



IN THE TRENCHES: IMPLEMENTING ONLINE PAYCHECK PROTECTION PROGRAM LOANS

And what you need to know to
create enforceable documents
and avoid enforcement claims

PRESENTATION OVERVIEW



ESIGN Laws



Electronic Signatures



PPP Underwriting Files and E-Closing



Risk Analysis Framework



ESIGN OVERVIEW

Creating Enforceable Contracts
in an Electronic Environment

ELECTRONIC SIGNATURE LAWS

More than just electronic
signatures:

E-Disclosures

E-Delivery

E-Signing/E-Closing

E-Archiving

Jenna Sue



E-SIGNATURE LAWS

E-signature Law

Effective Date

Electronic Signatures in Global & National Commerce Act (ESIGN)

October 2000

Uniform Electronic Transactions Act (UETA) (adopted in all but 3 states and one territory: Illinois, New York, Puerto Rico, Washington)

August 1999

THE BASICS

Legal sufficiency vs. attribution

- UETA answers the question “is it a signature?”
- Does NOT answer the question “is it your signature?”

It’s all in the PROOF

- May be proven by any means, including surrounding circumstances or efficacy of agreed-upon security procedure
- Different risks may require different kinds of evidence
- How does your paper process provide proof? Could it be better?

THE KEY TO ENFORCEABILITY

Attribution



Record Integrity

DISCLOSURES/DELIVERIES

Disclosures and deliveries can be made exclusively in electronic form. (I.e., you can send a customer electronic files to open and review).

If a disclosure is required to be given to a consumer, then ESIGN requires a special “ESIGN Disclosure” if such disclosure is given exclusively by e-delivery.

This requirement does not apply if you send electronic courtesy copies and then send the documents you seek to enforce by paper.

COMMERCIAL CUSTOMERS

The enforceability of electronic disclosures and electronic contracts generally is a matter of state UETA laws. The goal is to create an enforceable contract. For commercial transactions, the bank's fight is over enforcement, as opposed to express compliance with a statute.

The ESIGN Act treats consumer obligations differently. ESIGN contains a series of requirements to disclose to, or contract with, a consumer electronically.

Though these consumer disclosures do not expressly apply to commercial transactions, they can be deemed “best practices” when dealing with commercial customers.

ESIGN CONSUMER PROTECTIONS

ESIGN sets out requirements for transactions mandating delivery of written consumer disclosures.

Consumer must consent to receive e-disclosures.

Consumer must receive before consenting:

- information regarding consumer's right to receive paper copy and to withdraw consent, method of withdrawal and consequences thereof
- disclosure regarding applicability of consent to single transaction or entire relationship
- statement of hardware and software requirements for access to and retention of e-records

Consumer must electronically consent, or confirm consent electronically, in manner reasonably demonstrating that consumer can access data in e-form to be provided

FDIC GUIDANCE ON CONSUMER E-DISCLOSURE (FDIC COMPLIANCE EXAMINATION MANUAL, X-3.1)

1. Must have prior consent and specify the scope of consent
2. Must explain the right to withdraw consent and explain the procedure
3. Must explain rights to refuse the receipt of electronic disclosures
4. Must make paper notices available
5. Must provide notice of hardware and software requirements and notify of changes
6. Must have the ability to retain and reproduce records
7. Must confirm consent through a process that “reasonably demonstrates the consumer can access information in the electronic form” and “retain a copy.”

The Electronic Signatures in Global and National Commerce Act (E-Sign Act)

Introduction

The [Electronic Signatures in Global and National Commerce Act](#) (E-Sign Act),¹ signed into law on June 30, 2000, provides

ELECTRONIC RECORDS

ESIGN allows an electronic record to satisfy applicable statutory requirements that a document be retained “in writing” if the electronic record is maintained in a form capable of being retrieved by all parties for later reference.

No more difficult, more onerous, or more expensive than retrieving paper records.

AUTHENTICATION METHODS

Log In

Private Key

Public Certificate

Email Confirmations

Third party services:

- IDology,
- Trulioo,
- Experian,
- Jumio

AUTHORIZATION: ELECTRONIC SIGNATURES

“e-Signature”: electronic sounds, symbols, or processes attached to or logically associated with a contract or record and executed or adopted with intent to sign the record.

- Many different forms of e-sign technologies
- Clicking “I AGREE” or typing “I AGREE”
- One may sign electronically a tangible document
- Can also use a voice signature to sign a “hard copy”

AUTHORIZATION PITFALLS: CLICK WRAPS

Click-wrap is the electronic equivalent of the shrink-wrap method which allows users to read the terms of the agreement before accepting them.

This is generally the least favored as there is limited “affirmative consent.”

AUTHORIZATION: THE SIGNING CEREMONY

For each signature - evaluate authentication risk

Select level of paranoia

This can only be started **after appropriate authentication steps are logged and recorded for the future!**

Make it very clear for each signature what the significance is of “I Agree” and what is being signed



FIVE-POINT FRAMEWORK: RISKS

Authentication Risk - “That’s not my signature”

Repudiation Risk - “That’s not what I signed”

Compliance Risk - “I never saw that”

Adoption Risk - “Am I done yet?”

Relative Risk - “How does it compare to the traditional way?”

FIVE-POINT FRAMEWORK: MITIGANTS

Authentication Risk - Use “shared secrets” or other ways to affirm identity

Repudiation Risk - Record the transaction, web or phone confirmations

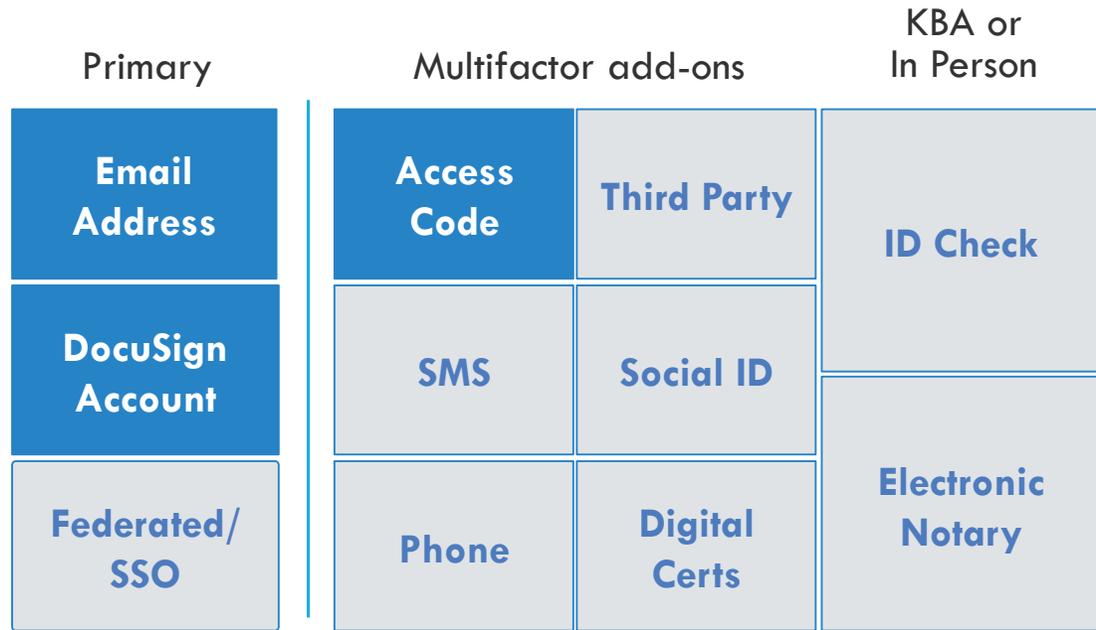
Compliance Risk - Varies

Adoption Risk - Given the volumes, even low adoption may save plenty

Relative Risk - Still important

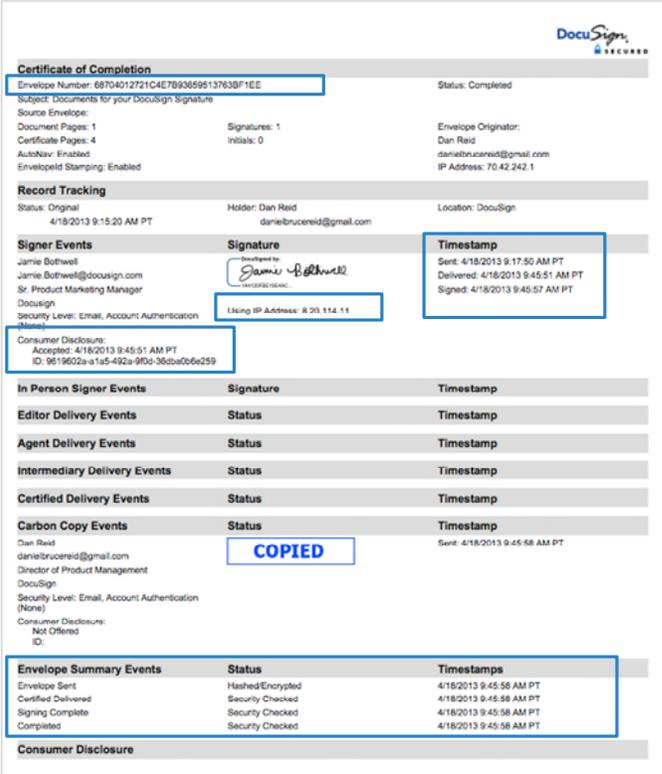
HOW DO YOU ASSURE ATTRIBUTION? (THE DOCUSIGN EXAMPLE)

1. Signer Identity



 Standard Method
 Enterprise Add-On

2. Audit Trail



Certificate of Completion
Envelope Number: 68704012721C4E7B936595137638F1EE Status: Completed
Subject: Documents for your DocuSign Signature
Source Envelope:
Document Pages: 1 Signatures: 1 Envelope Originator: Dan Reid
Certificate Pages: 4 Initials: 0 danielbruceireid@gmail.com
AutoNav: Enabled EnvelopeID Stamping: Enabled IP Address: 70.42.242.1

Record Tracking
Status: Original Holder: Dan Reid Location: DocuSign
4/18/2013 9:15:20 AM PT danielbruceireid@gmail.com

Signer Events
Jamie Bothwell
jami.bothwell@docuSign.com
Sr. Product Marketing Manager
DocuSign
Security Level: Email, Account Authentication (None)
Using IP Address: 8.20.114.11

Signature


Timestamp
Sent: 4/18/2013 9:17:50 AM PT
Delivered: 4/18/2013 9:45:51 AM PT
Signed: 4/18/2013 9:45:57 AM PT

Consumer Disclosure
Accepted: 4/18/2013 9:45:51 AM PT
ID: 9519602a-e1a5-492a-9f0d-365ba266e259

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	Status	Timestamp
Agent Delivery Events	Status	Timestamp
Intermediary Delivery Events	Status	Timestamp
Certified Delivery Events	Status	Timestamp
Carbon Copy Events	Status	Timestamp

Dan Reid
danielbruceireid@gmail.com
Director of Product Management
DocuSign
Security Level: Email, Account Authentication (None)
Consumer Disclosure: Not Offered
ID:

Envelope Summary Events

Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	4/18/2013 9:45:58 AM PT
Certified Delivered	Security Checked	4/18/2013 9:45:58 AM PT
Signing Complete	Security Checked	4/18/2013 9:45:58 AM PT
Completed	Security Checked	4/18/2013 9:45:58 AM PT

Consumer Disclosure

COPIED

Dan Reid
danielbruceireid@gmail.com
Director of Product Management
DocuSign
Security Level: Email, Account Authentication (None)
Consumer Disclosure: Not Offered
ID:

ENFORCEABILITY: MAY BE BETTER WITH ESIGN



5/1/2016

Tamper-proof container



5/1/2016 8:41:12 PM EST

name@email.com

IP: 192.156.22.122

ID Proofing Options:

- One Time Password
- Phone Authentication
- Knowledge Based Authentication
- Witnessed Signing
- Digital Certificate Validation

KEY REQUIREMENTS

The Audit Trail is key to showing authentication and authorization.

Data Security becomes important. If the bank cannot attest to the authenticity of the documents, the system risks non-compliance with the legal requirements of ESIGN and UETA.

This can be an electronically maintained “eVault” or could be as simple as printouts. However, the ability to “testify” to the authentication, authorization, and retention mechanisms is absolutely critical. All of the “Risk” concerns **must be addresses through this retention system.**

REGULATED ACTIVITIES

If particular approved forms are required, online presentation should match exactly with the legal requirements

Consider having separate online version of forms, to capture structured data rather than free form text, e.g., use drop-down selections

Have statutorily required notices and disclosures acknowledged in the process if not affirmatively

WHAT CAN BE E-SIGNED

The default rule is that any contract that could be signed or provided in paper form can be signed electronically.

SECTION 26-6-70. Legality of electronic contracts, records, and signatures.

- (A) A record or signature must not be denied legal effect or enforceability solely because it is in electronic form.
- (B) A contract must not be denied legal effect or enforceability solely because an electronic record is used in its formation.
- (C) An electronic record satisfies a law requiring a record to be in writing.
- (D) An electronic signature satisfies a law requiring a signature.

HISTORY: 2004 Act No. 279, Section 1.

WHAT CANNOT BE E-SIGNED?

Any contract under a law governing wills, codicils, and trusts.

Any contract under the Uniform Commercial Code (except sales, Art. 2 and leases, Art. 2A)

- Negotiable Instruments (Art. 3)
- Bank Deposits and Collections / Checks (Art. 4)
- Letters of Credit (Art. 5)
- Documents of Title / Warehouse Receipts (Art. 7)
- Secured Transactions / Security Agreements (Art. 9)

Default, acceleration, repossession, foreclosure, eviction, and right to cure notices related to a primary residence.

However, Article 9 has a similar provision that addresses the use of electronically “authenticated” records. (UCC § 9-105).

PRACTICAL ISSUES

Regulated disclosures are not changed by E-Sign.

If something must appear “in bold” or in a certain font size, it must still appear that way. If something must appear immediately above a signature, this is not changed by E-Sign.

Timing requirements for notices are not changed and any notices that must be “confirmed” must still be confirmed in the electronic space.

Most regulators have stated that regulatory notices must be provided electronically only after an electronic consent to receive the records. The customer cannot sign a paper to accept electronic disclosures.

PROMISSORY NOTES

Traditionally, promissory notes were considered negotiable instruments under Article 3 of the UCC (exempted from UETA). A person needed an original copy of the promissory note to transfer it.

However, most lenders now include clauses that allow the note to be a “transferrable record.” This was a specific clause of UETA that preserved a right to e-sign a promissory note. (“*Transferable Records*”).

E-NOTARIZATION



UETA and the South Carolina Code allow a document to be “e-notarized.” The notary may electronically sign a notary attestation.

However, the notary must still fulfill his/her duty of confirming the identity of the person and stating that the individual is the one who signed (or e-signed) the document.

Because of this practical limitation, this is not very common.

This does not mean a notary can do a “webcam” notarization. Only 3 states—Florida, Montana, and Virginia—allow webcam notarization with *significant* restrictions.

LEGAL EFFECT OF AN E-CONTRACT

E-contracts are
not “blessed”

All contract
principles
remain intact

Simply cannot be
denied – *solely* because
they are electronic

Requires user
consent



PAYCHECK PROTECTION PROGRAM

Effectively deploying aid to
impacted small businesses

PPP: DOCUMENT GATHERING

<ul style="list-style-type: none"> • Lender Application Form (SBA 2484) 	<ul style="list-style-type: none"> • Settlement Sheet (SBA 1050) 	<ul style="list-style-type: none"> • Customer Information Form (New Customers) 	<ul style="list-style-type: none"> • Authorization for Third Party Release
<ul style="list-style-type: none"> • Borrower Application Form (SBA 2483) 	<ul style="list-style-type: none"> • Disclosure and Compensation Agreement (SBA 159) 	<ul style="list-style-type: none"> • Customer Information Update Form (Existing Customers) 	<ul style="list-style-type: none"> • Corporate Resolution- Right to Consent to Electronic Transactions (can be included in master corporate resolution)
<ul style="list-style-type: none"> • Promissory Note (SBA 147) 	<ul style="list-style-type: none"> • Borrower Certification, Covenants, and Hold Harmless Agreement 	<ul style="list-style-type: none"> • Certification of Beneficial Owner(s) (FinCEN Form 1506-0070) 	<ul style="list-style-type: none"> • <u>Entity Certificate:</u> <ul style="list-style-type: none"> ✓ Certificate of Good Standing ✓ Articles of Incorporation or Certificate of Formation ✓ Bylaws or Operating Agreement ✓ Incumbency Certificate of Officers/Managers ✓ Resolution ✓ Fictitious Name Evidence (if applicable)
<ul style="list-style-type: none"> • Equal Opportunity Poster (SBA 722) 	<ul style="list-style-type: none"> • Patriot Act Notice 	<ul style="list-style-type: none"> • Consent to Receive Disclosures and Documents Electronically • Consent to Execute Documents Electronically (ESIGN Act) 	

PPP: UNDERWRITING/COLLATERAL FILE CHECKLIST

For loans made under the PPP, the SBA will not require the lenders to comply with Section 120.150

The applicant (including an Operating Company) must be creditworthy. Loans must be so sound as to reasonably assure repayment. SBA will consider:

- a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its associates, and guarantors;
- b) Experience and depth of management;
- c) Strength of the business;
- d) Past earnings, projected cash flow, and future prospects;
- e) Ability to repay the loan with earnings from the business;
- f) Sufficient invested equity to operate on a sound financial basis;
- g) Potential for long-term success;
- h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and
- i) The effect any affiliates may have on the ultimate repayment ability of the applicant.

- **Evidence of Number of Employees as of 2/15/20**

- Payroll records
- Filings
- Form 1099

- **Evidence of Monthly Payroll Costs**

- IRS Form 941
- IRS Form 940
- W2s
- 2019 Summary of Employer Retirement Plan Contributions
- 2019 Summary of Employer Paid Group Health Insurance Premiums

- **NAICS Code(s)**

- **CAIVRS Search Confirmation in File**

- **OFAC Search Confirmation in File**

- **Corporate Entity Confirmation from Governmental Source**

- **Other Identification and Customer Due Diligence (CDD) Records**

- **W9**

- **Wire or ACH Instructions**

PPP: YOUR COMPLIANCE MGMT SYSTEM (“CMS”)

Policies & Procedures should be drafted, reviewed for unintended regulatory and compliance consequences and implemented as soon as possible for this PPP Product and Process.

Don't lose sight of your existing policies and procedures already in place. For example, the activity under this program should not be processed in a vacuum. You should be making sure that your:

- Fair Lending program is applied to the program,
- BSA/AML programs are followed, and
- Reg O policy is considered.

PPP: NEW CUSTOMER REQUIREMENTS

At a minimum:

- Name.
- Date of birth.
- Address.
- Identification number (or evidence of an application for one).
 - For a U.S. person, a taxpayer identification number (TIN)

Your Program Controls!

PPP: AUTHENTICATION OF EXISTING CUSTOMERS

- PPP loans for existing customers will not require re-verification under applicable BSA requirements unless otherwise indicated in your own program.
- **Please Note:** When building your procedures or checklist, make sure you are checking the listing of beneficial owners (not just the existing entity) and relying on the exclusion of exiting customers.

PPP: RETENTION OF RECORDS

Your record retention policy will apply

How are you processing applications/ retaining documents

- Verbally

Procedures! Procedures! Procedures!

Looking back a decade

- HAMP/HARP

PPP: FAIR LENDING CONCERNS

How are you marketing this product?

How are you processing this product?

If you are expecting to hit capacity do you have a waterfall drafted?

- Existing Customer vs. New Customer (neutral metrics)
- Time Stamped Application: First in, First out (processing times N/A)

Given Borrowers cannot apply for multiple loans:

- Will you close your origination channel when you are close to capacity
- Avoid possible litigation exposure if allocated funds are exhausted.

PPP: FAIR LENDING CONCERNS

For those of you who have not had the pleasure of arguing against a finding of pattern and practice, the best ammunition against the finding is to show your efforts taken at the time of product roll out. In our opinion, examiners will be applying some type of flexibility when looking at this portfolio of loans, but will review this portfolio and use the findings if supported by other statistical anomalies.

Post Program: Regression Testing:

- Normal operations
- PPP population
- Combined population

PPP: REG O

Treasury's Stance:

- Reg O exemption for US Guarantees

CARES Act language in 120.10:

- Businesses in which the lender or CDC, or any officer, director, key employee, a close relative of any such individual or holder of 20 percent or more of the value of the Lender's stock or debt instruments would be ineligible.

SOP 50 10 5 (K):

- The SBA will not guarantee a loan in which the lender, its associates, partners or close relatives has a direct or indirect financial or other interest in the applicant or had such interest in the past 6 months prior to the date of application.

THE BOTTOM LINE?

E-signatures can be legal

Authentication and repudiation risks are manageable, especially in new business areas

Evaluating these risks must be done in context

Policies and Procedures (both new and old) are applicable and necessary

QUESTION OR THOUGHTS?

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