



Glasser LegalWorks
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E-Signature,
E-Securities

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Relevant Laws

- ☐ Electronic Signatures in Global and National Commerce Act (“E-SIGN”), 15 U.S.C. §§ 7001, *et seq.*
- ☐ New York Law
 - ☐ Electronic Signatures and Records Act (“ESRA”), N.Y.S. Technology Law § 104
 - ☐ New York General Obligations Law, § 5-701

E-SIGN - Consent

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- ☐ First of two key issues
- ☐ Parties must consent
- ☐ Consumer consent requires additional elements
 - ☐ Affirmative consent
 - ☐ Right to withdraw and consequences
 - ☐ Scope (this record, “identified categories of transactions”)
 - ☐ Reasonable demonstration

E-SIGN – Agency Authority

- ☐ Second key issue
- ☐ Agency can interpret statute, *provided that*
 - ☐ Consistent with principal provision of statute
 - ☐ Does not add to requirements
 - ☐ Substantial justification for the regulation or guidance
 - ☐ substantial equivalence to paper requirements
 - ☐ no unreasonable cost on use of electronic records
 - ☐ technology neutrality

E-SIGN – Agency Authority

- ☐ Record-keeping a bit different
- ☐ Record must be *accurate* and *retainable*
- ☐ Agency can specify “performance standards” if needed for important governmental objective
 - ☐ the lone exception to technology neutrality in Act
 - ☐ but still cannot require particular software or hardware
- ☐ Can require paper *only* if necessary to serve a compelling governmental interest relating to law enforcement or national security

New York Laws

- ☐ ESRA same basic rule as E-SIGN
- ☐ Implementing regulations issued by NY Office for Technology
- ☐ New York General Obligations Law § 5-701
 - ☐ General writing requirement (for contracts not to be performed within one year)
 - ☐ Qualified financial contracts exempted, if not between natural persons, with “sufficient evidence to indicate that a contract has been made”

New York Laws

- ☐ What is “sufficient evidence”?
- ☐ “confirmation” in writing or electronically
- ☐ Actual or “constructive” receipt
- ☐ the time actual receipt . . . would have occurred if the receiving party . . . has exercised reasonable diligence”

The Real World

- ☐ Consumer

 - ☐ Charles Schwab

- ☐ B2B

 - ☐ Lehman Brothers

- ☐ Very different sets of issues and very different degree of dependency on intricacies of the applicable statutes