

# CREDIT UNION EXECUTIVE NEWS

March 4, 2011

## E-STATEMENTS—AUTOMATIC ENROLLMENT NONCOMPLIANCE

One area of growing compliance violations for credit unions is the practice of automatically enrolling a member for e-statements and allowing an opt-out to receive paper statements. Sounds like a smart way to get instant penetration and huge cost savings. Unfortunately, this shortcut does not meet compliance requirements. The costs and risks of this noncompliant practice could be a hundred times more than any savings a credit union may have achieved and, until corrected, that potential liability continues to grow.

If a credit union has adopted automatic e-statement enrollment based on vendor advice, a compliance blog or following the path of another credit union, the credit union has received incorrect guidance. Worse yet, this is not a one-time compliance problem. Automatic e-statement enrollment with member opt-out is impermissible under the federal ESIGN Act and results in the credit union having failed to provide members' statements every month after paper statements were discontinued.

### What are the Requirements for E-Statement Enrollment?

The credit union's ability to deliver statements electronically, rather than in paper form, is governed by the federal Electronic Signatures in Global and National Commerce Act (ESIGN Act). But remember, Regulation E and Truth-in-Savings (TIS) still require paper statements for deposit and EFT services unless a proper ESIGN Consent Notice (opt-in) for electronic delivery is obtained.

The requirements are simple. Under ESIGN, a writing delivered electronically is the same as a paper based writing, except if the writing is one required by a consumer regulation (such as periodic statements under Reg E and TIS). For required periodic statements, electronic delivery is only permitted if the member is (i) informed of the nature of the electronic delivery, and (ii) affirmatively consents to such delivery – the ESIGN Consent Notice.

a. Notice Requirement. The ESIGN Notice must contain six disclosures related to how e-statements will be delivered, the requirements for receiving e-statements, the member's right to withdraw a previous consent and any consequences for doing so.

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## E-STATEMENTS (CONT.)

b. Consent. The ESIGN Consent itself has two major elements. First, the member must affirmatively consent or agree to receive the required disclosure (e-statement) electronically. Automatic enrollment with an opt-out is not an affirmative consent. After all, just because a member has an email address does not mean they want to forgo paper statements for e-statements.

Second, the member's consent must reasonably demonstrate that he or she can access the e-statement account information in the electronic format being used. Thus, the consent process needs to be an online function either through a home banking service or email, that demonstrates the member's ability to access e-statements in that electronic format.

Simply incorporating e-statements as an enrolled account opening service on an Account Card, like automatic enrollment, does not satisfy ESIGN and gains you nothing.

c. E-Statement Delivery Rules. The rules for delivery of e-statements (email v. website posting) and redelivery of rejected email have been relaxed to a certain extent. Prior to 2009, the FRB provided a series of operational rules for e-statement delivery under Reg E, Reg DD, and Reg Z but the FRB repealed those specific requirements. However, NCUA did not follow the FRB's action to repeal the same TIS provisions in Part 707.10, so credit unions are still left with several e-statement delivery rules.

### Corrective Steps

To the extent a credit union has deployed automatic enrollment without obtaining the member's consent, the credit union will need to back up to the starting line and develop an e-statement consent strategy, and a notice and consent process. The strategy may be more of a PR strategy than a compliance strategy.

While electronic disclosure noncompliance may not be high on the priority list for the new Consumer Financial Protection Bureau (CFPB), NCUA is still the regulator policing e-statements and an automatic e-statement enrollment process is not an easy one to hide when examiners or members discover noncompliance.

**Brian Witt**

## E-NOTICES—ANOTHER SAVINGS OPPORTUNITY

Many credit unions have found significant cost savings in discontinuing the mailing of routine notices and using electronic delivery. With many core processors now offering electronic notice capabilities, the practice is becoming mainstream. However, like e-statement delivery, shortcuts can lead to noncompliance.

With e-notices, credit unions can discontinue a long list of paper form notices or letters that fall into the "courtesy" notice category - good member communications, but not required by law. These include: overdraft and NSF notices, stop payment confirmation, overlimit notices and similar warning communications. However, many notices that the credit union sends are still required by federal regulation (Reg E, TIS, Reg Z, state law, etc.) and cannot be summarily discontinued in lieu of electronic delivery. Like e-statements, such disclosures require a proper ESIGN Consent Notice of the member prior to electronic delivery.

### How to Implement E-Notices and Be Compliant

The credit union has a lot of flexibility to send many notices, letters and alerts to members electronically, but not complete flexibility. Also, even though your core processor may provide full electronic notice generation capability, the credit union must comply with ESIGN. The key to ESIGN compliance is sorting out which notices are "required" and subject to notice and consent and which are unregulated courtesy notices.

ESIGN requires identification of the specific types of notices to be provided electronically. The ESIGN Consent Notice (the "Notice") cannot just provide a broad sweeping statement that "I agree all credit union notices and disclosures can be sent by email." Such a disclosure fails to specify the scope of disclosures to be sent electronically. For "required" e-notices, the credit union needs to list each of the disclosures in the Notice. In contrast, for courtesy notices, you would not need to list them all, but a general statement in the Notice should suffice.

In order to adopt a wide variety of e-notices that can be sent via email, the credit union should carefully review the list to determine those that require a specific listing in the Notice and those notices not covered by ESIGN that can be sent via email with a general reference.

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## E-NOTICES (CONT.)

### Required v. Courtesy E-Notices

The following is a list of common notices and disclosures, required and courtesy, that the credit union can send via email:

#### Required Notices

- CD Maturity
- CD Renewal
- Dormant Account Fees
- Annual Tax Statements
- Annual Privacy Policy
- Changes in Terms
- Billing Error Rights

#### Courtesy Notices

- NSF
- Returned Checks
- Overlimit
- Overdraft Transfers
- Safe Deposit Box
- Stop Payment confirmations
- Transaction confirmations

### ESIGN Requirements

As discussed more fully in the E-Statement article in this Newsletter, the E-SIGN Consent Notice requirements for E-notices include: (i) the six electronic delivery disclosures; and (ii) the member's affirmative consent. Again, this consent must be obtained electronically. A paper based consent or automatic enrollment for e-notices provides nothing but noncompliance exposure.

*Brian Witt*

## E-MARKETING—DON'T OVERLOOK CAN-SPAM COMPLIANCE

E-mail marketing of credit union products and services can be an effective, immediate and inexpensive channel of delivery. But like most areas of credit union operations, email marketing is subject to regulatory compliance requirements.

The Controlling the Assault of Nonsolicited Pornography and Marketing Act ("CAN-SPAM") is the federal law governing commercial advertising and promotional emails.

## E-MARKETING (CONT.)

The CAN-SPAM Act supplements consumer protections put in place to curb telemarketing abuses. The law effectively legalizes the sending of unsolicited commercial email, provided senders comply with certain requirements. While the law is directed toward mass e-mailers, certain provisions will affect credit union marketing through e-mail.

CAN-SPAM applies to all email "the primary purpose of which is the commercial advertisement or promotion of a commercial product or service" regardless of whether the recipient has previously agreed to be contacted by the sender or not. Thus it applies to the Credit Union and any email marketing to members. There is no exception for email in the context of an established business or member relationship.

There is a narrow exception for transactional or relationship emails, defined as messages sent "to facilitate, complete, or confirm a commercial transaction" that the member-recipient has previously agreed to enter into with the Credit Union. Simply agreeing to receive email communications from the Credit Union does not constitute an agreement to enter into a transaction with the Credit Union. Similarly, a promotional email does not become a transactional or relationship email merely by virtue of the member having agreed to be contacted by the Credit Union.

CAN-SPAM is an opt-out law. For most purposes, consent by the member (e-mail recipient) is not required, but if a member wants to unsubscribe or opt-out, the Credit Union needs to honor the request and stop sending e-mails to the member or be subject to stiff penalties.

### Basic Requirements & Prohibitions

The following are the basic requirements and prohibitions of CAN-SPAM:

**Subject Line** - Prohibits fraudulent or deceptive subject lines, headers, return addresses, etc.

**Identification** - Criminalizes sending sexually-oriented e-mails without clear markings.

**Opt-out** - Requires the Credit Union to have an "unsubscribe" system that makes it easy for member-recipients to unsubscribe and opt-out of receiving Credit Union e-mails.

**Return Address** - Requires a postal mailing address in the message.

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**E-MARKETING (CONT.)**

**Opt-Out Requirement**

The CAN-SPAM Act requires the Credit Union to provide a functioning reply address or e-mail unsubscribe system that operates for at least 30 days after a mass e-mailing. In addition, The Credit Union must include a postal address and a clear indication that the e-mail includes a solicitation, if applicable, unless you have a "prior affirmative assent" from the member. The Credit Union can provide the opt-out, by using language such as the following: *"If you do not wish to receive any further emails from us, please click [here](#) or reply to this email with the word 'unsubscribe' in the subject line."*

**Enforcement**

Every separate email sent in violation of the law can result in penalties of up to \$16,000. CAN-SPAM compliance is enforced by the NCUA and FTC, which has levied several significant fines for noncompliance.

*Brian Witt*

**AUTOMATIC ENROLLMENT FOR EFT AND DEPOSIT RELATED SERVICES—UNFAIR AND DECEPTIVE?**

A credit union wants to bundle an identity theft protection service with an otherwise free checking account. So the credit union structures the offering in the following manner: the credit union automatically enrolls members for the service, a \$1 service fee is deducted from the members' checking accounts unless they opt-out, the credit union's Truth-in-Savings (TIS) account disclosures reflect the "optional" \$1 fee for the service, but the account is still advertised as free.

What's wrong with this picture? According to the NCUA, the proposed service offering, advertising and opt-out is an unfair and deceptive practice. NCUA recently issued an opinion letter on the proposed credit union offering (NCUA GCO 10-0842) and outlined three specific problems:

**Unfair and Deceptive Acts and Practices**

NCUA has authority to enforce unfair and deceptive acts and practices against FCUs when there is a material misrepresentation or omission of information that is likely to mislead a member. In this case, NCUA determined that the FCU's identity theft services program was deceptive because the advertising of the account stated it was free but account holders were charged a fee unless they opted out.

**AUTOMATIC ENROLLMENT (CONT.)**

**Truth in Savings Disclosures and Advertising**

NCUA also considered whether TIS disclosure violations might occur in the advertising and account opening TIS disclosures. The TIS account disclosures must reflect (i) the amount of any fee, (ii) how a fee is determined, and (iii) any conditions under which the fee may be imposed. Also the TIS advertising rules govern the proper use of the word "free." Evidently, neither of these TIS disclosures were satisfied in the FCU's proposed offering, particularly given the service was bundled with a "free" checking account.

**NCUA Advertising Rule**

Independent of TIS, NCUA's advertising rule prohibits inaccurate or deceptive advertising that misrepresents its services or contracts. NCUA clearly felt the provision of the identity theft protection services for \$1 per month with opt-out only, along with the "free" advertising of checking account was deceptive and inaccurate. The automatic deposit enrollment service and opt-out above would have likely resulted in additional violations, but at least the FCU asked before implementing. It's good they asked, but under these facts it is incredible their attorneys even sought NCUA's opinion on such deceptive practices.

**Looking Ahead**

Effective July 21, 2011, NCUA will no longer have the authority to adopt and enforce regulations on unfair or deceptive acts and practices. This area of enforcement gets transferred entirely to the new Consumer Financial Protection Bureau (CFPB). The focus for CFPB is going to be different than for the NCUA. CFPB is solely concerned with consumer abuse and is not looking after a deposit insurance fund. Looking ahead, we may see more regulatory developments in the area of bundled services related to opt-in/opt-out practices.

*Brian Witt*

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**LET'S REVIEW—IS IT “OPT-IN” OR “OPT-OUT”?**

Over the last several years, there have been a number of new laws and regulations that permit the member-consumer to make an “opt-in” or “opt-out” determination related to a credit union service or practice. Here is a recap of the current opt-in/opt-out requirements:

Service/Practice	Required Member Action	Law
E-Statement	Opt-In	ESIGN
E-Notices	Opt-In	ESIGN
E-Mail Marketing	Opt-Out	CAN-SPAM
Privacy Information Sharing	Opt-Out	NCUA Privacy Rule
Overdraft Protection for ATM/ Debit Transactions	Opt-In	Reg E

**Overwhelmed by the Weight of Compliance?**

If you are looking for solutions to better manage your credit union’s compliance, without adding more staff, Farleigh Wada Witt has exciting news: a new compliance management system for credit unions. Call or email Brian Witt or Hal Scoggins for more information. We stand behind our credit union clients’ compliance!



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**Who Stands Behind Your Credit Union Compliance?**