

using E-commerce. While both businesses and consumers must agree to E-commerce, E-SIGN provides certain protections and compulsory procedures when a statute or regulation, such as the Equal Credit Opportunity Act, requires that information be provided to a consumer. These same protections are not afforded to businesses. Under E-SIGN, "consumer" means an individual who obtains, through a transaction, products or services used primarily for personal, family, or household purposes. Some loans under E-SIGN qualify as consumer transactions, while others are business transactions. A qualified lender must distinguish between the two types of transactions to comply with E-SIGN.

We have summarized the pertinent consumer consent provisions below. For a complete list, please see the preamble to the proposed E-commerce rule.<sup>11</sup> You may also view the proposed rule and other E-commerce information under the "Resources for the FCS" section of our Web site at <http://www.fca.gov>.

- Consumer consent may apply to a particular transaction and/or category of records. Consumers may decide when they want electronic records and notices.

- Consumers who choose to receive documents electronically must show the technological capacity to do so prior to consenting to E-commerce. For example, to show technological capacity, the lender may ask the consumer to communicate with the lender by sending an e-mail to the lender through an Internet provider or by logging onto the lender's Internet Web site.

We direct qualified lenders to E-SIGN and part 609 of our regulations to determine how to apply E-commerce and use electronic communications. Qualified lenders should also consult legal counsel before engaging in E-commerce and using electronic communications.

#### *C. May a Borrower Waive All or a Portion of the Borrower Rights? [§ 617.7010]*

Questions about whether a borrower may waive the rights granted in the Act and FCA regulations have arisen since these laws were enacted. We have consistently taken the position that, as a general rule, an institution may not obtain a waiver of borrower rights. These rights have a public policy purpose and should only be waived in limited circumstances, such as when the parties are in a reasonably equal

bargaining position or when other federal rights provide protections similar to borrower rights. We propose adding this position in proposed § 617.7010(a).

#### *1. May a Borrower Who Has a Loan Guaranteed by the Small Business Administration (SBA) Waive Borrower Rights? [§ 617.7010(b)]*

In FCA Bookletter BL-028, issued April 1, 1996, we permitted borrowers to waive certain borrower rights in connection with receiving a loan guarantee from the SBA. A borrower with an SBA guaranteed loan may waive the right of distressed loan restructuring, the right to appear before the credit review committee (CRC or committee), and the right of first refusal. We believe such a waiver is appropriate because the laws governing SBA guaranteed loans provide for servicing actions similar to the borrower rights provided in the Act. We propose incorporating this waiver in proposed § 617.7010(b)(1). Any waivers that are obtained pursuant to this regulation must be given voluntarily by the borrower and must be in writing. The qualified lender would be required to provide written explanation of the rights being waived by the borrower.

#### *2. May a Borrower Waive Borrower Rights in Connection With a Subordinated Debt Transaction? [§ 617.7010(a)]*

The FCC commented that a borrower should be able to waive borrower rights in subordinated debt transactions in the same manner as in loan sale transactions. We do not agree and are not proposing any regulatory changes. Subordinated debt transactions are direct loans made by a qualified lender. In these transactions, the lender is merely allowing another lender to have a priority lien on the collateral. The loan remains unchanged and borrower rights continue to apply.

#### *3. How Does a Waiver Apply in a Loan Sale Transaction? [§ 617.7015(c)]*

Existing § 614.4336(c) describes the procedures that a qualified lender must follow when selling a loan to a non-qualified lender. The qualified lender must either: (1) Include, with the borrower's consent, a provision in the original loan contract or modify it so that the purchasing lender will continue to provide the borrower rights granted by part C of title IV of the Act; or (2) obtain a waiver of borrower rights from the borrower. The FCC commented that we should allow, without borrower consent, the prospective buyer of a loan to execute an agreement with the

qualified lender in which the buyer will provide all borrower rights that a qualified lender is obligated to provide. We do not propose adding this alternative. Under the Act, borrower rights belong to the borrower and may only be modified by the borrower. Absent a provision in the loan contract, non-qualified lenders are not obligated to provide borrower rights and we do not have enforcement authority over them.

The FCC alternatively asked if the buyer of a loan may directly obtain a waiver of borrower rights from the borrower, rather than requiring the qualified lender to obtain the waiver. We do not agree with this comment. Implementing all borrower rights provisions, including waivers, are the responsibility of the qualified lender. Therefore, we are proposing no changes to the waiver provisions of existing § 614.4336(c) and redesignating it as proposed § 617.7015(c).

#### *D. What Is the Review Process for Adverse Credit Decisions? [§ 617.7300 et seq.]*

Section 4.14 of the Act requires a qualified lender to establish a CRC to review adverse credit decisions made by the qualified lender on loan applications and denials of applications for restructuring.

#### *1. Whom Should the Qualified Lender Notify? [§§ 617.7300, 617.7410(d), and 617.7420(b)]*

Existing §§ 614.4441, 614.4516(a)(2), and 614.4518 allow a lender to notify one designated primary obligor or applicant in situations where there are multiple borrowers or applicants. The FCC recommended a single notice provision as a way of eliminating multiple notices and claims of a wrong party receiving notice. Although we recognize the efficiencies gained in sending disclosures to only one of the obligors, we also recognize the value of keeping all obligors informed. As a result, we propose in §§ 617.7300, 617.7410(d), and 617.7420(b) to require that qualified lenders notify all applicants or all parties listed on the promissory note as primarily obligated to repay the debt. The applicants or borrowers may designate one person to be the primary contact and the lender may then send the original notice to that person. However, the lender must send copies of the notice to the other applicants or borrowers.

<sup>11</sup> 66 FR 53348 (October 22, 2001).