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ANNUAL MEETING

TENNESSEE BANKERS ASSOCIATION Service Since 1890

THE BROADMOOR
COLORADO SPRINGS, CO
JUNE 17–19, 2018

PLUS

- **Q&A with TN Department of Economic and Community Development Commissioner Bob Rolfe**
- **Leadership Luncheons Recap**

E-Sign: Will that be one click or two?

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SIGNiX, the most trusted name in Independent E-Signatures™, makes signing documents online safe and secure with comprehensive legal evidence permanently embedded in each document to eliminate any dependence upon SIGNiX. For more information, visit *www.signix.com.*

Since the passage of the Electronic Signatures in Global and National Commerce Act (E-Sign) in June 2000, the world has gone digital. People routinely contract, purchase products, and execute any number of agreements online. E-Sign was vital to that development by giving parties comfort that their electronic agreements would be enforceable. However, E-Sign was not all-inclusive and did not provide all the answers relative to online transactions. Today, many online businesses—particularly banks—still struggle with understanding some of the requirements of E-Sign. The language of E-Sign is straightforward, but the details of implementation leave room for interpretation and potential pitfalls that can be damaging for the unwary.

The statutory language of E-Sign is not complex. It outlines four basic elements for compliance:

Pre-Consent Disclosures

Before a consumer can agree to consent to electronic disclosures, notices or agreements, the business has to clearly and conspicuously describe:

- What right or option the consumer may have to receive the disclosures in hard copy
- The process to withdraw consent, effect of a withdrawal of a consent to electronic disclosures, and any fees that may apply
- The process to update contact information.
- The scope of the current consent—whether the consent applies only to the current transaction or will apply prospectively for all transactions
- How consumers can obtain a hard copy of a record after a consent is given and any applicable fees
- The hardware and software requirements for access and retention of electronic disclosures

Consent

Next, E-Sign requires that consumers confirm or express their consent electronically in a manner that reasonably demonstrates that the consumer is able to access the required disclosures online.

Post Consent

If a change is made in the hardware or software necessary to access or retain electronic records and because of the change, there is material risk the consumer will no longer be able to access or retain future disclosures, the business must provide the consumer with:

- The revised hardware and software requirements
- The right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any conditions or consequence that was not set out in the pre-consent disclosures

Then the business must get the consumer to confirm or express their consent electronically in a manner that reasonably demonstrates that the consumer will be able to access the required disclosures online given the new hardware and/or software requirements.

Retention

Finally, E-Sign says when a statute, regulation, or other rule of law requires that a contract, disclosure, or other record relating to a transaction be retained for some period of time, that requirement is met under E-Sign by retaining an electronic record of the information in the contract, disclosure, or other record that accurately reflects the information in that document and is accessible by anyone who is entitled to access it for the period of time required in a form that is capable of being accurately reproduced for later reference.

Once a bank decides to take advantage of the opportunities of E-Sign, there are several issues to consider. Most of them are fairly obvious, but if overlooked, they could cause significant issues from a legal and regulatory perspective. The bank will have to implement appropriate policies and procedures, a methodology will have to be adopted to verify identity and memorialize consent, and the Federal Reserve's regulations regarding E-Sign disclosures and record retention may need to be considered as well.

Whether or not to implement E-Sign is hardly a choice in banking today. Online account origination is not the future—it is the present. Banks can help prevent E-Sign violations by involving their compliance departments and engaging external resources when necessary to ensure compliance. Failure to establish an compliant E-Sign program may invalidate all contracts, agreements, and/or disclosures delivered or formed electronically.


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