February 24, 2020

Via E-Mail

Mr. Royce B. Min
General Counsel
U.S. Social Security Administration
6401 Security Blvd.
Baltimore, MD 21207

Dear Mr. Min:

We are submitting this letter after reviewing comments posted to the public record by the Social Security Administration ("SSA") that are inconsistent with and mischaracterize our previously submitted comments in response to the SSA's Draft User Agreement and related documents for participants in the SSA's electronic Consent Based Social Security Number ("SSN") Verification ("eCBSV") Service, issued for notice and comment under the Paperwork Reduction Act ("PRA").[1] In the interest of ensuring implementation of Section 215 of the Economic Growth, Regulatory Relief and Consumer Protection Act (P.L. 115-174,"the Banking Bill") is a success, we request a meeting with you to discuss these statements and resolve any inconsistencies and areas where our legal interpretations do not align.

In our comment letters, we opposed approval of the draft documents without substantial modifications, and provided – in detail – our concerns and proposed solutions. Most of our concerns fell into two categories: First, areas where the SSA clearly exceeded its authorities provided to it in the Banking Bill;[2] and second, with regards to consumer consent, the SSA's incorrect interpretation and application of the Electronic Signatures in Global and National Commerce Act ("the E-SIGN Act").

None of the issues we raised exist in a gray area of legal interpretation: All of our comments were grounded in the plain and unambiguous text of the Banking Bill and the E-SIGN Act.

It is for this reason that we are concerned with, and object to, many of the points raised by SSA staff during a January 23rd briefing with staff of the House Ways and Means Committee,

[1] We submitted two comment letters: A December 23, 2019 letter, submitted jointly by the Consumer First Coalition and the American Bankers Association ("December Letter"), attached for reference and *available at* https://www.regulations.gov/document?D=SSA-2019-0052-0002; and a January 17, 2020 letter, submitted by the Consumer First Coalition, American Bankers Association, Better Identity Coalition, Consumer Bankers Association, Consumer Data Industry Association, and U.S. Chamber of Commerce ("January Letter"), attached for reference and *available at* https://www.regulations.gov/document?D=SSA-2019-0052-0003.
[2] § 215 of Pub. L. No. 115-174.

from which notes were published as part of the public record.[3] From comments made by SSA staff, we are concerned that SSA intends to pursue a strategy for implementation of the Banking Bill that ignores or misinterprets the law and our comments. Our concerns are compounded by the fact that these statements and mischaracterizations were made to Congressional staff. As such, we offer the following responses and corrections to statements made in that meeting, all of which is excerpted from the aforementioned briefing summary:

1. ***SSA Statement:*** *"Mr. Chitwood acknowledged that a common theme expressed by commenters to date was that the Banking Bill was the sole legal authority that should guide all aspects of eCBSV, including the materials SSA developed and requested public comment on in the PRA Federal Register Notice. These commenters cited the language "nonwithstanding" from sections 215(f)(1) and (f)(3) from the Banking Bill to support their view."*

   Response: Based on a review of the public record, our comment letters were the only ones that addressed this topic, and therefore we assume such statement was a characterization of our comments. However, this is not an accurate representation of our comments.

   In our comments, we focused on the fact that the Banking Bill is the sole authority for purposes of consumer consent. From the January Letter: "*The Draft User Agreement does not accurately reflect the plain language of the Banking Bill with regards to legal authorities for consent and enforcement. For example, Section I.C. (p.3) fails to acknowledge that, for purposes of consumer consent, the Banking Bill is the sole legal authority, and explicitly overrides the Privacy Act and any other law or requirement – including existing SSA requirements."*

   Our comment is not an attempt to persuade the SSA of a <u>possible</u> interpretation of the Banking Bill: Rather, it is to point out that the statute is crystal clear that it – the Banking Bill and its unequivocal direction to SSA to rely solely on the E-SIGN Act for purposes of electronic consent – controls with regard to consent, and that no other law, rule or regulation shall have any bearing on implementation with regard to consent. The Draft User Agreement does not accurately state the applicable law, and we have asked SSA to make substantial changes to the Agreement to ensure these mistakes are corrected. *See also our response to item 2.*

2. ***SSA Statement:*** *"Mr. Chitwood stated that SSA did not interpret the Banking Bill's provisions to exclude the applicability of other legal authorities when it drafted the User Agreement. Rather, SSA's Office of the General Counsel applied the*

[3] *See* "Social Security Administration In-Person Briefing for Ways and Means Subcommittees: Paperwork Reduction Act Federal Register Notice Materials for the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 (Banking Bill), Public Law 115–174 ("Electronic Consent Benefit Verification Service")" https://www.regulations.gov/document?D=SSA-2019-0052-0005.

"notwithstanding" language more narrowly. Specifically, at the time the User Agreement was drafted, SSA interpreted the "notwithstanding" language to mean that no other laws, in particular the Privacy Act, would serve as a basis to justify SSA refusing to accept electronically-signed consents. However, at the time the User Agreement was drafted, SSA did not view the "notwithstanding" language as negating all other existing laws or guidelines that might affect various aspects of eCBSV implementation."

Response: Similar to the previous item, this is not an accurate representation of our comments. We did not state that no other legal authorities are applicable to the entirety of the Draft User Agreement. We did, however, point out the fact that the Banking Bill makes clear that it is the sole legal authority with respect to consumer consent.

Specifically, paragraph (f)(1) of the Banking Bill states: "Notwithstanding any other provision of law or regulation, a permitted entity may submit a request to the database… only (A) **pursuant to the written, including electronic, consent** received by a permitted entity from the individual who is the subject of the request…" (Emphasis added.) Additionally, paragraph (f)(3) of the Banking Bill states that "No provision of law or requirement, including section 552a of title 5, United States Code, shall prevent the use of electronic consent for purposes of this subsection or for use in any other consent based verification under the discretion of the Commissioner."

There is only one way to interpret the clear statutory language, which is that, for purposes of consumer consent, the Banking Bill – and its exclusive reliance on the E-SIGN Act – alone is determinative.

3. ***SSA Statement:*** *"Mr. Chitwood concluded his remarks by stating that at the time the User Agreement was drafted, SSA believed eCBSV should be implemented and used in harmony with these other existing laws, guidelines, and regulations. He acknowledged this view was not shared by the eCBSV commenters."*

   Response: Again, this is not an accurate representation of our comments. With the exception of consent, our comments on many of the remaining provisions of the Draft User Agreement asked for additional precision and specificity with regard to various legal authorities. We asked the SSA to redraft the sections pertaining to legal authority to recognize which law is authoritative on which matter (i.e., the Banking Bill on consumer consent).

4. ***SSA Statement:*** *"Sean Clerget (Oversight, Minority) asked for an illustrative example. Mr. Chitwood relayed one from the comments – the statement that because the Banking Bill does not require SSA to articulate what an electronic signature is, the agency should not be bound by the requirements of eSign in relation to eCBSV. SSA's position is that eSign still applies."*

   Response: The illustrative example provided by SSA staff is a total misstatement of our comments. Not only did we never suggest that the SSA should not be bound by

the requirements of the E-SIGN Act, one of our central arguments was that in fact that the Banking Bill explicitly directs SSA to adhere to the E-SIGN Act for purposes of consumer consent and no other law or requirement.

Paragraph (f)(2) of the Banking Bill states that "for a permitted entity to use the consent of an individual received electronically…, the permitted entity **must obtain the individual's electronic signature, as defined in section 106"** of the E-SIGN Act. (Emphasis added.) In contradiction to the statutory language and in a manner that would frustrate the purpose of the Banking Bill and the eCBSV, the Draft User Agreement and related document (the Electronic Signature Requirements document) sought to "prescribe electronic signature requirements that are beyond SSA's authority in the Banking Bill and do not align with the E-SIGN Act." (January Letter).

This point was essential to our objection to the variety of misinterpretations and misapplications of the E-SIGN Act throughout the Draft User Agreement, and the basis for our contention that the Electronic Signature Requirements document is so flawed as to require deletion from the implementation process.

In both our December Letter and January Letter, we argued that due to the express language in the Banking Bill, the Draft User Agreement need only state that to obtain electronic consent, a Permitted Entity must obtain an electronic signature as defined in the E-SIGN Act.

5. ***SSA Statement:*** *"Although SSA provided a separate agreement with electronic consent requirements that permitted entities must follow when obtaining electronic consent from their customers, the User Agreement also lists and describes these requirements."*

   Response: This is not accurate. As discussed in response to item 4 above, the separate Electronic Signature Requirements document includes many elements that are not in the Draft User Agreement. Further, the Electronic Signature Requirements document is not an "agreement." From our January Letter:

   "It also appears that the Electronic Signature Requirements document includes details and requirements that are unrelated to obtaining an electronic signature, as that term is defined in the E-SIGN Act. The Banking Bill is clear that the only nexus to the E-SIGN Act with regards to eCBSV is that, for electronic consent, a Permitted Entity must obtain an individual's Electronic Signature, as defined in the E-SIGN Act. Only the cross-referenced definition should be reflected in the Draft User Agreement. The manner of obtaining consent and other requirements in the Electronic Signatures Requirement document is extraneous, unnecessary, and introduces requirements that contradict the law."

The Draft User Agreement does not list and describe the requirements in the Electronic Signature Requirements document. Rather, the Draft User Agreement states that a Permitted Entity "will use an Electronic Signature process that meets or exceeds SSA's requirements, consistent with section 106 of the ESIGN Act (15 U.S.C. § 7006) and as defined in the Electronic Signature Requirements for Permitted Entities on SSA's internet website at https://www.ssa.gov/dataexchange/eCBSV/index.html."

As noted above, the Electronic Signature Requirements document is **not** consistent with the E-SIGN Act, and in fact, contradicts that law and the Banking Bill.

6. ***SSA Statement:*** *"Mr. Chitwood informed the briefing participants that the six elements in the draft electronic signature requirements are not random; they conform with the elements the Federal CIO Council has stated constitute a legally valid electronic signature."*

   Response: To begin, it is not appropriate for SSA to refer to and rely on Federal CIO Council guidance as the Council does not have the authority to determine what is "legally valid" with regard to electronic signatures or any other matter. The Council, which was established by the E-Government Act of 2002 (P.L. 107-347), is limited to an advisory role.

   Moreover, the guidance SSA is citing – the Council's 2013 guidance on "Use of Electronic Signatures in Federal Organization Transactions" – is irrelevant to eCBSV. This guidance provides advice on what agencies – not the private sector – should do when an agency itself is establishing an e-signature solution for citizen-facing agency applications. The Banking Bill, however, does not require SSA to establish an e-signature solution. Instead, it requires banks and other permitted entities to use an electronic signature – as defined by the E-SIGN Act – to capture electronic consent from a consumer prior to submitting a verification request to SSA.

   In addition, SSA's apparent decision to rely on the Council's guidance contradicts the previous statement by SSA referenced in item 2 above: *"Specifically, at the time the User Agreement was drafted, SSA interpreted the "notwithstanding" language to mean that no other laws, in particular the Privacy Act, would serve as a basis to justify SSA refusing to accept electronically-signed consents."*

   It is correct that no provision of law or other requirement shall govern electronic consent for purposes of eCBSV other than the E-SIGN Act, as specifically stated in the Banking Bill. Therefore, the SSA's reliance on Federal CIO Council guidance – in addition to being wholly inappropriate given the Federal CIO Council's lack of legal authority – is also a violation of the Banking Bill.

In fact, paragraph (f)(2) of the Banking Bill could not have been clearer in stating that the sole legal authority, standard and definition for an electronic signature is the E-SIGN Act, not the Federal CIO Council or any other standard or definition: "For a permitted entity to use the consent of an individual received electronically pursuant to paragraph (1)(A), the permitted entity must obtain the individual's electronic signature, as defined in section 106 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7006)."

In both our December Letter and January Letter, we asked SSA to correct the definition and associated requirements of electronic signature to comply with the specific language of the Banking Bill.

7. ***SSA Statement:*** *"A verification is valid for 90 calendar days, and it can be used for one business purpose only, regardless of the time that has lapsed since SSA provided the verification. For example, if a financial institution verifies the SSN of a member of the public who has applied with the institution for a home loan, and that same member of the public later applies at the institution for an auto loan, the institution must seek another matching verification with SSA."*

   Response: We request clarification on this statement as it could be interpreted to contradict section III.A.17 of the Draft User Agreement, which states: "The Permitted Entity and any Financial Institution(s) it services must not reuse the SSN Verification. The Permitted Entity and any Financial Institution(s) it services may mark their own records as "verified" or "unverified" **for future reference**." (Emphasis added.)

   We do not dispute the SSA's authority to limit the re-use of a specific SSN Verification – a term defined in the Draft User Agreement that describes the specific and actual piece of data received from eCBSV indicating a match or no match. However, as the Draft User Agreement notes, it is well within a Permitted Entity's rights to annotate a consumer's file following receipt of an SSN Verification from eCBSV.

   Therefore, and in line with the language from the Draft User Agreement, our understanding as applied to the scenario above is that the financial institution has every right to make note of the "verified," "unverified," or similar notation it made when the consumer applied for a home loan when that same consumer later applies for an auto loan.

   We request clarification that this remains SSA's intent. Attempting to restrict this further is not only contradictory, but is also far outside SSA's legal authority.

In conclusion, these statements from SSA give us reason to be very concerned with the current trajectory of this implementation effort. In good faith, we have provided substantive

comments and feedback on the Draft User Agreement and related documents, and yet, it appears our comments are being misconstrued or ignored. Therefore, as described above, we request a meeting with you to course-correct this implementation effort and to ensure the Banking Bill is implemented as Congress intended. We are sharing this letter with the House Ways and Means Committee staff that attended the January 23rd meeting, as well as staff of relevant authorizing committees in the House and Senate, in an effort to correct the record, and we ask you to correct the record with that staff as well.

Sincerely,

American Bankers Association

Better Identity Coalition

Consumer Bankers Association

Consumer Data Industry Association

Consumer First Coalition

U.S. Chamber of Commerce