

Secure Electronic Delivery of Consumer Disclosures

Legal Considerations for Banks and Credit Unions

Increased regulatory oversight and consumer protection laws have put considerable pressure on banks and financial services organizations. For many, the burden of meeting new regulatory requirements translates into higher processing and operational costs. In fact, a 2013 survey from Deloitte Consulting found that 65 percent of financial institutions reported an increase in the cost of compliance, up from 55 percent in 2010.¹

But what if you could turn that burden into an opportunity – an opportunity to actually save money, strengthen compliance and improve customer experience? This paper examines the electronic delivery of disclosures as a way to do just that.

Rather than reacting to regulatory pressure with additional people, manual controls and process complexity, institutions that automate have the ability to respond faster to changes in regulations; execute customer transactions correctly and consistently across all channels and business lines; and capture a full compliance audit trail. Recognizing that, banks, credit unions and financial services companies of all sizes are bringing customer-facing transactions online and turning to electronic signatures as a key enabling technology. E-Signatures, e-forms and digital processes are being used today for account openings, loan applications, mortgage applications, retail finance contracts and many other financial transactions. Consumer disclosures are at the core of many of these processes.

When delivering disclosures electronically, financial services companies gain the ability to control the process as well as gather comprehensive evidence to prove compliance with laws and regulations. Consumers gain convenience and faster application processing. There are benefits for all involved. However, delivering consumer disclosures online requires special consideration. The key is to ensure all legal requirements are met in a way that provides a great customer experience and drives adoption. This whitepaper takes a pragmatic look at how to do that. We look at the advantages of automating disclosures, how an electronic signature solution can help, and best practices based on the real-world experiences of banks, mortgage finance companies, insurance carriers and others. This paper will answer questions like:

- What are the benefits of secure e-disclosure delivery?
- What are the top legal and regulatory considerations?
- What does a well-designed disclosure delivery process look like?

THE BENEFITS OF MOVING DISCLOSURES ONLINE

In the last few years, the financial services industry has embraced electronic transactions. Gone are the fears about whether or not it is legal. Banks no longer question whether or not consumers are willing to do business online. Organizations of all sizes recognize the need to bring transactions online and by extension, consumer disclosures that were previously delivered on paper need to be factored into the electronic process.

According to Fannie Mae, “An electronic mortgage process could shave 30 days off the average 52 days it takes to close a loan and save the industry an average of about \$1,100 per mortgage or roughly \$1 billion a year.”³

“Evidence has shown that with electronic documents, consumers are more likely to read the accompanying disclosures.”²

- American Banker

Presenting electronic disclosures to borrowers can cut as much as a week off the mortgage origination process, enabling completion of the entire application process in hours instead of days. That's the case for Ohio-based lender Signature Mortgage. Today, within minutes of the customer and representative speaking on the phone, the company's loan origination system generates a mortgage application complete with all the required up-front disclosures. From there, an employee sends the applicant an email notification inviting them to login to a secure website, where they can review, accept and sign up to 45 pages of documents – all through a web browser.

The latest bank to automate mortgage disclosures is one of the largest mortgage lenders in the U.S. In the first half of 2014, the bank went live with electronic disclosure delivery for home equity lines of credit (HELOC). In the second half of the year, this top bank plans to launch a secure, electronic disclosure delivery initiative that will give customers the option to receive mortgage disclosures and applications entirely online. Similar to the previous example, the applicant is sent an email inviting them to login to a secure website. From any location, at any time, the consumer can review and accept or e-sign the disclosures through a web-browser on their PC, laptop or tablet, and keep the process moving forward without having to wait for a paper package to be physically delivered.

This is a significant improvement over the cumbersome and costly paper process. For decades, banks have been sending paper disclosure packages to applicants by courier. Banks traditionally rely on the courier or mail for delivery of disclosures but do not have reliable visibility

into whether or when the consumer received the package. This is particularly concerning when dealing with disclosures that have timing requirements. In the electronic process, the consumer receives an email notification and has to log into a website to receive the disclosures. Secure electronic delivery ensures and proves that disclosures are delivered within the required timeframe (e.g., three day RESPA timeframe for mortgage) and control over delivery stays in the hands of the bank - there is no dependency on a third party.

Other benefits of automating disclosure delivery include:

- **Easily demonstrate compliance** – comprehensive evidence makes it possible for banks to quickly and easily prove who received the disclosures, at what time, from what IP address, how the disclosures looked in the customer's browser, how long the customer spent reviewing each page, etc.
- **Reduce application processing time** – cut new business processes from days to minutes.
- **Minimize rate shopping and customer drop-off** – shorter processing time reduces the time that customers could be out shopping for a better rate.
- **Improve customer experience** – more convenient, efficient process with fewer errors.
- **Cut paper handling, printing and shipping costs** – on average banks spend \$17 per courier run.⁴ For a single branch with 100 courier deliveries per week, that's an annual cost savings of \$85,000.
- **Increase efficiency and productivity** – re-allocate personnel responsible for manual paper processing and chasing down paperwork to higher value tasks.
- **Insight and analytics** - monitor electronic transactions and gain real-time visibility into their status.
- **Respond rapidly to changing regulations** – electronic processes make the organization more agile with regards to compliance because of the ability to enforce a consistent experience across all your operations, quickly push out new e-forms to all branches and enforce new workflow rules at any point. As an example, the newly established Consumer Financial Protection Bureau recently announced the creation of new mortgage disclosure forms for closed-end mortgages. Coming into effect in 2015, the new disclosures combine several existing forms and additional statutory disclosure requirements, to reduce consumer confusion and minimize paperwork.⁵ How quickly will your organization be able to push them out to all personnel and enforce their use?

“We purchased e-SignLive™ Enterprise Edition to allow tracking and evidence of electronic document delivery. Benefits we have already experienced are customer convenience, company cost-savings, and an improved loan process.”

- Top 5 bank

LEGAL CONSIDERATIONS AND BEST PRACTICES

The challenge of delivering government-regulated consumer disclosures in compliance with the federal ESIGN and state UETA laws cannot be trivialized. Financial institutions may wrongly presume that since an actual signature is not required on many disclosures, the legal and evidence requirements are lesser and that a simple email with an attached disclosure is sufficient. This is not the case. There are specific requirements related to disclosures that must be met to ensure that the electronic process and resulting contracts are compliant, enforceable and secure.

The good news is, many financial services providers are already delivering consumer disclosures online and the efforts of early adopters have contributed to a fairly comprehensive set of best practices. But before presenting those, let's look at what the laws tell us.

COMPLYING WITH ESIGN

The ESIGN Act allows disclosures to be delivered electronically, provided that the consumer affirmatively consents to receiving the information electronically. This is referred to as "ESIGN Consent" and must be established before the disclosures are e-delivered. In other words, before consumers can receive GFE, TIL or other disclosures electronically, they must be advised of:

- Their right to receive disclosures on paper (e.g., you are entitled to get your disclosures on paper, but we'd like to do this with you electronically instead);
- The ability to withdrawal consent for electronic disclosures at any time;
- How to obtain a paper copy, even after consenting to electronic communications;
- The hardware and software requirements for viewing disclosures online.

These items must be incorporated into the consent statement that is presented to the signer, as part of the ESIGN Consent process. The ESIGN Act also stipulates that consumers must confirm their consent electronically, *in a manner that reasonably demonstrates* they are able to view the disclosures electronically. As an example, if you emailed a PDF document to a customer, there would be no way to be certain they have the system requirements necessary to receive, open and view the PDF. How can you be sure that all operating system and application versions among your entire customer base will display the font and layout of the disclosure exactly in accordance with the law?

According to David Whitaker, counsel with BuckleySandler LLP and a recognized legal authority on electronic financial services and payment systems, when thinking about "reasonably demonstrating" the customer's ability to receive online disclosures, start by looking at the way you do business online with your customers today:

"Design your disclosure process so the customer interacts with your organization the same way they would for other electronic documents (e.g. welcome kit, online statements, etc.). Disclosures should be presented in the same format that other information is presented. In the case of existing customers, in many cases they have already created a user ID/password, and have agreed to various terms and conditions for other products/services, all of which does an excellent job of demonstrating that they have the ability to interact with your e-disclosures online."

If it is properly designed and the disclosures are carefully drafted, going through the ESIGN Consent process is only required one time between a bank and its customer. However, the ESIGN Act specifies that if a change is made in the hardware or software requirements needed to view the disclosures, the consumer must be advised and has to re-consent electronically – once again, reasonably demonstrating that they have the ability to access the information. In addition, while a "one-size-fits-all" ESIGN Consent process is possible, many banks prefer to obtain a separate consent for each online account or service they enter into with a customer, in order to provide a more consistent experience and keep the consent disclosures more focused on the transaction at hand.⁶

"Two years ago, at our annual Consumer Direct Focus Group, we learned that very few lenders were using e-disclosure. Last year, the percentage of lenders had risen to 50%.

This year, every single lender in attendance was either using electronic disclosures for application documents or was very near to doing so. Nearly twice as many direct lenders are offering electronic disclosures to consumers now as they were only one year ago, and most of the consumers are opting to use them."⁷

- Mortgage consulting firm STRATMOR Group

Note that when you deliver disclosures through HTML pages, obtaining ESIGN consent and proving reasonable demonstration can be accomplished in one step. In other words, the way in which you obtain ESIGN consent is the same way you will be delivering the disclosures. If the customer is able to complete ESIGN consent, you have proven they will also be able to receive future consumer disclosures electronically.

And if disclosures are delivered as downloadable PDF documents (which they are in most processes as this is the best way for the consumer to retain a copy of the records), the initial consent process may be sufficient if it mentioned the use of PDF documents up front. However, some organizations prefer to have an additional consent step built in at the time of PDF disclosure download, since the format has changed. In that case, the e-signature software can ask the consumer to re-consent specifically for this change of document format, and provide a button to allow the consumer to optionally download the free reader from Adobe if they think they need it.

With this in mind, the following is a practical overview of how to implement ESIGN requirements for signatures and disclosure delivery in everyday practice.

Requirement	Explanation	Best Practice
<p>Availability of Paper (Pre-Consent Disclosures)</p>	<p>Prior to asking the customer to consent to receive electronic disclosures, provide them with a clear and conspicuous statement informing them of two things: (1) their right to go back to paper (2) their right to withdraw consent to electronic communications.⁸</p> <p>[This wording is found in the official ESIGN consent statement which should be provided by your e-signature vendor – see example from Wells Fargo here]</p>	<ul style="list-style-type: none"> • Inform the consumer that they may opt-out of the electronic process and request a paper copy (with instructions on how to do so). • Be sure to provide an explicit opt-out button or feature. • Have an alternative process in place for cases where the consumer requests paper copies of electronic notices and disclosures. • Look for an e-signature solution that also provides the flexibility for the customer to print their electronically-delivered disclosures so they can read/review them on paper, but still electronically sign (if they so choose).
<p>ESIGN Consent</p>	<p>Ask borrowers to affirmatively consent to receive information electronically before presenting e-disclosures.</p>	<ul style="list-style-type: none"> • ESIGN Consent should be a required capability of your e-signature solution. • Build workflow rules into your process to prevent the consumer from e-signing or accepting disclosures until the ESIGN Consent is accepted.
<p>Reasonable Demonstration</p>	<p>The process of obtaining consent has to be done in a manner that reasonably demonstrates that the consumer can access the information in electronic format.</p>	<ul style="list-style-type: none"> • When documents and disclosures are delivered in HTML pages, a signer who reviews and accepts ESIGN Consent through a web page can be considered to have reasonably demonstrated their ability to receive the disclosures. • When disclosures are delivered in PDF format, a specific consent should be established for that format. • For in-person use cases, to prove reasonable demonstration of a consumer's ability to retain a disclosure once they have left the branch: we recommend you send an email requiring the signer to log in and obtain the copies of their documents. This works well, since in the branch everything is done using the web, and once at home, the customer re-consents to receive PDF format.

<p>Signature Attribution</p>	<p>ESIGN and UETA provide the definition of an e-signature, but do not include a requirement to prove that it was applied by the signer. The burden of proof is on the person seeking to enforce the signature.</p> <p>This is covered by the rules of evidence when introducing the e-signed documents in a court proceeding.</p>	<ul style="list-style-type: none"> • Attribution may be proven by a variety of means, including surrounding circumstances or an agreed-upon security procedure, such as any of the authentication methods supported by the e-signature solution. • Best practice for authenticating borrowers online in accordance with FFIEC requirements include implementing a layered security program using the controls outlined in the FFIEC Guidance.⁹ One of which is using sophisticated challenge question systems, which could be supplied through third-party services such as Equifax or Experian. • Another authentication layer that could be used in addition to those described above, is executed through the signer's personal smartphone. Signers could be sent a one-time passcode via SMS text that they must use to authenticate themselves before starting the e-sign session.
<p>Intent</p>	<p>The intent to sign must be established. (this is part of the ESIGN/UETA e-signature definition)</p>	<ul style="list-style-type: none"> • In the case of disclosures that require a signature, use plain language, e.g. "You are now signing the document." Make it clear that by clicking the SIGN HERE button they are affixing their signature to the document. • Watch for placement of the signature call-to-action (CTA) on the screen (e.g. ACCEPT or SIGN buttons). Courts want it to be beneath the information that the signature is associated with, so that the process doesn't seem to be designed to push the customer to agree before they've actually read it. • Watch out for batch signing in consumer transactions. It is very risky to use the "sign once – apply in multiple places" approach.
<p>Availability</p>	<p>Disclosures should be maintained on the website for a reasonable amount of time for consumers to access, view and retain them.</p>	<ul style="list-style-type: none"> • Make them available through an online banking (or other self-serve) portal. According to one bank, "Clients can still get a paper copy of the electronic document if they choose, but we are finding that many clients don't want to have to file this somewhere, so having a permanent record in Online Banking they can access at any time is great," says the bank executive.
<p>Record Retention</p>	<p>ESIGN and UETA require that you maintain electronic records that accurately reflect the information contained in the disclosures.</p>	<ul style="list-style-type: none"> • E-Signed records, including delivered disclosures, must be tamper-evident. Look for an e-signature solution that uses digital signature encryption to secure and authenticate data, in order to avoid the risk of repudiation. • Look for an e-signature solution that embeds the signature(s) and audit trail directly in the e-signed document – as opposed to logically associating separate files in a vault or proprietary database. This is more secure, easier to manage and more portable. • Look for intuitive, one-click signature and document verification. If the verification process is too cumbersome, users may wrongly assume that the document and signatures are valid, without proper verification. A one-click process simplifies the user experience, providing reassurance that errors or fraudulent actions will be detected. There should not be any need to train users how to verify a document.
	<p>Your electronic records must remain accessible to all persons who are legally entitled to access them.</p>	<ul style="list-style-type: none"> • In the case of disclosures that require a signature, look for an e-signature solution where you do NOT have to store the e-signed record in the e-signature service. The record should be able to securely travel through any email, storage or archiving system without being compromised or requiring additional programming. This enables you to manage e-signed records in a manner that meets your long-term records retention policies. In other words, the e-signed document should be able to be indexed, stored and retrieved easily in the system of record of your choice.

Other Requirements and Considerations

Requirement	Explanation	Best Practice
Timing, Delivery & Formatting	All formatting, timing and display requirements must be observed, including any size and proximity requirements.	<ul style="list-style-type: none"> • Pay special attention to proper sequence within the transaction, and any timeframes or deadlines for delivery. • Your e-signature solution should provide the ability to set expiry dates on transactions as well as notifications for transactions expiring soon. Look for an e-signature solution that provides a means for employees to monitor the status of the transaction and take appropriate action if the consumer does not accept their disclosures, i.e. within the 72-hour RESPA deadline. • Look for a browser-based e-sign solution that renders documents in a way that retains the formatting and display of the original record. • Because it is an industry and ISO standard, PDF is the best practice – it is the only acceptable format for e-signed records. PDF can contain an e-signature as well maintain formatting requirements that are dictated by disclosure laws.
	Disclosures made by posting on an Internet website are required to: (1) be accompanied by a notice to consumers alerting them to the availability of the disclosures, and (2) maintain the security and privacy of a customer's personal information.	<ul style="list-style-type: none"> • Offer secure, web-based document download with email notification rather than sending documents containing confidential information via unsecured email, which could compromise a customer's private data and does not prove timing and display requirements were adequately satisfied.
	Delivery must be secure and address bounce-backs.	<ul style="list-style-type: none"> • Have a process in place to manage email notification bounce-backs.
Evidence	Having a full document audit trail plus electronic evidence of how the transaction occurred reduces the burden on internal compliance staff when responding to audits.	<ul style="list-style-type: none"> • Look for an e-signature solution that records the entire electronic process – and that makes it easy to review all of the steps and screens that the consumer saw as they were going through the signing process (even the look of the documents and disclosures that were presented in the browser). • You should be able to easily and reliably reproduce this evidence at any point, even years later.
Mobility	There are special considerations for e-signatures and mobility – including the limited screen size of some devices and the challenge of meeting the formatting and display requirements mentioned above.	<ul style="list-style-type: none"> • While the size of the display on a mobile device is important, especially in regulated transactions, mobile banking leaders have learned through automating other business processes that the key is rather to design a process that captures intent and presents the terms and conditions clearly and in a way that is accessible to consumers. • Even more important is the ability to download and retain documents on a mobile device. The question becomes, how do you store documents when using only browser-based apps? Your e-signature solution must provide the ability to download documents (through the browser and in the app) either to the mobile device or to cloud storage.

CONCLUSION

The advantage of using e-signatures to automate disclosure delivery is that other customer-facing transactions can share the same implementation. You may be evaluating e-disclosures as an initial process for getting started with e-signatures. Or, you may have already automated other lines of business and are looking to extend your existing e-signature implementation to e-disclosures. We offer you the flexibility to take the approach that best suits your business needs.

With two decades of experience automating lending processes, Silanis understands the unique requirements of online disclosure delivery. At Silanis, our technology and expertise is based on best practices and learnings acquired through implementations at leading banks, as well as community and regional banks, credit unions, correspondent lenders, captive lenders, retail finance companies, wealth management brokerages and more – not to mention the value of our close relationships with the country's leading legal experts and industry associations. Our goal is to share this expertise with you. Give us a call to speak about your individual needs and requirements in more detail.

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