

SO YOU WANT TO SAVE SOME POSTAGE EXPENSE, DO YOU?

Perhaps you are thinking that sending customer deposit account statements electronically is a great way to cut down on the number of pieces of mail going out from the bank each month. Just get the customer to tell you, “Yes, please do send my statements electronically,” and then everything is a go. What could be easier?

E-SIGN and

Be careful about how you approach this. Many deposit account statements contain disclosure elements required by Regulation E and Regulation DD, and those regulations specify that disclosures be provided “in writing, in a form the consumer can keep.” How can your electronic statement comply? The answer lies in the Electronic Signatures in Global and National Commerce Act (Pub. Law 106-229),¹ E-SIGN for short.

E-SIGN received some notice and fanfare upon its passage in 2000, but has since disappeared from the radar as other laws and regulations moved to the forefront. With things like the USA PATRIOT Act, the Gramm-Leach-Bliley Act, and other regulations and laws competing for compliance attention, it’s little wonder not many people remember E-SIGN. And E-SIGN is also somewhat limited in that there are no implementing regulations or enforcement agencies responsible for E-SIGN itself. The only body with the authority to interpret the statute is the federal court system, and at this point there has been very little case law to help determine whether actual practices are in compliance with statutory provisions.

But this doesn’t mean you can ignore E-SIGN. Failure to comply with its provisions could be a powder keg in the event of litigation. If the courts hold that you did not comply with E-SIGN, every e-statement you’ve ever sent could be declared invalid for purposes of compliance with Reg. E and Reg. DD. Think of the potential retroactive penalties and costs.

So what does E-SIGN require? Let’s walk through the process.

First, you need an E-SIGN disclosure in which you tell consumers what electronic disclosures are all about. You must provide a statement that tells consumers what the hardware and software requirements are for access to and retention of the electronic statements. Obviously, they need some type of computer, but consider whether consumers can obtain statements on a personal digital assistant (PDA) device or a pocket PC. Does the consumer need a printer or a storage device such as a hard drive? What about an Internet browser?—any particular brand or version?—or Adobe Acrobat Reader? Your disclosure of the technical requirements needs to be complete.

Tell customers whether they can change their minds about receiving the statements electronically, and if there are any consequences such as additional fees for switching back to paper statements. This doesn’t mean you cannot have an account that offers only electronic statements; you can. In such a case, tell customers that if they change their minds about receiving electronic statements, their accounts will be closed or changed to a type that offers paper statements. If customers have the option to choose paper or electronic statements, and customers with paper statements are charged a \$3 service charge, then that’s what you must tell the customer in this disclosure. You must tell consumers whether they have the option to receive paper copies of any documents provided electronically.



E-Statements

**Compliance
Challenges
on the
Electronic
Frontier**



You can't simply send the E-SIGN disclosure to an e-mail address collected at account opening and state something like, "Failure to contact us within 72 hours after receipt of this message constitutes acceptance of e-documents in lieu of paper documents for this account." The customer has to say, "Yes, I received the information about electronic documents, I agree that I meet all the requirements, and I do want to receive my account documents electronically."

Disclose the process customers use to change from electronic to paper statements. Do they need to send e-mail messages to a particular address? Can they just contact customer service, and if so, what's the phone number? At the same time, tell them how they can update their contact information, such as e-mail addresses.

Tell customers what documents their consent to receive electronically covers. Does it cover only account statements, or all communications that might be sent in connection with the account? Does it cover NSF notices? Privacy notices? What about responses required by Regulation E when the customer alleges that an EFT error such as an unauthorized electronic withdrawal occurred? Are customers also consenting to receive any or all of those communications electronically instead of paper? Your E-SIGN disclosure must spell this out.

Finally, tell customers how to request paper copies of electronic documents and whether fees will be charged for this service.

Now that you've given your consumers all this information, the next step is to obtain their informed consent to receive electronically the documents outlined in the E-SIGN disclosure. This can be tricky, because E-SIGN requires that this consent be affirmative and that it be done or confirmed in a manner that demonstrates the consumer's ability to receive the document electronically in the format contemplated by the bank for sending the document.

"Affirmative consent" means the customer has to take some type of positive step to request electronic communications. You can't simply send the E-SIGN disclosure to an e-mail address collected at account opening and state something like, "Failure to contact us within 72 hours after receipt of this message constitutes acceptance of e-documents in lieu of paper documents for this account." The customer has to say, "Yes, I received the information about electronic documents, I agree that I meet all the requirements, and I do want to receive my account documents electronically."

The customer's consent to receive statements electronically has to be done or confirmed in a manner that reasonably demonstrates ability to receive and read the documents in the format the bank plans to use to provide the documents. If you plan to send account statements in portable document format (PDF) file, the customer has to show capability to receive and read a PDF file. If you plan to send statements via e-mail with a link to an HTML Web page, you must send a sample e-mail with a link to a sample HTML Web page with some type of statement that the customer can confirm they have been able to access.

There is more than one way to accomplish this. The bank could create a Web page formatted similar to the customer's statement with a keyword embedded at the site; the e-mail sent to the customer would contain a link to this Web page, which would then have a submission form that required the customer to provide the correct e-mail address, the keyword listed on the site, and a statement confirming consent to receive documents electronically. The key is that the method of confirmation must demonstrate the customer's ability to perform all of the steps necessary to receive the documents electronically.

If the technical requirements needed to access the documents electronically change after consumers have begun receiving electronic documents, E-SIGN requires that you notify customers of the new requirements and after doing so again solicit their consent or confirmation of consent in a manner that demonstrates they are capable of receiving and reading the documents under the new requirements. You also must provide the opportunity to revoke their consent to receive disclosures electronically, and if they do revoke consent, you cannot apply any fees or other consequences you did not previously disclose when they signed up for electronic documents.

The timing requirements for electronic disclosures are no different from those for paper disclosures. For example, Regulation E requires that you provide a notice to the



consumer within three business days after concluding an investigation into an alleged EFT error. This timing applies regardless of whether that notice is sent in paper or electronic format.

There is one other factor to consider when providing electronic versions of disclosures required by Regulation B, Regulation E, Regulation M, Regulation Z, or Regulation DD: All of these consumer protection regulations had interim rules added in early 2001 to cover electronic communications.² These interim rules originally had a mandatory compliance date, of October 1, 2001, but on August 8, 2001, the Federal Reserve Board lifted that compliance date,³ indicating they were considering adjustments to the interim rules that would provide more flexibility and promising reasonable notice when setting a new mandatory compliance date. Five years have passed and no new mandatory compliance date has been set. The electronic communications sections of these five regulations therefore remain in interim format and compliance is not mandatory. But compliance with the provisions of these interim rules is worth considering because it does provide a safe harbor.

The electronic communications sections of the five regulations are virtually identical in all material aspects. These rules stipulate that following E-SIGN is the prescribed way to obtain consent for electronic disclosures. They require that electronic disclosures be either delivered directly to customers' e-mail addresses (which could have significant information security ramifications for the bank) or available at another location such as a Web site. If the disclosure is available at another location, notice must be sent via e-mail informing customers of the accounts involved and the address of the Web site or other location where the disclosure is located. The bank must make the disclosure available at that location for 90 days from the later of the date first available or the date customers were notified of its availability. If a disclosure or notice provided by e-mail is returned to the bank undelivered, the bank must attempt to redeliver using whatever information it has about the customer. If the bank has an alternate e-mail address, this can be used; otherwise, the bank must use the customer's mailing address. Simply resending the notice to the same e-mail address from which it was returned is not acceptable. Not every e-mail system will send the bank notice when an e-mail is not delivered, and in some cases the host system simply vaporizes the e-mail. In those cases, the bank would have no redelivery obligation. This is why the demonstrable consent process is important in setting up electronic delivery of documents. You need to be sure that the e-mail you send reaches its intended destination.

Following these precautions will allow you to enter with confidence into the electronic frontier and realize those cost savings gained from not sending paper statements every month. This process helps ensure those cost savings won't evaporate into lawyers' fees, fines, and penalties because the bank didn't properly inform customers that they would be receiving their statements electronically and obtain the customers' informed consent to that process. **BC**



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Endnotes

¹The full text of E-SIGN is available at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ229.106.pdf.

²66 FR 17322 and 66 FR 17779.

³66 FR 41439.