

September 10, 2020

Senator John Thune
U.S. Senate
Washington, DC 20510

Re: S. 4159 (Thune), E-SIGN Modernization Act of 2020 (oppose)

Dear Senator:

The 35 undersigned consumer, civil and human rights, legal services and community organizations write to express our opposition to S. 4159 (Thune), the E-SIGN Modernization Act of 2020. In the guise of modernization, the bill would gut the critical requirements of the E-Sign Act¹ that ensure that consumers actually agree to the use of electronic communications in a way that confirms that they are able to access information sent to them electronically. Without the protections of the current law, critical documents, such as disclosures, contracts, statements, records and other information would never actually be seen by many consumers. If passed, **the bill would increase fraud and effectively prevent access to legally required information and records about the transactions to which consumers are bound.**

The E-Sign Act establishes the federal rules for when electronic records and electronic signatures may substitute for their paper counterparts.² Allowing commerce to proceed through electronic media has brought convenience for businesses and consumers alike. Electronic contracts allow us to shop online and have goods delivered the next day with a click of our mouse. For consumers who have computers or smartphones and are comfortable receiving information electronically, the E-Sign Act allows them to consent to receiving records of these agreements, statements and other documents electronically instead of on paper.

At the same time, the E-Sign Act contains simple requirements to ensure that, when information that is legally required to be provided in writing is provided electronically, consumers are actually able to receive and access that information. Yet, S. 4159 would remove the critical provision that provides practical and legal assurance of the consumer's ability to access the electronic information because it would remove the requirement that the consumer:

(ii) consents electronically, or confirms his or her consent electronically, in a manner that *reasonably demonstrates* that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent;³

This requirement in E-Sign that the consumer *demonstrate* ability to access the information only applies when a law requires that consumers be provided disclosures or other important information in writing.

¹ Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. § 7001 *et seq.*

² 15 U.S.C. 7001(a).

³ 15 U.S.C. § 7001(c)(1)(C)(ii) (emphasis added).

The bill would also remove E-Sign’s requirement⁴ that the consumer again demonstrate ability to access the information “if a change in the hardware or software requirements . . . creates a material risk that the consumer will not be able to access or retain a subsection electronic record that was the subject of the consent”⁵ Thus, under the bill, a company could make a change after the consumer had agreed to receive information electronically that prevents the consumer from receiving legally required information.

The “reasonably demonstrates” requirement ensures that the consumer in fact has access to a means of accessing the electronic information. It also underscores to the consumer the fact that, by electronically consenting, the consumer is agreeing to receive the described information through electronic means in the future.

When passing E-Sign, Congress requested that the FTC and the Department of Commerce assess the importance of E-Sign’s consent provision. The two federal agencies reported to Congress that this demonstration requirement is to “ensure that consumers who choose to enter the world of electronic transactions will have no less access to information and protection than those who engage in traditional paper transactions.” The strict use of and compliance with the consumer consent provision is necessary to protect consumers from the ever-growing use of electronic commerce for fraud—a problem repeatedly noted by the FTC in recent years.

E-Sign’s protections have important practical effects:

- Consumers cannot be required to click “I agree” to fine print requiring them to receive legally required information *in a manner they actually cannot receive*.
- The demonstration requirement *prevents fraud* by requiring the consumer herself to demonstrate ability to access the information.

The demonstration requirement is as important today as it was in the early days of email and personal computers. The E-Sign Act does not assume or dictate a particular type of electronic communication – it covers any record provided in “electronic form.” Smartphones and tablets did not even exist twenty years ago when E-Sign was passed, yet it covers communications on those devices. As electronic communications move beyond email to mobile apps, alerts sent through various social media platforms, and forms of communication that we cannot even imagine today, the E-Sign Act ensures that people can actually receive and read information in the form or manner sent. The demonstration requirement ensures, for example, that fine print in an agreement could not recite that a person who does not have a smartphone capable of accessing an app has agreed to receive statements electronically through that app.

The demonstration requirement also remains important because still, in 2020, we have a significant digital divide. While many people have some ability to access the electronic world, not all have smartphones or home computers. Even when they do, they may have older, poorly working models. Reliable internet access also remains uneven, as the quality of internet service is often poor in rural areas, people often have limited data plans, computer literacy varies, and prepaid plans and

⁴ 15 U.S.C. § 7001(c)(1)(D)(ii).

⁵ 15 U.S.C. § 7001(c)(1)(D).

income drops leave people with gaps in service. Thus, it is essential to ensure that consent to electronic communications is genuine.

Even in in-person transactions, the E-Sign Act's demonstration requirement is increasingly important in preventing fraud and deception. The growth of tablets and other electronic devices in stores and even door-to-door sales means that people who are being solicited in person are often asked to agree to electronic communications. E-Sign's demonstration requirement ensures that the consumer either is given a paper copy of disclosures and the contract they have agreed to, or confirms that the consumer is actually able to receive the electronic copy by complying with E-Sign's consent requirement.

We are seeing an increase in electronic signatures and records being used to perpetrate fraud, and we must strengthen, not gut, the E-Sign Act's consent requirements. For example:

- Electronic records have enabled **contractor fraud, elder financial abuse, and home equity stripping**. Fraud involving Property Assessed Clean Energy (PACE) loans,⁶ sales of solar panels, home security systems,⁷ and other home improvements⁸ has been facilitated by electronic records. Salespeople come to the homes of elderly or disabled consumers and provide the contract and critical disclosures about the terms of these transactions (including how to rescind the transactions) *electronically on the seller's tablet*, without even handing a piece of paper to the consumer. People are told one thing and later find out that the electronic version of the contract supposedly electronically signed is a different agreement they have never seen. Often these consumers have no independent access to electronic media: no computer or tablet and no email address of their own, or limited access that they are not comfortable using.
- **Car dealers** have used tablets, physically obscuring the view of the key terms and without any input from the consumer, to commit the consumer to prices higher than discussed orally.⁹ In one case, for example, the consumer was not even physically present and never agreed to the purchase.
- **Auto mechanics, furniture salespersons**, and others have trapped people in **predatory loans up to 180% APR** when they thought they were agreeing to free installment plans.

⁶ See, e.g., National Consumer Law Center, Residential Property Assessed Clean Energy (PACE) Loans: The Perils of Easy Money for Clean Energy Improvements (Sept. 2017, available at https://www.nclc.org/images/pdf/energy_utility_telecom/pace/ib-pace-stories.pdf).

⁷ Rebekah L. Sanders, Watch out: Electronic signatures are new tool for scammers (July 31, 2018), <https://www.azcentral.com/story/money/business/consumers/2018/07/31/electronic-signatures-new-tool-scammers/868325002/>.

⁸ Lauren Sweeney, Customers of Bonita Springs AC company allege signature fraud (Feb. 25, 2019), <https://www.winknews.com/2019/02/25/when-electronic-signatures-show-up-on-documents-you-didnt-sign/>.

⁹ See Ryan Felton, Jalopnik, Car Dealers Are Using Electronic Loan Contracts To Scam Buyers Into Horrible Situations (Dec. 15, 2017), <https://jalopnik.com/car-dealers-are-using-electronic-loan-contracts-to-scam-1821021493>.

- Parents have been committed on student loans they **did not agree to co-sign** where the email address provided for electronic communications was incorrect.

While some of these problems result from forged electronic signatures, E-Sign's reasonable demonstration requirement provides a means to combat fraud by enabling the consumer to show that they did not receive legally required information or consent to the transaction.

E-Sign's consumer consent provision is the primary safeguard against these reprehensible activities. When Congress passed E-Sign in 2000, it anticipated these scoundrels and included the specific consumer consent provision that S. 4159 would remove. As Senator Leahy noted:

I maintained that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures in a manner that verified the consumer's capacity to access the information in the form in which it would be sent. Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information.¹⁰

The current consent requirement has not been a significant burden on electronic transactions. Electronic commerce and other forms of electronic transactions have increased exponentially in the decades since the E-Sign Act was passed. Consumers who are transacting online can and do easily demonstrate their ability to receive information. Disclosures are routinely provided online, and E-Sign consent is not a difficult process. Often consumers are merely asked to view the required disclosures and check a box to confirm that they consent to, have seen, and are able to access the disclosures electronically.

Indeed, rather than relieving burdens, the bill would create a confusing and bifurcated standard for replacing writing requirements between federal and state law. Almost half of state laws explicitly restate the current E-Sign consumer consent requirements or mandate the current E-Sign requirements by referring to E-Sign and applying those rules to state requirements.¹¹ If federal law were to change on this point, it would leave compliance with many state law requirements in an ambiguous and potentially conflicting situation until every state's laws were also changed to undermine these important consumer protections.

Protections in the electronic world are more important today than ever. The E-Sign Act should be strengthened, not weakened, such as by making the reasonable demonstration requirement more meaningful, by prohibiting companies from refusing to transact with consumers who do not want to receive information electronically, and by requiring paper copies be provided on the spot if desired for agreements formed through in-person transactions.

¹⁰ 146 Cong. Rec. S5219–S5222 (daily ed. June 15, 2000) (statement of Senator Leahy).

¹¹ See National Consumer Law Center, Consumer Banking and Payments Law § 11.7.7 (6th Ed. 2018) *updated* at www.nclc.org/library.

For these reasons, we strongly oppose S. 4159 and any other effort to weaken the E-Sign Act. If you have any questions, please contact Lauren Saunders at lsaunders@nclc.org or Margot Saunders at mrsaunders@nclc.org.

Yours very truly,

Americans for Financial Reform
Arkansans Against Abusive Payday Lending
Center for Digital Democracy
Center for Economic Integrity
Center for Responsible Lending
Citizens Action Coalition of IN
Community Legal Services in East Palo Alto
Community Legal Services of Philadelphia
Connecticut Legal Services, Inc.
Consumer Action
Consumer Federation of America
East Bay Community Law Center
Georgia Watch
Institute on Aging
Jacksonville Area Legal Aid, Inc.
Legal Aid Justice Center
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low income clients)
National Housing Resource Center
Ohio Partners for Affordable Energy
Pennsylvania Legal Aid Network
Public Counsel
Public Good Law Center
Public Justice Center
Public Law Center
Public Utility Law Project of New York, Inc.
Statewide Poverty Action Network
Texas Appleseed
THE ONE LESS FOUNDATION
TURN-The Utility Reform Network
Virginia Citizens Consumer Council
Virginia Poverty Law Center