

**2018 GLOBAL TECHNOLOGY SUMMIT
AT THE INTERSECTION OF
BUSINESS, LAW AND TECHNOLOGY**

**SO YOU WANT TO TAKE YOUR BUSINESS DIGITAL:
LEGAL BASELINE AND CONSIDERATIONS**

TechLaw

Customer Journey – Digital First

- So you want to take your business digital
 - Advantages
 - Identify points of pain
 - Gather the right team
 - Build vs. buy
 - What to watch for
 - Third-party vendor risk

Legal baseline enabling digital transactions

- ESIGN and UETA
 - Writing and signing
 - Consent
 - Retention
 - Smart contracts
- Case Law
 - Emerging principles
 - Intent, notice, opportunity to review
 - Attribution/authentication
 - Record integrity/audit trails
- Key regulatory issues
 - UDAPP/ non-bypassable?
 - Compliance/timing of disclosure and delivery
 - Tension between user friendly presentation and regulatory form requirements

Illustration – digital delivery of documents

Delivery Design Choices

- Secure or unsecure?
- Push out in email/SMS, or send “ready notice” and pull behind firewall?
- Embedded hyperlinks in “ready notice” email?
- Permit target to set delivery preferences?
- Permit target to designate multiple recipients?
- Forced review or bypassable?

Key Considerations

- Will the records contain sensitive information?
- Will the records contain required disclosures or notices?
- Are multiple delivery methods possible/desirable?
- Are there “phishing” or “pharming” issues to address?
- Need to maintain control over display and audit trails?
- Need to obtain ESIGN consumer consent?

Design

- Enrollment / consent process
- Audit trails and reporting
- Transmittal message contents
- Authentication process for access to secure data (if applicable)
- Record generation and posting to delivery system
- Message or notice generation/transmission
- Record retention/destruction process
- Record generation/posting

Key Considerations

- 2– factor authentication required?
- How will cross-system compatibility/communication issues be addressed?
- How much of design will be automated or manual?
- Is system intended for use with targets without prior electronic relationship with sender?
- Regulatory requirements for timing, delivery, proximity, conspicuousness, forced review?

Execution

- Establish agreement on delivery
 - When deemed delivered
 - Delivery address
 - Obligation to update address
- Obtain ESIGN consent
- Generate records
- Send notice or attachments
- Provide opportunity to retain
- Generate audit trail
- Handle bouncebacks
- Handle withdrawal of consent

Key Considerations

- Addressing electronic delivery channels
- Agreement on what constitutes “sending” and “receipt” (Note some state UETAs limit variation by agreement)
- Agreement on obligation to update electronic addresses
- Managing bouncebacks and withdrawal of consent

Other legal and regulatory considerations when communicating with customers in the digital channel

■ **Americans with Disabilities Act (ADA)**

- No federal regulatory standards exist for website accessibility; de facto standard is WCAG 2.0 AA
- Two main sources of private risk: (i) Demand letters seeking money and fees and (ii) courts starting to require companies to meet WCAG 2.0 AA standard
- Interaction with Section 255 of the Communications Act and Twenty-First Century Communications and Video Accessibility Act

■ **CAN-SPAM Act**

- Develop compliant opt-out process for marketing emails that is nimble enough to ensure that customer not inadvertently opting out of all emails (EG, non-marketing emails)
- Ensure not using false or misleading header information or deceptive subject lines
- Ensure compliance with FCC's consent requirements for sending mobile service commercial messages

Other legal and regulatory considerations when communicating with customers in the digital channel (cont'd)

■ TCPA

- Consent requirements for calls made using an autodialer, prerecorded, or artificial voice to a cellphone unless wireless carrier does not charge called party for call. Prior express consent for informational calls; prior express written consent for telemarketing
- Prior express written consent needed for telemarketing calls made using prerecorded or artificial voice to a residential line
- National DNC list requirements for telephone solicitations; company-specific DNC list requirements for telemarketing calls
- Autodialer definition still unclear, but recent federal court decision rejected expansive FCC definition. FCC recently sought comments on autodialer scope
- Re-assigned numbers: FCC exploring solutions. Companies can take steps to mitigate risk

Other legal and regulatory considerations

■ ePayments

- Many ePayment solutions are subject to strict requirements for consumer authorization and disclosure, notice of transactions, representations and warranties by payees, limits and controls on practices, and investigation/correction of unauthorized transfers. Exposure for violations includes actual damages, automatic transaction reversals, statutory penalties (individual and class action), and regulatory enforcement
- Applicable rules, which frequently overlap and sometimes conflict, include Regulation E, NACHA Rules, card network rules (VISA, Mastercard, etc.), money transmission licensing, Regulation CC, AML/BSA and others. Innovative solutions are often necessary in order to “thread the regulatory needle” when taking and processing online and mobile payments

■ Data collection, use, sharing, securing

- Data use, tracking/geolocation, biometrics, and data security are subject to both state and federal requirements – including Regulation P, the California Consumer Privacy Act, state data privacy and security laws
- Opportunities and challenges of artificial intelligence.
- GDPR and the possible termination of the US-EU Privacy Shield agreement many impact policies and practices of US companies with respect to data retention and sharing with third parties