

Special Alert: District Court Confirms Telephonic Consent to Preauthorized ACH Debits Complies with ESIGN and EFTA

On February 17, a U.S. District Court in Nashville, TN found that a creditor complied with both the Electronic Signatures in Global and National Commerce Act¹ (“ESIGN”) and the Electronic Fund Transfer Act² and its implementing regulation, Regulation E³ (collectively “EFTA”) when it obtained a consumer’s “written” authorization over the telephone to enroll in recurring ACH payments and mailed a paper copy of the authorization to the consumer two days later.⁴ This case (“*Blatt*”) is significant because it clarifies and confirms much of the existing understanding of the interaction between ESIGN and the Uniform Electronic Transactions Act, and provides precedent for advancing the validity of widespread industry practices in other courts.

Background Law

Under the EFTA, before a party may take recurring preauthorized debits from a consumer account, the party must first obtain an authorization from the consumer that is in writing and “signed” or “similarly authenticated,” and provide the consumer with a copy of the authorization.⁵ [Official Commentary](#) from the Consumer Financial Protection Bureau (“CFPB”) clarifies that these writing and signing requirements can be satisfied by complying with ESIGN.⁶ A CFPB [bulletin](#) issued in November 2015, further clarifies that a consumer may provide authorization over the telephone, if the party obtaining consent complies with ESIGN.⁷

ESIGN Section 101 sets forth a general rule validating the use of electronic records and electronic signatures in lieu of paper documents and “wet” ink signatures, and establishes basic rules for using electronic signatures and records where some other law, such as EFTA, requires a document to be “in writing” and “signed.”⁸ ESIGN provides that, notwithstanding any statute, regulation, or other rule of law with respect to any transaction in or affecting interstate or foreign commerce:

¹ 15 U.S.C. § 7001, *et seq.*

² 15 U.S.C. § 1693, *et seq.*

³ 12 C.F.R. §1005.1, *et seq.*

⁴ [Blatt v. Capital One Auto Finance, \[Memorandum and Order\] No. 2:15-cv-00015, 2017 WL 660677 \(M.D.Tenn. Feb. 17, 2017\).](#)

⁵ 12 C.F.R. §1005.10(b).

⁶ 12 C.F.R. Supp. I 1005.10(b) ¶15.

⁷ CFPB Compliance Bulletin 2015-06.

⁸ 15 U.S.C. § 7001.

- A signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- A contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Where consumers are a party to a transaction, Section 101(c) of E-SIGN further provides that electronic records may be used to satisfy any law that requires records be provided to consumers “in writing” only if the consumer has affirmatively consented electronically to the use of the electronic records.⁹ Further, prior to obtaining consent, the electronic record provider must deliver a clear and conspicuous statement of the E-SIGN-required consumer consent disclosures (“E-SIGN Consumer Consent Disclosures”) informing the consumer of various rights, including the scope of the consent, the consumer’s right to paper and the right to withdraw consent at a later time in a manner that reasonably demonstrates that the consumer can access the information being provided in electronic form.

The *Blatt* Case

In *Blatt*, an auto finance company obtained a consumer’s authorization over the telephone to automatically debit monthly payments from the consumer’s bank account, and mailed a confirmatory letter describing the terms of the authorization to the consumer two days after obtaining the authorization over the telephone. The consumer challenged the validity of the authorization, complaining that his authorization was not in “writing” or “signed” as required by EFTA because the auto finance company failed to provide him with the E-SIGN Consumer Consent Disclosures before obtaining his authorization over the telephone—thus invalidating the auto finance company’s reliance on E-SIGN to meet the writing requirement in EFTA.

The court disagreed and found that the E-SIGN Consumer Consent Disclosures only apply when there is a requirement to provide information *to a consumer* in writing. Here, the auto finance company was not required by law to provide the consumer with any written information. Rather, the consumer provided an electronic record to the auto finance company—his authorization to enroll in automatic payments. Because the consumer provided the electronic record to the auto finance company, the E-SIGN Consumer Consent Disclosures were unnecessary and the failure to provide them did not invalidate the auto finance company’s reliance on E-SIGN to meet the writing and authentication requirements of EFTA.

The court further held that although EFTA requires the party obtaining the authorization to provide the consumer a copy of the authorization “when made,” that requirement is satisfied where the copy is mailed two days later. The court declined to establish a firm deadline to meet the “when made” deadline, but held that two days from the date of authorization was sufficient.

⁹ 15 U.S.C. § 7001(c).

Finally, the court found that the copy of the authorization called for by EFTA did not need to be in the same format as the original authorization and need not literally restate verbatim the same words and phrases from the telephone conversation in which the consumer provided his authorization. It was thus permissible to obtain the authorization over the telephone and provide a paper copy reciting the material terms of the authorization, including the “timing and amount of the recurring transfers from the consumer’s account.”¹⁰

Implications

Blatt is noteworthy because it expressly addresses the interplay between ESIGN and the EFTA. It also confirms and expands upon the Official Commentary to Regulation E and prior CFPB guidance, and will be instrumental in advancing these arguments in future cases.

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If you have questions about the ruling or other related issues, visit our [FinTech](#) and [Auto Finance](#) practice pages for more information, or contact a Buckley Sandler attorney with whom you have worked in the past.

¹⁰ *Blatt*, 2017 WL 600677 at *5 (citing CFPB Compliance Bulletin 2015-06 at 4).