

E-Sign – Can Banking Become Paperless?

Paperless Banking

The **paperless office** is now considered to be a philosophy to work with minimal paper and convert all forms of documentation to a digital form. The ideal is driven by a number of motivators including productivity gains, costs savings, space saving, the need to share information and reduced environmental impact.

http://en.wikipedia.org/wiki/Paperless_office
(visited April 12, 2008).

Replacement of Paper

- On-line newspapers
- Websites replacing mail order catalogs
- Electronic filing in all federal courts
- Electronic payments systems -
Biometric
- Banking? Statements, checks, loan documents, deposits and withdrawals

What is E-Sign?

- Electronic Signatures in Global and National Commerce Act
- Federal statute that became effective on October 1, 2000

Key Provisions

- Fundamental Principle:
 - Any aspect of transaction “may not be denied legal effect, validity or enforceability solely because it is in electronic form.”
 - Translation – electronic documentation and signatures are on equal legal footing with paper and ink.

Key Provision – “Signature”

- An electronic signature is defined as an “electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”
- Authenticity – only requirement is that the signature be the person’s act

Key Provision - Exclusions

- Wills, codicils or testamentary trusts
- Divorce and family law matters
- UCC –does not apply to certain sections
- Court orders or official court records
- Cancellation of health or life insurance benefits
- Product safety notices

Key Provision - Exclusions

- Notice regarding default, accelerations, repossession, foreclosure or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, the primary residence of an individual

Key Provision - Consumer Consent

- A consumer must consent to electronic transactions
- Wherever law requires notice “in writing,” such notice may be satisfied with electronic writing only if consumer has consented to use of electronic notices

Adequacy of Consent

- Must be reasonable under the circumstances
- Should be well –disclosed and obtained often

Request for Consent Should:

- Notify consumer of right to obtain any record in paper form
- Advise of right to withdraw consent and describe procedure for doing so
- Define scope of consent
 - One aspect of relationship or entire relationship?
- Describe procedure for updating contact information
- Notify consumer of any system compatibility issues for communicating electronically

Sending Transaction Documents

- Information is deemed “sent” when it is properly addressed, in a form readable by recipient and directed to a system outside of sender’s control or it reaches recipient’s control
- E-mail caught in a spam filter would be deemed “sent” under E-Sign
- The parties may and should include a process for verifying receipt of sent information

Other Provisions

- Rules about mistakes and changes during the transaction
- Allows formation of contract when interaction is between computer and person or two computers
- E-Sign specifically permits the practice of retaining checks in electronic form
 - Check 21 provides more recent and specific guidance for electronic checking

Bottom Line with E-Sign

- Allows use of electronic signatures and electronic records

What about Maine law?

- E-Sign only pre-empts the law of states that do not adopt the “Uniform Electronic Transactions Act” (“UETA”)
- Maine passed UETA
- UETA is not materially different from E-Sign

What about regulations?

- E-sign limits regulatory authority
 - How?
 - What regulations are permissible?

Existing Regulations

- Federal regulations only address adequacy of records and rules for providing required notices electronically
- Maine Bureau of Financial Institutions regulation 02-029 simply says that records may be retained in electronic form so long as they allow for “reconstruction of electronic transactions”.

Using E-Sign

- Obtain consumer consent to transact business electronically
- Advise customer of rights

Industry Standards

- Given the flexibility in E-sign's requirements, the transition to electronic banking is being largely driven by the free market
- Competition will pressure community banks to monitor the technology and keep up with the trends

Electronic Disclosures Generally Allowed

- Regulations governing Truth in Lending, Truth in Savings, Fair Credit Reporting Act notices and disclosures direct compliance with E-Sign.
- The general rule is that electronic notices are allowed if consumer consents
- Note that, for truth in lending disclosures, where the consumer inquiry comes from a remote computer electronically, the disclosure must be sent electronically

How E-Sign Applies to Real-Life Transactions

- Deposits and withdrawals
- Transfers of funds
- Consumer loans – unsecured
- All permissible under E-Sign
 - Concerns are authentication, security, and the ability to prove the validity of the transaction
 - Proper systems and procedures can address these concerns
 - Regulators publish guidance

General Principles of Authentication

- Single factor authentication may be used in low risk transactions
- Multiple factor in high risk transactions
 - Sliding scale, the higher the risk, the more security needed
 - Dangers are fraud and data theft

E-Sign Allows for Electronic Mortgage Loans

- How would it work?
- What are the impediments?
 - Notaries
 - County Recorders
 - Purchasers of loans in secondary market

Other types of electronic contracts

- Click wrap contracts
- Browse wrap contracts

Electronic Recordkeeping

- “Originals”
- Must be sufficient to reconstruct the transaction
- May only be used if provided to opposing party in form that is usable