



Electronic Signatures in Global & National Commerce Act at Your Company

Disclaimer

- ▶ The information presented in this session is not offered to be legal advice. Participants should consult with legal counsel for advice on specific situations.
- ▶ The opinions expressed in this presentation are the express opinions of the presenter and do not reflect the opinions of the speaker's employer, MB Financial Bank, N.A.

Advantages of Electronic Commerce

- ▶ Reduces costs
- ▶ Saves time
- ▶ Increased security of documents
- ▶ Removes geographic barriers
- ▶ 24/7 availability
- ▶ Improved record retention and retrieval
- ▶ Environmentally friendly

Background and Purpose

- ▶ Congress enacted the Electronic Signatures in Global & National Commerce Act (E-SIGN, Pub. Law 106-229 6/30/00) to facilitate and encourage commerce. E-SIGN promotes the use of electronic disclosures, contracts, signatures and recordkeeping by establishing legal equivalence between:
 - ▶ Written disclosures/contracts/signatures on paper and those in electronic form; and
 - ▶ “Wet” (i.e. Pen-and-ink) signatures and electronic signatures
- ▶ provided certain requirements are met.

Background and Purpose

- ▶ E-SIGN does not require disclosures, records, or contracts to be in electronic format; generally, all parties must agree to this method.
- ▶ E-SIGN does not replace any requirements such as a document which is to be given in a particular font size or format; within a particular timeframe; in a clear and conspicuous manner. All other rules pertaining to that electronic record stand.

Record Retention

- ▶ E-SIGN allows disclosures, records, and contracts to be retained electronically. E-SIGN does not change the record retention period required under any other law applicable to the transaction at hand.
- ▶ Also, the electronic records must:
 - ▶ accurately reflect the information contained in applicable contracts, notices, or disclosures; and
 - ▶ remain accessible to all persons entitled to access, in a form that can be accurately reproduced, for the required period.

Regulation

- ▶ There is currently no implementing regulation, and no expectation that any will be issued.
- ▶ Risk professionals only have the law to rely on for guidance.

Coverage

- ▶ E-SIGN applies to commercial and consumer transactions affecting electronic commerce, and to transactions regulated by both Federal and state government.
- ▶ If there is no requirement by a statute, regulation, or other rule of law that something be in writing, E-SIGN requirements do not apply.

Coverage

- ▶ E-SIGN requirements do not apply to:
 - ▶ Certain contracts or records relating to wills, codicils, testamentary trusts;
 - ▶ Certain records relating to family law;
 - ▶ Certain records relating to the Uniform Commercial Code;
 - ▶ Court orders and notices required to be executed in connection with court proceedings;
 - ▶ Notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure under a credit agreement secured by, or rental agreement for, a primary residence of an individual;
 - ▶ The cancellation or termination of health insurance or life insurance benefits;

Coverage

- ▶ Recall of a product, or material failure of a product, that risks endangering health or safety;
- ▶ The cancellation or termination of utility services; and
- ▶ Documents required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

Relation to Other Regulations

- ▶ Some regulations specifically refer to E-SIGN.
- ▶ For example, Regulation DD, implementing the Truth in Savings Act refers to E-SIGN under the disclosure requirements §1030.3(a):
 - ▶ *The disclosures required by this part may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) (15 U.S.C. 7001 et seq.)*

Sending e-Documents

- ▶ My company wants to send electronic documents...

Consumer Requirements

- ▶ E-SIGN applies to both commercial and consumer transactions, with enhanced requirements for delivering e-documents under consumer transactions.

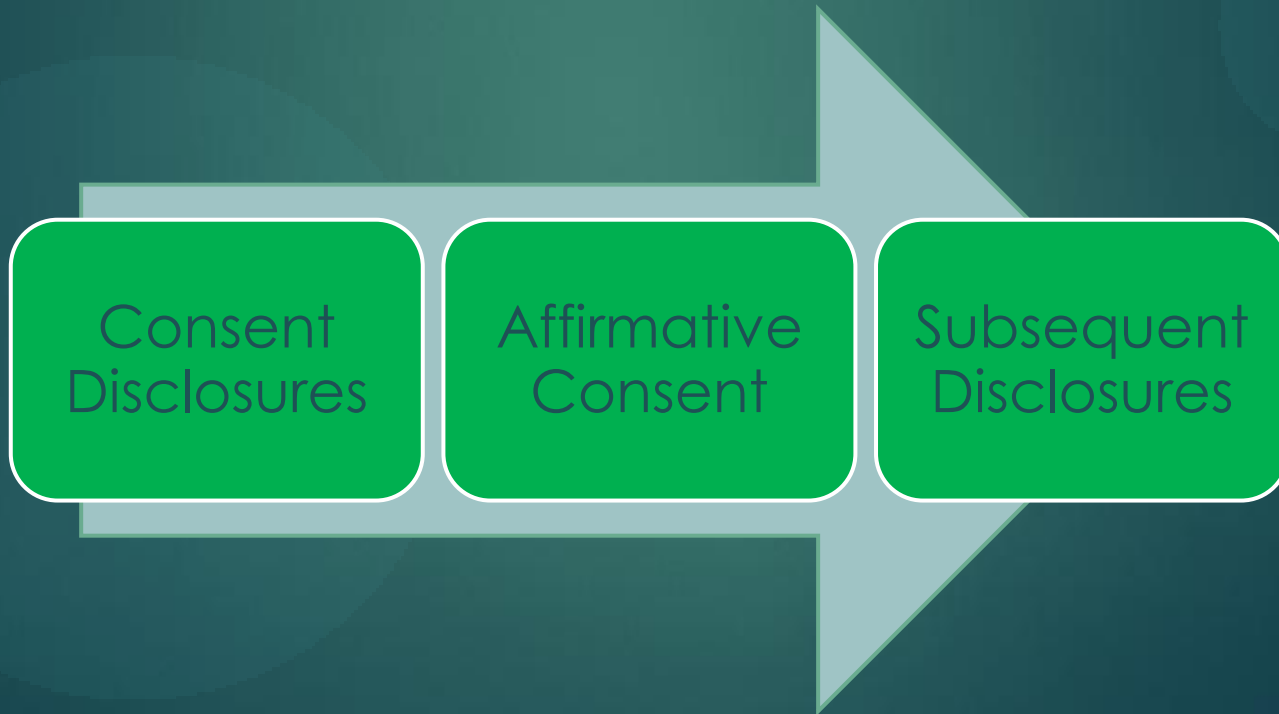


Consumer Consent

- ▶ The consumer consent provisions of the Act allow the consumer to:
 - ▶ consider the ramifications of e-delivery; and
 - ▶ ensure that they can access the information.

Consumer Consent

- ▶ The consumer consent process involves:



Consent Disclosures

- ▶ Before obtaining consumer's affirmative consent, an institution must provide the consumer with a clear and conspicuous statement that informs the consumer about:
 - ▶ Availability of Paper Records
 - ▶ Scope of the Consent
 - ▶ Withdrawing Consent & Updating Information
 - ▶ Hardware & Software Requirements

Availability of Paper Records

- ▶ Must inform the consumer of any option or right to have the record provided on paper; the right to withdraw consent; and any conditions or consequences of withdrawing consent (i.e. fees; change of account type; termination of parties' relationship).
- ▶ Must also inform consumers how they may request a paper copy of an electronic record and whether any fees will be charged for the copy.

Scope of the Consent

- ▶ Must specify what electronic records or transactions the consent covers. In other words, an institution's consent disclosures must tell consumers whether their consent covers only one particular transaction or broader categories of information.
- ▶ For example, the consent disclosure would explain whether the consent covers only account statements or all communication that might be sent in connection with an account.

Withdrawing Consent and Updating Information

- ▶ Must describe the procedures that the consumer must use to withdraw consent. It must also describe how the consumer may update information needed to contact the consumer electronically (i.e. email address changes).
- ▶ For example, your institution's disclosure may state that in order to withdraw consent, the consumer must call customer service at a particular telephone number or it may specify that an email message must be sent to a certain email address.

Hardware & Software Requirements

- ▶ Must detail the hardware and software requirements necessary to access and retain the electronic records.
- ▶ For example, the disclosure may specify whether a printer is required, and whether particular software is required to view electronic records, among other things.



Affirmative Consent

- ▶ Once the consumer has received the consent disclosures, the next step in the process is to receive the consumer's affirmative consent.
- ▶ The E-SIGN Act requires that the consumer consent electronically, or confirm 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.”*

Affirmative Consent

- ▶ This means that the consumer must say “Yes, I do want to receive my records electronically; I have not withdrawn my consent.” And they must perform all the steps necessary to receive the records electronically.
- ▶ There are various ways to accomplish this “live test” and it depends on what your information technology team can deliver.

Affirmative Consent

- ▶ For example, if your institution provides required notices in a PDF format, you could send the user a link to a PDF document that contains a code that the user must provide in order to demonstrate that they were able to read the PDF. When the system receives a valid code, it marks the consumer's record in a way that indicates the election of electronic records instead of paper.
- ▶ To further document the consumer's election, the system may also date/time stamp the action and capture the IP Address from which the election was made.

Subsequent Disclosures

- ▶ If the hardware or software requirements change and the changes create a material risk that consumers will not be able to access or retain the electronic records, institutions must:
 - ▶ Notify consumers of the new requirements;
 - ▶ Give them the opportunity to withdraw their consent without charging any fees or imposing other consequences that were not previously disclosed; and
 - ▶ Obtain their consent again.

Pitfalls

- ▶ Beware that your team may think to show the legal/compliance units the agreement, but not the new or changed system process.
- ▶ Beware of processes that do not capture the “demonstrable” consent component. Some companies have a great disclosure and agreement, but do not capture the “live test.”
- ▶ Beware of vendors that are not receptive to correcting a non-compliant process because “no one else has asked for this process.”
- ▶ Beware of team members that encourage consumer clients to demonstrate consent on your own company computers.

Pitfalls

- ▶ Beware of consent form presentation that is not clear and conspicuous.
- ▶ Beware of processes that make “I agree” the default or give no other options.
- ▶ Beware of processes that have weak security or authenticity controls.

Using e-Signatures

- ▶ My company wants to use electronic signatures...

Electronic Signatures

- ▶ Electronic signature means “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with *the intent to sign the record.*”
- ▶ Person means “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.”

Electronic Signatures

- ▶ An e-signature does not need to resemble a “wet” signature. It can be a simple click to accept terms and conditions or a typed name or typed initials and part of an address.
- ▶ Note, a digital signature only refers to a particular type of technology or method, which is supposed to demonstrate authenticity. It may or may not yield a legally binding electronic signature. Not all electronic signatures use a digital signature.

Pitfalls

- ▶ Beware of using forms where the default is the “I agree” button. (It is better to require some affirmation such as a click checkbox and the default being “I decline” to help demonstrate the person’s intent to enter into the transaction.)
- ▶ Beware of consent form presentation that is not clear and conspicuous.
- ▶ Beware of using forms that can be accessed by someone besides the person who should sign.
- ▶ Beware of processes that have weak security or authenticity controls.

Risks

- ▶ Having a weak E-SIGN process can subject a company to legal and compliance risk. A client could allege:
 - ▶ They never consented to e-delivery;
 - ▶ They never signed the document;
 - ▶ They signed a different document;
 - ▶ They only accidentally accepted or signed because of system default;
 - ▶ They never received the required disclosure or document;
 - ▶ The document was tampered with; etc...

Risks

- ▶ May lead to serious business claims against a company such as:
 - ▶ They do not owe the money;
 - ▶ You owe them money;
 - ▶ The contract is not valid or enforceable;
 - ▶ The document is not admissible in court; etc.

Risks

- ▶ If a court of law or a regulator agrees, an institution could be subject to:
 - ▶ Regulator enforcement action or other scrutiny
 - ▶ Legal action, including class action suits



Risk

- ▶ Note, E-SIGN does not specify civil liability provisions for violations of that act.
- ▶ E-SIGN does not provide any exemption from penalties for failing to deliver disclosures required by regulation.
- ▶ Regulators have other potential citations included in individual regulations.
- ▶ There have been a number of lawsuits brought forth citing E-SIGN, including the first civil money penalty issued against a financial institution, for violation of E-SIGN and other rules, in June 2013.

Managing Risk

- ▶ Assess what documents are provided electronically;
- ▶ Assess whether any signatures are received electronically;
- ▶ Determine why they are provided electronically—is it required by a law?
- ▶ Determine whether the document is subject to E-SIGN requirements;
- ▶ If yes, review the process being used;
- ▶ Determine whether the process is E-SIGN compliant;

Managing Risk

- ▶ Determine whether the process is sound and defensible;
- ▶ If it is not, work with IT and legal counsel to create a consistent, compliant, sound process;
- ▶ Review the electronic document being delivered;
- ▶ Determine if it is compliant;
- ▶ May need to correct existing, non-compliant situations; ...

Managing Risk

- ▶ Educate stakeholders
 - ▶ Know that your company team may be hesitant to accept what you are saying;
 - ▶ Know that your vendors may need educating.
- ▶ Implement a thorough review exercise for new and changing processes that involve electronic documents and signatures; and
- ▶ Employ solid vendor management.

Conclusion

- ▶ E-SIGN compliance requirements are about electronic workflow and processes to fulfill legal/regulatory requirement.
- ▶ Design should protect the company from legal and regulatory risks.
- ▶ Legal counsel should be consulted to review processes and agreement language.

Questions?



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