altered, where, you know, a variety of  
15 different documents have been altered.

16 The other benefit is that electronic  
17 transactions really contain the promise of eliminating  
18 ID theft, and we're not there today, necessarily, but we  
19 will be, and that's really critical that, you know, that  
20 I can know that my digital signature will never be used  
21 by someone else, unless I give it to them. And of  
22 course I share the concern with the spouse who is going  
23 to divorce you the next day or the child of the elderly  
24 woman and so forth, that's an issue, and I think that's  
25 going to be there. It's there in the print world,

1 they're in the e-commerce world.

2 Also, there's the possibility that you will  
3 never have to change your email address. If I move  
4 across country, I can keep the same ISP provider and  
5 have the same email address, so that my company that I  
6 do business with don't have to change their records, I  
7 don't have to notify them. You know, we're concerned  
8 about the stale email address, but there's a benefit  
9 there, if you just flip that around, there's a  
10 technological possibility that I could from now until  
11 death have the very same email address. So, that's a  
12 tremendous benefit.

13 I wanted to note one thing that no one  
14 mentioned, keeping the link to the document on the  
15 website for a period of time, the Federal Reserve in its  
16 proposal mandated a 90-day proposal. I would suggest  
17 that that certainly in that case, you know, that's fine.  
18 It would be okay, certainly. I think that this should  
19 be a market oriented approach.

20 I think the major problem with electronic  
21 documents that Margot listed that everyone is going to  
22 have to struggle with is that not everyone has access,  
23 and there is typically a charge for access. And, you  
24 know, this is the kind of what the country has based,  
25 you know, whenever there's been a major technological

1 change.

2 When the cars were invented, not everybody had  
3 cars, a lot of people had horses and buggies, and there  
4 were probably people who were saying, you know, horses  
5 and buggies have these really clear benefits that, you  
6 know, cars don't have. And I know that was the case.  
7 You know, but then Henry Ford developed an economical  
8 car. So, what we need is a Model T for computers, it's  
9 getting there, and I think that if it was 45 percent  
10 now, it was 10 percent a few years ago, it will be 80  
11 percent a few years from now.

12 MS. HARRINGTON: Thank you, Jeff. We're going  
13 to hear from Mark and Virginia and then we're going to  
14 move right into the public participation part of the  
15 day. Mark?

16 MR. BOHANNON: Thanks. Let me again point out  
17 that as probably the one industry representative here  
18 who has not exclusively devoted his life to financial  
19 services in this context, that because ESIGN may affect  
20 other areas, I want to reiterate that I've heard, I  
21 think, a really excellent discussion among the consumer  
22 advocates and among the business representatives about a  
23 variety of very useful best practices. As I've listened  
24 to them, and I could add many more, that come out of the  
25 quality movement, and other areas in terms of putting

1 customer first as a priority, I want to, I think, come  
2 back to -- I haven't heard yet any best practice  
3 suggestions about (C)(ii) provisional and regional  
4 demonstration.

5 And so I think that, again, I think you've done  
6 an excellent job of discussing what really are good  
7 business practices generally, about dealing with a user  
8 or consumer, I want to go back to that, because as I was  
9 thinking through this session and looking at that and  
10 having participated in a variety of best practice  
11 development efforts in a variety of sectors, where best  
12 practices depend on knowing what your goal is, building  
13 consensus around it, having experience from which to  
14 draw best practices, so that you're not creating  
15 artificial efforts at trying to achieve the goal.

16 I think we have to keep in mind that there is  
17 still both legal uncertainty about what reasonable  
18 demonstration means, and that is being communicated on  
19 all sides today, that we're still at a very preliminary  
20 level of seeing this implemented. And I'll use my own  
21 personal experience.

22 I've actually started asking many of the folks  
23 who have to give me notices to give them to me online.  
24 My first realization was that few of them are prepared  
25 to do so. I'll be quite honest with you, I think we're

1 still at a very nascent stage of having those who have  
2 to give notices do it online. I think there's still a  
3 time to market question.

4 The second is for those who are sending them to  
5 me, I am noticing that I am more empowered as a  
6 consumer. And I want to be very clear about this,  
7 because I, you know, although my eyesight is getting  
8 worse as I get older, and I haven't gotten bifocals yet,  
9 I'm finding that when I get the notices electronically,  
10 I can then use search features that are provided to me  
11 in the operating systems and the personal productivity  
12 applications, whether it be in Word, WordPerfect, Lotus  
13 Notes, HTML, PDF, I can actually search for whether I'm  
14 subject to an arbitration clause, which is an example  
15 that came up here later. Whereas when I was reading it  
16 in the paper form, I had a lot of trouble trying to  
17 discern what it was.

18 And so I think that one of the things that the  
19 FTC could do is encourage NGOs and others to educate  
20 consumers on how to use the tools that come with the  
21 Internet, to make yourself more informed of the notices  
22 that you're required to get by law. I use that only as  
23 an example.

24 And I think that one of the issues around best  
25 practices is that -- and I go back to the issue of

1 consensus and understanding the real world is, best  
2 practice is ultimately in these particular contexts come  
3 up against a variety of goals. And, for example, in the  
4 privacy area, where we've done a lot of work with our  
5 industry members, we have privacy policies going back to  
6 1995, working with them on meeting USEU safe harbor  
7 provisions, as well as existing FTC concerns.

8 We don't believe it's a best practice to tie  
9 your privacy policy to other disclosures, because we're  
10 finding from our customer members, customer research, is  
11 that privacy is not such a high profile issue, that if  
12 you bury it with something else, you are not really  
13 meeting the customer demand.

14 So, I caution as we try to come to grips of what  
15 our best practice is, in the context of (C)(ii), that  
16 there are a variety of demands here for those who are  
17 trying to meet customer needs, legal requirements, keep  
18 customers coming back to you that affect some of these  
19 things. And that's even before I get to how I even  
20 begin to discuss what are best practices in meeting  
21 (C)(1) about helping people explain what software and  
22 hardware requirements are. That's a whole other  
23 discussion.

24 So, I leave that with you as someone who is not  
25 just an exclusively financial services representative

1 here.

2 MS. HARRINGTON: Thank you, Mark. Virginia, you  
3 are going to have a very quick last word here before we  
4 begin the public participation.

5 MS. GOBATS: Okay. I was eliminating from my  
6 list best practices that got mentioned around her, but  
7 one, I think we're not talking enough about the  
8 education of the investor before they get to the consent  
9 point. That maybe we ought to do the demo I had  
10 upstairs, we have to do more like that showing people  
11 what will happen. You do this, then we do this, then  
12 this happens to you. You make that choice and you get  
13 the delivery. So, we do more of that on the website,  
14 even, saying here's what the process looks like.

15 And then the idea of many of our clients use  
16 trial periods, so they make available the electronic  
17 delivery and say we will turn this off in three months.  
18 You will get a chance to consent to them turning the  
19 paper off, three months from now we will send you a  
20 reminder. So, that helps people because they're  
21 changing their habits, it's a behavioral change that's  
22 going on, and you want to make sure that they're going  
23 to be comfortable in it.

24 Then I just wanted to cheer for HTML for a  
25 moment, because we have some beautiful HTML screens out



1     there, done by me, I'm not even a techy, nice bolding,  
2     point sizes, varied all over the place, everything,  
3     symbols, so HTML is not so ugly, and XML allows you to  
4     jump from place to place, which is good. The other  
5     thing is, nobody has mentioned, I don't think, the fact  
6     that most of the firms are downloading the software you  
7     need to be able to display the document.

8             So, everybody I know is downloading Adobe  
9     Acrobat if they have PDF files. So, that's the best  
10    practice that I think everybody is following.

11            And then the last is help, getting a lot of  
12    help. For example, the best practice that Fidelity has  
13    is giving you help on the phone with going through with  
14    the process itself. If you make a mistake, you don't  
15    really know how to go through the consent process, trust  
16    me, call those customer service people, they are  
17    wonderful. I've done it three times and I keep thinking  
18    that I didn't do it right.

19            MR. GALLAGHER: Thank you for that.

20            MS. GOBATS: Right. One last thing is that  
21    there's something looming out there and that is the  
22    threat in some cases of aggregators, and the aggregators  
23    who are out there offering your clients or all of our  
24    clients a view of their entire portfolio and all of  
25    their relationships, really present a threat of our

1 customers losing their direct relationship with us, and  
2 not even looking at our statements, electronic or  
3 otherwise.

4 So, it will help us to move forward with the  
5 electronic delivery and establish that relationship now  
6 to get people to tell us more about what they want in  
7 their products and services, in the products and  
8 services that we deliver.

9 MS. HARRINGTON: Thank you. I was just  
10 whispering here with my colleagues that perhaps what we  
11 and the NTIA folks ought to do outside of the context of  
12 this assignment, completely, in fact months and months  
13 after we're done with this report, is to insight people  
14 to come in for sort of a best practices fest after we  
15 have some real experience that Mark, I think, so clearly  
16 explains is really necessary to develop an understanding  
17 of what best practices might be. So, maybe we'll do  
18 that, you know, I can't think of any better place than  
19 Washington in oh, January, for all of you to come back  
20 and visit, but I think we will talk about that with our  
21 colleagues at NTIA and do something like that in a time  
22 when we're done the road a little further, and that may  
23 be something that we say in our report that we're going  
24 to do.

25 Okay, Eric, have you received any cards from

1 anyone?

2 Well, here was the process for people who wanted  
3 to participate, we asked you to fill out little cards  
4 letting us know that you wanted to participate during  
5 this last portion of the day, and none of you have,  
6 although some of you used the cards to send questions  
7 up, but we will not stand on formality.

8 Is there anyone who has been patiently sitting  
9 through this entire discussion today who would like to  
10 ask questions or address questions that have been  
11 discussed? Anyone? Susan? Go to the microphone,  
12 please. And identify yourself and your affiliation for  
13 our reporter, if you will.

14 MS. GRANT: Is this working? Sorry I didn't use  
15 my card. I just want to say --

16 MS. HARRINGTON: Could you identify yourself.

17 MS. GRANT: I'm sorry, Susan Grant, National  
18 Consumers League. I just want to say how encouraged I  
19 am by this conversation today, and I think that the  
20 report to Congress should be so far so good. It looks  
21 like things are working well so far from what little we  
22 know in the short time that the law has been in effect.

23 I do think that this should be given longer  
24 before any recommendations are made for changes, and I  
25 especially want to put in a plug for the requirement for

1 consent to be made in a way that demonstrates the  
2 consumer's ability to get the information  
3 electronically. That's a very, very important  
4 provision, and I haven't really heard anything so far  
5 today that makes me think that it's overly burdensome.

6 If it means that in some cases fewer consumers  
7 are agreeing to get information that way, that's not  
8 necessarily a bad thing at this point. It may mean that  
9 people are making decisions less impulsively, that they  
10 are considering further whether they want to get  
11 information this way or whether they would prefer to get  
12 it by paper or some other means, and so to the extent  
13 that it gives consumers time to deliberate and make a  
14 better informed decision, that's not necessarily a bad  
15 thing.

16 And finally I want to say that I think that this  
17 just opens up tremendous opportunities, as several of  
18 the speakers have alluded to, to do an even better job  
19 than has been done before in giving information to  
20 consumers in a way that's timely, and that is going to  
21 catch their attention in a way that they'll actually  
22 read and understand, and anything that we can do at the  
23 National Consumers League or any other consumer advocacy  
24 groups to help business with that, we would be very  
25 happy to talk to you. Thanks.

1 MS. HARRINGTON: Thank you, Susan. There's  
2 someone in the last row with a hand up there. Would you  
3 give us your name and your affiliation, if any.

4 MR. LEDIG: Bob Ledig with Fried Frank here in  
5 D.C.

6 Three quick questions. Number one, does anyone  
7 on the panel believe that subsection C applies to  
8 transactions that do not trigger a required disclosure;  
9 in other words, simply a consumer business agreement  
10 online? Does anyone on the panel think that that is  
11 subject to section C?

12 Number two, GLBA privacy kicks in July 1. The  
13 statute says that you can give notices through a  
14 writing, electronically or as an agency decides. Does  
15 anyone have any view as to since there's no specific  
16 writing requirement there, whether the consent provision  
17 applies.

18 And third, the Federal Reserve Board in the  
19 interim order that just came out clearly is in favor of  
20 having email notices tell people to go visit a site or  
21 to give a -- some sort of a -- you know, to go visit the  
22 website to see information. Do people on the panel  
23 believe that that requires a demonstration that you can  
24 also read the email as well as the demonstration you can  
25 read HTML on the site?

1           And I'm sorry I strung those all together.

2           MS. HARRINGTON: Well, I think the answer to the  
3 first question is no.

4           The answer to the second question is I don't  
5 know, and I don't know whether the people who are  
6 working here at the FTC on Graham-Leach-Bliley are  
7 working on something, whether the other agencies that  
8 have to provide guidance are, I just don't know, but I'm  
9 sure that as we get closer to July 1st, all of the  
10 agencies that have responsibility will be putting out  
11 more information, and so I would urge you to watch their  
12 websites.

13           And I was really busy thinking about your second  
14 question, so I don't -- anybody want to say anything  
15 about the third? I don't remember what it was,  
16 actually.

17           MR. WOOD: Regarding Graham-Leach-Bliley last  
18 May, in May of 2000, the banking agencies and the FTC  
19 all issued a rules that were substantially similar.

20           MS. HARRINGTON: Right.

21           MR. WOOD: That are now in the process, most  
22 people have begun receiving disclosures from companies.  
23 Financial services companies.

24           MS. HARRINGTON: Right, but I think that there  
25 was a specific question about guidance for --

1           MR. LEDIG: The question is E-SIGN is triggered  
2 by a requirement to get something in writing, the  
3 statute here gives three alternatives, only one of which  
4 is a writing. While the GLBA regs talk about getting  
5 consumer consent, they appear to basically just require  
6 a click-through on a website, as compared to the whole  
7 consent provision, including a demonstration provision.  
8 That's the point I was referring to.

9           And the third point, question is if you interact  
10 with somebody and you say I'm going to email you to let  
11 you know the information is on the website and there's  
12 nothing in the email, other than letting you know go to  
13 the website, do you have to drive someone outside of the  
14 website and see that they can read email and demonstrate  
15 that? In other words, is that part of the disclosure  
16 process?

17           MS. HARRINGTON: That's a reasonable  
18 demonstration question, and I really am not in a  
19 position to answer that sitting here. Or to give you my  
20 two cents worth. Anyone on the panel want to?

21           MR. WITTE: Well, the whole issue of whether or  
22 not something is required to be in writing when there's  
23 an electronic alternative provided online is really a  
24 very interesting one, and it's not terribly clear. It's  
25 one of those things that is distinctly unclear and is

1 particularly exquisite in the context of the privacy  
2 rules, because as Bob and I were talking about at the  
3 break, the regulations add another twist to what the  
4 statute provides, and there's, I think, a fair amount of  
5 misunderstanding as to what the privacy rules, both  
6 regulation SP and D and ABC, whatever they are, provide  
7 the need for consent in the context of electronic  
8 delivery of privacy notices. I think it's something  
9 that's really got to be worked out and understood.

10 But it's really one of the great ambiguities  
11 which we could spend a whole other session on.

12 MS. HARRINGTON: Right, and it's quite a ways  
13 beyond the task that we're about here today, but I'll --  
14 Margot, you had your tent up, did you want to say  
15 something and then we'll move on?

16 MS. SAUNDERS: I just wanted to flag what was  
17 just flagged, which is that there is an underlying  
18 ambiguity about what records are actually covered by  
19 this, as we've already identified, does the underlying  
20 law have to specifically say in writing or is the  
21 underlying law allows electronic already, does that not  
22 mean that E-SIGN consent disclosures would kick in, and I  
23 would argue that a reasonable reading, that a safe  
24 reading, certainly a best practice reading, is that the  
25 consumer consent provision should be applied to anything



1 that -- any writing requirement that is supposed to  
2 be -- any requirement of a notice that's supposed to be  
3 provided to a consumer, whether the other law allowed it  
4 to be electronic or not.

5 The purpose of the provision in ESIGN is to make  
6 sure the consumer can access it and why should we have a  
7 different rule because another law preceded ESIGN didn't  
8 think through all of these issues.

9 MR. WITTE: But therein lies the reg, because  
10 the other rule set its own 17 requirements and then you  
11 have to decide whether you need to comply with 24.

12 MS. HARRINGTON: Well, I think that everyone who  
13 has read the statute has spent hours, days and weeks on  
14 this particular issue, perhaps without reaching any  
15 resolution. Fortunately, our task here is not to reach  
16 any resolution or even have any discussion on that.

17 So, someone else had a hand up back there. Yes?  
18 Thanks.

19 MR. GREENWOOD: Daniel Greenwood, I'm here for  
20 the Commonwealth of Massachusetts today, and when we  
21 started listening, I think that the thought was this  
22 impacts state law, it's something we ought to know  
23 about, and through the course of the conversation, I  
24 started wondering whether this, in fact, could apply to  
25 governmental entities as well with respect to

1 individuals that are doing some kind of transaction with  
2 the governmental entity as a consumer in some way, and I  
3 wondered if any panelists had any thought on that.

4 A couple that just came to mind which I was  
5 testing against the statute were, you know, maybe some  
6 sort of financial aid with a public school, you've got  
7 something maybe like a tourist making a reservation  
8 online with a public campground, and there's a  
9 regulation that indicates that people who make  
10 reservations will get a notice confirming it, in paper,  
11 would be the understanding. EBT, electronic benefits  
12 transfer, welfare benefits, there's a lot of written  
13 notices there.

14 Any thought to whether consumer subsumes  
15 citizen, or is consumer taken to be understood as a  
16 private interaction?

17 MR. WITTE: Well, Dan, as you know, there is --  
18 there is the notion that is pretty reasonably  
19 substantiated that purely governmental functions, but  
20 purely governmental affairs, aren't covered by the  
21 definition of transaction and therefore wouldn't be  
22 applied.

23 On the other hand, to the extent that there is a  
24 commercial element, which I think is what you were  
25 trying to describe, or were describing, then pretty good

1 question, and it would seem as though it would apply, if  
2 the government has also, by the way, imposed a writing  
3 delivery requirement on itself.

4 MS. HARRINGTON: Lots of interesting questions  
5 arise under this statute. Again, we're really focused  
6 on the reasonable demonstration requirement of the  
7 consumer consent provision, and the costs and benefits  
8 associated with that.

9 So, we'll have another -- we'll have a quest  
10 fest maybe later on on all the other reasonable  
11 questions that we could reasonably discuss. Anyone  
12 else?

13 (No response.)

14 MS. HARRINGTON: Well, I'm going to turn to I  
15 think to Wendy, on behalf of our colleagues at the  
16 Commerce Department for some closing remarks.

17 MS. LADER: Thank you, I get the lucky task of  
18 tell you that the day has ended, and it's ended early,  
19 half an hour early. We want to thank you very much.

20 MS. HARRINGTON: That's our strategy of not  
21 having air conditioning.

22 MS. LADER: That's right.

23 MS. HARRINGTON: Blame it on the Archives, but  
24 it's really, you know, so we can keep on schedule.

25 MS. LADER: We want to thank all of the

1 panelists who came here today for your fabulous insights  
2 on the ESIGN consumer consent provision, this has really  
3 advanced the discussion and it's going to significantly  
4 help us as we prepare to draft the report.

5           What are our next steps? As you know, this  
6 report is due to Congress on June 30th, so we will be  
7 turning to that report drafting process very soon.  
8 You've also heard that we're going to keep the record  
9 open so you can file further comments, or for those you  
10 who haven't filed, please file initial comments if  
11 you're interested. Obviously the sooner you file those  
12 comments, the sooner we'll be able to read them and  
13 consider them. And follow up with you if we have any  
14 further questions. So, we hope that you will file those  
15 soon.

16           Finally, I want to thank a number of people  
17 here. This workshop is the product of many good minds,  
18 and I want to thank at the FTC Eileen Harrington, Teresa  
19 Schwartz, Marianne Schwanke, April Major, Craig  
20 Tregillus, excuse me, Carole Danielson and Eric Laska,  
21 and at NTIA, I want to thank Sallianne Fortunato,  
22 Josephine Scarlett, Sandra Castelli, Michael Pazyniak  
23 and Tracy Marshall.

24           There are probably a number of people who worked  
25 on this who I haven't mentioned and we thank you as

1 well. And to those of you who stayed for the entire  
2 day, you are the true survivors, I think we need a new  
3 DOC/FTC survivor game and you have won. So, we owe you  
4 our greatest thanks and hope that you have found this  
5 day to be as informative as we have.

6 Thank you very much.

7 (Applause.)

8 (Whereupon, at 4:36 p.m., the workshop was  
9 concluded.)

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## 1           C E R T I F I C A T E     O F     R E P O R T E R

2

3     DOCKET/FILE NUMBER: P004102

4     CASE TITLE:     ESIGN WORKSHOP

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8     herein is a full and accurate transcript of the notes  
9     taken by me at the hearing on the above cause before the  
10    FEDERAL TRADE COMMISSION to the best of my knowledge and  
11    belief.

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13                                    DATED:

14

15

16                                    Sally Jo Bowling

17

## 18           C E R T I F I C A T E     O F     P R O O F R E A D E R

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20           I HEREBY CERTIFY that I proofread the transcript  
21    for accuracy in spelling, hyphenation, punctuation and  
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25                                    Sara J. Vance