

ASK KENNEDY

May 5, 2021

Topics Covered:

- [Verification of E-Signatures](#)
 - [COVID-19: 2021 Paid Leave and Bank Vaccine Policies](#)
 - NDBA Resources: [Bank Record Retention Quicknotes 5th Ed.](#)
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Question #1: With e-signed signature cards, it is at times difficult to verify signatures in processes such as for checks written on a dormant account or in our unclaimed property processes, as the wet signature may look very different from the e-signature (ex. wet signature on a check vs. e-signature on a signature card). How do you recommend verifying signatures in these situations?

Response: I would look into whether your bank has a wet signature on the account agreement itself. Access and usage of the account may even be sufficient for verification.¹ Finally, the electronic signature on the signature card will suffice for having a signature card.

If you have doubts as to whether the wet signature is valid, you might want to request the customer come in and provide a wet signature on the signature card as well.

Question #2: We have a bank employee who had COVID-19 in 2020 and received the requisite paid leave. This employee now has COVID-19 again in 2021 and is seeking compensation. Also, the employee is not vaccinated. What are the bank's options in this situation?

Response: The requirement that employers provide paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA) expired December 31, 2020. Employers are not required to provide employees with FFCRA leave after December 31, 2020, but may voluntarily decide to provide such leave. Tax credits for doing so are available through September 30, 2021.

As to vaccine requirements, there is some question over whether mandatory vaccination policies are permitted. It is permissible to ask employees whether they have received the vaccine.

¹ See <https://bankingjournal.aba.com/2019/07/fdic-approves-large-bank-deposit-recordkeeping-proposals/>.



The ABA has issued a [Staff Analysis on Common Questions to Inform Banks' Vaccine Policies](#), available to ABA members. Other (free) resources include the Equal Employment Opportunity Commission's [Question and Answer document](#).

Bank Records Retention *Quicknotes* 5th Edition Available to NDBA Members!

The Bank Record Retention Document is available to NDBA members and can be purchased for \$99. Please contact Jolene German at jolene@ndba.com to order your copy today!

ABA's From the Hotline

[ABA's From the Hotline](#) is a reference containing over 200 compliance-related questions from ABA members. You can ask a compliance related question [here](#).

As a sample, here are some questions and answers from the reference concerning Regulation E:

My bank recently encountered two incidents involving Regulation E claims and I am unsure if the bank handled them correctly. In the first instance, our customer used a debit card to buy \$1,000 in gift cards at a store with her debit card. She then provided the gift cards to another person, who turned out to be a scammer. In the second instance, the bank customer received a spoofed call appearing to be from the bank, and the customer handed over her debit card PIN and the password information to access her account online. The scammer used the information to take several thousand dollars from the account. Is the bank liable under Regulation E in either of these scenarios?

In the first situation, the bank has no Regulation E liability. Authorization is the key. In this scenario, the bank is not liable because, even though fraud was involved, the consumer clearly authorized the transaction. Moreover, the bank would not have been in a position to detect or stop the transaction.

The second scenario is different because the customer never authorized the transactions. Under §1005.6 of Regulation, consumers generally are not liable for unauthorized transactions (with some conditions and exceptions). Moreover, the Commentary to §1005.2(m)(3) states, "An unauthorized EFT includes a transfer initiated by a person who obtained the access device through fraud or robbery." In this case, the scammer obtained the access device (PIN and password) through fraud, unlike the first scenario where the scammer never obtained the access information or accessed the account. (*February 2020*)

A customer filed a timely report asserting fraudulent debit card transactions, which she reported immediately after reviewing her account online. The bank's investigation determined that the bank sent the customer a real-time fraud alert concerning these transactions and that the customer acknowledged the alert and stated that the transactions were not fraudulent. Is the bank liable for these transactions under Regulation E (Electronic Fund Transfer Act) or does the liability fall on the customer who confirmed that she authorized these transactions at the time they were made?

The customer is liable. The bank may decline the claim because the consumer approved the transactions when the bank contacted her via a fraud alert, thereby making these authorized transactions. (*August 2020*)

My bank has a customer who has a CashApp account, which allows her to make P2P transactions that are processed through the debit card for her account held at my bank. She has filed a dispute claiming that she did not authorize several CashApp transactions. Under Regulation E, should the bank investigate the dispute or should the customer go to CashApp for resolution?

It appears that, for Regulation E purposes, the customer should file a claim with CashApp.

Under §1005.14(a) of Regulation E (Electronic Fund Transfer Act):

A person that provides an electronic fund transfer service to a consumer but that does not hold the consumer's account is subject to all requirements of this part [Regulation E] if the person:

- (1) Issues a debit card (or other access device) that the consumer can use to access the consumer's account held by a financial institution; and
- (2) Has no agreement with the account-holding institution regarding such access.

First, it appears that CashApp has issued an access device. Under Regulation E Section 1005.2(a)(1), an access device is a "card, code, or other means of access to a consumer's account...that may be used by the consumer to initiate electronic fund transfers." (emphasis added) It appears that CashApp, whatever the channel, has in some fashion provided a "means of access" to the consumer's bank account. Second, CashApp does not have any agreement with the bank about this access.

As noted, under §1005.14(a), service providers are subject to "the requirements generally applicable under" Regulation E, including liability for unauthorized transactions that exceed the consumer's liability (See Comment 1 to §1005.14(b)) and the dispute resolution provisions (See Comment 1 to §1005.14(b)(2)). In addition, service providers must extend "by a reasonable time the period in which notice of an error must be received...if a delay resulted from an initial attempt by the consumer to notify the account-holding institution." (See §1005.14(b)(2)(i))

However, while Regulation E assigns responsibility for resolving the dispute to the service provider, you should check payment network rules (e.g., Visa or MasterCard) to determine the bank's responsibilities under those rules. (*February 2021*)

FEDERAL LEGISLATION

SAFE Banking Act

The Issue

In the U.S., banks may be federally regulated or state chartered.² Federally regulated banks risk losing their federal charters if they accept proceeds from a licensed cannabis business (e.g., allowing an employee

² See <https://onlinelibrary.wiley.com/doi/full/10.1111/fmii.12104>.



of a marijuana-related business (“MRB”) to deposit his paycheck in a checking account).³ And if you think state chartered institutions are free of the federal confines, think again - state chartered banks and credit unions are supervised and insured by federal agencies.⁴ “Regardless of whether a bank has a state or federal charter, all banks are either regulated or supervised by the Federal Deposit Insurance Corporation, Inc. (FDIC).”⁵ In this way, financial institutions are attached to the federal government and its stance on marijuana.

Though many describe marijuana banking as a “gray area,” the current situation is truly black-and-white: Marijuana’s federal illegality places financial institutions at risk any time they deal with MRBs.

The Act

The Secure and Fair Enforcement Banking Act, better known as the SAFE Banking Act, aims to protect financial institutions doing business with cannabis operators. The SAFE Banking Act seeks to provide a safe harbor for depository institutions allowing proceeds from a legitimate cannabis business to be considered lawful under federal money laundering statutes or any other federal law. This allows banks to provide financial services to cannabis businesses and any ancillary businesses that receive some portion of their income from cannabis-related businesses.

2021 Legislation

On April 19, 2021, the House of Representatives passed the SAFE Banking Act of 2021 by a vote of 321-101.⁶ “The bill now moves to the Senate, where it has significant support.”⁷ The ABA has been adamant about the Act and has provided a [letter to Congress in support of the SAFE Banking Act of 2021](#) and [applauded House lawmakers for passing the Act](#).

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³ See <https://onlinelibrary.wiley.com/doi/full/10.1111/fmii.12104>.

⁴ See <https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html>. “The federal government insures or charters virtually every bank in the U.S.”

⁵ Deborah L. Dickson, *Bank on Marijuana: A Legitimate Industry Warranting Banking Access*, 2 SAVANLR 459, 477 (2015).

⁶ <https://www.jdsupra.com/legalnews/cannabis-banking-the-safe-banking-act-2-1954562/>

⁷ <https://www.jdsupra.com/legalnews/cannabis-banking-the-safe-banking-act-2-1954562/>