



eSignature and ePayment News and Trends

[Achieving Digital Transformation and Securing Digital Assets](#)

ESIGNATURE AND EPAYMENT NEWS AND TRENDS

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By: Margo H. K. Tank | David Whitaker | Andrew Grant | Elizabeth S. M. (Liz) Caires

A fact of business today is that customers – both consumers and other businesses – and employees expect to transact digitally. To remain competitive, companies find themselves increasing their efforts to digitally transform their businesses.

Successfully implementing this transformation requires careful planning to ensure regulatory compliance, a smooth integration with existing business technology and a positive customer experience.

Each issue will feature in-depth insight on a timely and important current topic.

In this issue, for our Insights piece, we provide an analysis of the CFPB's recent request for information regarding disclosures on electronic devices as well as some best practices for companies to think about in this space. This issue also includes reports on other recently enacted federal and state laws, federal and state regulatory activities, fresh judicial precedent and other important news.

For related information regarding blockchain and digital assets, please see our monthly bulletin [Blockchain and Digital Assets News and Trends](#).

INSIGHT

CFPB to study electronic disclosures on mobile devices

By Margo H. K. Tank, David Whitaker, Andrew Grant and Liz Caires

As mobile devices have become the platform of choice for many consumers, the effective delivery of disclosures on those devices has become a key consideration for financial service providers, as well as for other providers of goods and services. The Consumer Financial Protection Bureau (CFPB) has published a notice and request for comment in connection with its plans to conduct studies to understand the use of electronic disclosures on mobile devices. The CFPB is seeking comments on its approach to these studies, **due September 10, 2021**. Read more.

REGULATORY DEVELOPMENTS

FEDERAL

Indianapolis and Chicago Federal Home Loan Banks provide updates on acceptance of eNotes. On August 11, 2021, the Federal Home Loan Bank of Indianapolis stated that members can now sell mortgage loans secured with eNotes through the Advantage Mortgage Purchase Program (Advantage MPP). In addition, members can now pledge eNotes as collateral when accessing the bank's credit products.

On August 10, 2021, the Federal Home Loan Bank of Chicago provided updated guidance on its acceptance of eNotes as collateral via an updated FAQ.

FFIEC issues new guidance titled Authentication and Access to Financial Institution Services and Systems. In August, the Federal Financial Institutions Examination Council (FFIEC) issued new guidance titled Authentication and Access to Financial Institution Services and Systems. This Guidance sets forth risk management principles and practices regarding a financial institution's authentication of (a) users accessing financial institution information systems, including employees, third parties, service accounts, applications, and devices and (b) consumer and business customers authorized to access digital banking services. The guidance replaces the FFIEC-issued Authentication in an Internet Banking Environment (2005), and the Supplement to Authentication in an Internet Banking Environment (2011).

STATE

Illinois adopts the Electronic Wills and Remote Witnesses Act. On July 26, 2021, Illinois adopted the Electronic Wills and Remote Witnesses Act. While the law provides for, among other elements, the validity and revocation of electronic wills and the remote attestation for a will, there is a potential issue with the implementation and application of the new law. Specifically, the law defines an "electronic signature" to require use of "a security procedure under the Electronic Commerce Security Act" (ECSA). "Security procedure" is a defined term under the ECSA. As previously discussed here, Illinois recently enacted the Uniform Electronic Transactions Act, and in so doing, immediately repealed the Electronic Commerce Security Act. Therefore, where the Electronic Wills and Remote Witnesses Act addresses the use of electronic signatures when signing electronic wills, the validity and effectiveness of such signatures may be uncertain because the definition of electronic signature references a defined term in a repealed law.

California Department of Financial Protection and Innovation publishes opinion letters on money transmission covering agent of the payee and Bitcoin ATMs:

- On July 30, 2021, the California Department of Financial Protection and Innovation (DFPI) published an opinion letter concerning whether a company was exempt under California's Money Transmitter Act (MTA) as an agent-of-the-payee. The company requesting the opinion received funds transfers during real estate closing transactions. The company is authorized to receive real estate closing funds on behalf of its client, the seller. Once the funds are received, the company will remit the funds into the seller's bank account. The company does so pursuant to an agreement in which the seller appoints the company as its limited payments agent. The DFPI concluded that while the company's activities are money transmission, they fall within the agent-of-the-payee exemption.
- On August 11, 2021, the DFPI published an opinion letter concerning whether a company that operated a Bitcoin ATM was acting as a money transmitter. Here, a customer would approach a kiosk, and buy Bitcoin by inserting the needed amount of U.S. dollars. The customer would then direct the kiosk to send the Bitcoin to the customer's personal Bitcoin wallet. The company does not hold virtual currency for the customer and sells Bitcoin from its own inventory. The DFPI

stated that because the company's activities are limited to selling Bitcoin, the company does not require an MTA license because it does not involve the sale or issuance of a payment instrument, the sale or issuance of stored value, or receiving money for transmission.

INDUSTRY DEVELOPMENTS

Payments

New Nacha Rules regarding debits from consumer accounts. In early August, Nacha published an update to its Operating Rules and released a supplement to its Operating Guidelines regarding its Meaningful Modernization updates, which take effect on September 17, 2021. The update creates a new category of authorization titled a "Standing Authorization," which is an advance authorization by a consumer of future debits that are not pre-scheduled at regular intervals, but instead require some additional affirmative action by the consumer to authorize each individual debit. Further, the update allows for "Oral Authorizations" as a valid authorization method, distinct from telephone authorizations, that may be used for certain types of authorizations and subject to certain requirements. The update also modifies the disclosure requirements applicable to debit entries for consumer accounts.

CASE LAW

FEDERAL

Electronic signature and contract formation

Court upholds electronically signed arbitration agreement. In *Romero v. Watkins and Shephard Trucking Inc.*, 2021 WL 3675074 (9th Cir. Aug. 19, 2021), the court upheld an electronically signed arbitration agreement despite the plaintiff's challenge of the password reset process. Specifically, the plaintiff argued that that he was only encouraged and not required to reset his generated password, thus an employee of the defendant may have had access to his account. The court stated that the defendant provided individualized proof that the plaintiff signed the arbitration agreement – the evidence identified the day the plaintiff signed and that the defendant's security manager declared that his superiors never asked for his password. Taken together, the court was satisfied by the evidence showing that the plaintiff formed a contract to arbitrate.

Court finds that defendant could not conclusively establish that plaintiff signed arbitration agreement. In *Klink v. ABC Phones of North Carolina, Inc.*, 2021 WL 3709167 (N.D. Cal., Aug. 20, 2021), the court found that the defendant did not conclusively prove by a preponderance of the evidence that the plaintiff signed the arbitration agreement. While the court acknowledged that the plaintiff made a self-serving statement that she did not click on the button to accept the arbitration agreement, the plaintiff also alleged facts, such as her manager was in the room when she created her unique password and the defendant failed to establish that the plaintiff could not have started working without completing the on-boarding tasks, that were sufficient to create a genuine issue of material fact regarding whether an arbitration agreement existed.

Email with typed name sufficient to satisfy New York statute of frauds. In *In re: Misty G. O'Connor, d/b/a Misty Shores Events, LLC*, 2021 WL 3507628 (Bankr. W.D. N.Y., July 27, 2021), the court analyzed New York's Electronic Signatures and Records Act to determine whether an email was a writing that was subscribed to, as required by New York's statute of frauds law. The court stated that an email enjoys the same status as a letter etched with ink on paper. Regarding the signature requirement, the court emphasized the broad definition of an electronic signature to conclude that by typing a name in a space above her full name at the end of an email, the signer created a symbol attached to a writing with an intent to sign such writing. Therefore, the court treated the email as a subscribed writing that satisfies the statute of frauds.

STATE

Electronic signatures and general online contract formation

Court upholds electronically signed note and guaranty. In *Price v. Series 1 – Virage Master, LP*, 2021 WL 3204753 (Tex. Ct. App. July 29, 2021), the court concluded that the plaintiff signed the loan note on behalf of his law firm, and the guaranty in his personal capacity, even though he used he used the same signature block for both – "law office of B. Gregg Price." The court noted that for the note, the plaintiff also added "Equity partner with ability to bind Borrower." The

plaintiff also attempted to argue under the Texas Uniform Electronic Transactions Act that there needed to be an independent agreement to conduct a transaction electronically. The court stated that the law does not require such an independent agreement and that the agreement to proceed electronically is determined from the context and surrounding circumstances. Here, the court concluded that the plaintiff agreed to proceed electronically.

Court remands over factual issue regarding whether one party intended to sign an email chain. In *Parish Transport LLC v. Jordan Carriers Inc.*, 2021 WL 3418396 (Miss. Sup. Ct. Aug. 5, 2021), the Mississippi Supreme Court, in a case of first impression because the court had never interpreted or applied Mississippi's Uniform Electronic Transactions Act, reversed and remanded the lower court's decision because the court concluded that there was a genuine issue of material fact regarding whether one party intended to his email signature block to apply to a single email or the email chain as a whole. First, the court concluded that email correspondence between two parties regarding the sale of goods can be a valid contract under the Mississippi statute of frauds. Second, the court analyzed whether the email correspondence was signed. In so doing, it stated that an automatic signature block – even one which reads “Sent from my iPhone” – could constitute an electronic signature so long as the person had the requisite intent to adopt the closing as his or her signature. The court concluded, however, that the sender's name and email address in the “from” field of an email are not electronic signatures. Finally, the court stated that an email chain can constitute the entirety of a writing, and therefore, an earlier signature in the chain can satisfy the statute of frauds signature requirement. The court reversed and remanded the case because here, the court found that there was a genuine issue of material fact regarding whether one party's earlier signature block was an intent to sign and adopt the email chain as a whole.

Court denies motion to compel arbitration in employment suit. In *Ramirez v. Millard Mall Services*, 2021 WL 3162839 (Cal. Ct. App. July 27, 2021), the court affirmed the lower court's denial of the motion to compel arbitration because substantial evidence existed that there was no mutual consent to arbitrate. While the defendant provided electronic evidence showing that the plaintiff signed the arbitration agreement, the plaintiff countered stating that, while she electronically completed the onboarding process, the arbitration agreement was not within those documents. Further, evidence was provided showing that the defendant had nine different onboarding processes – only one of which required arbitration when the plaintiff was hired – and that the employee handbook did not reference arbitration. Therefore, the court found that there was substantial evidence supporting the trial court's factual finding that there was no mutual assent to arbitration.

UPCOMING EVENTS

On September 8, 2021 at 1 pm EST, Margo H.K. Tank and David Whitaker will present a webinar as part of the ESRA 2021 Webinar Series titled 2021 Legal Year in Review. To register for this webinar and for more information on the ESRA 2021 Webinar Series, please visit [here](#).

RECENT EVENTS

The Financial Times has ranked DLA Piper second on its lists of Most Innovative Law Firm and Most Digital Law Firm in the FT North America Innovative Lawyers 2020 report. *The Financial Times* particularly noted our pro bono legal work on behalf of the UN's World Food Programme, with which the authors of this publication assisted.

RECENT PUBLICATIONS

The Law of Electronic Signatures, 2020 - 2021 Edition (Thomson Reuters) is an essential guide to electronic signatures and records laws, including the context in which the laws were adopted and the ways in which the authors believe the drafters intended them to be interpreted. The publication is prepared by authors, including Margo Tank and David Whitaker, with more than 30 years combined experience that includes involvement with the drafting and passage of Electronic Signatures in Global and National Commerce Act (ESIGN), the preparation of the Uniform Electronic Transactions Act (UETA), the creation of the Standards and Procedures for electronic Records and Signatures (SPeRS™) and serving as counsel to the Electronic Signatures and Records Association. The insights they provide will be indispensable to anyone seeking to understand the impact of, and the liability associated with, using electronic signatures and electronic records.

These insights include:

- Details on the legal requirements for using electronic signatures and records, including delivery, presentation, signing and record retention
- Comprehensive tables itemizing the state variations to the uniform UETA language
- Special considerations for using electronic signatures and records in connection with emerging and evolving technology
- Using electronic records and signatures in specialized transactions and documents, such as securities, chattel paper and mortgages
- Analysis of the interplay between ESIGN, UETA and many other key laws and regulations
- Identification and summaries of recent legal developments and court cases impacting electronic signatures and records

The MBA Compliance Essentials Remote Online Notarization State Surveys, developed by DLA Piper, provides a comprehensive look at RON requirements in each state that has enacted RON legislation. These fully editable surveys are organized by category of requirements, including registration, technology, seal and signature, certificates of RON acts, journal, authentication, session, recording and additional requirements. Companies can purchase the full package which includes surveys for all states that have enacted RON legislation along with a matrix summarizing state requirements, or companies can purchase information about individual states as needed. [Read more.](#)

For more information

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

You may also enjoy our coverage of the US government transition as we report on actions by the Biden Administration and the 117th Congress.

In case you missed it

The materials from our CLE Privacy Symposium held in partnership with the Electronic Signature & Records Association are available online. [Access them here.](#)

Read the latest issue of our bulletin *Bank Regulatory News and Trends*

Read the latest issue of our bulletin *Consumer Finance Regulatory News and Trends*

Trending

Cybersecurity considerations for executives and boards of directors: How recent cyberattack trends and developments inform strategies for reducing cyber-risk | [Insights | DLA Piper Global Law Firm](#)

Seventh Circuit adopts objective reasonableness standard for False Claims Act liability | [Insights | DLA Piper Global Law Firm](#)

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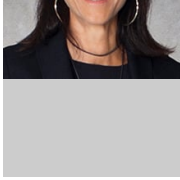
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