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**Electronic Signatures and Records Under
ESIGN, UETA and SPeRS**

By

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ELECTRONIC SIGNATURES AND RECORDS

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I. Overview of the Electronic Signatures in Global and National Commerce Act

A. Introduction

In June 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act to address the uncertainties existing under both federal and state law concerning the legal effect of executing contracts and maintaining records by electronic means. Pub. L. No. 106-229, 114 Stat. 464 (*codified at* 15 U.S.C. §§ 7001-7031) (referred to in this outline as “ESIGN”). ESIGN adopts the principal features and underlying policies of the Uniform Electronic Transactions Act (“UETA”), a model law approved and recommended to the states for adoption by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in July 1999. *See* <http://www.law.upenn.edu/blilulc/fnact99/1990s/ueta99.htm>. ESIGN, like UETA, is an overlay statute (that is, one that is superimposed on existing federal and state laws) giving legal force and effect to “electronic signatures” and “electronic records.” As such, neither ESIGN nor UETA provides a complete regulatory scheme. Instead, each recognizes the inherent flexibility and adaptability of the common law, and also the wide variety of substantive statutes that already exist with respect to ink signatures and written documents. Thus, both UETA and ESIGN affect statutes and regulations that impose requirements for contract formation, record retention, and notices and disclosures that relate to the conduct of business, consumer and commercial affairs.

B. Establishing Validity of Electronic Signatures and Records

There are four principal rules under ESIGN:

1. A signature, contract, or other record related to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form. ESIGN §101(a)(1). The general rule of validity applies to a “transaction” conducted in interstate or foreign commerce. ESIGN defines a transaction broadly to mean: “an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct: (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.” ESIGN §106(13).
2. A contract related to any transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. ESIGN §101(a)(2).
3. Notwithstanding the general rule above, if a law requires that a contract or other record be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is

not in a form capable of being retained and accurately reproduced for later reference by all parties. E-SIGN §101(e).

4. E-SIGN does not require “any person to use or accept electronic records or electronic signatures....” E-SIGN §101(b)(2). Implicitly, if the parties to a contract agree to use and accept electronic records and signatures, then E-SIGN gives legal effect to the chosen methods. In a business-to-business transaction (business-to-consumer transactions are discussed below in Section E), evidence of an agreement to use or accept electronic records and signatures may exist by use or behavior consistent with such use or agreement.

C. Significant Definitions

1. E-SIGN, like UETA, defines an “electronic signature” as an “electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” E-SIGN §106(5); UETA § 2(8).
 - a. E-SIGN does not specify what an electronic signature should look like, but rather allows providers of goods or services to select acceptable electronic signature technologies or processes that will be most effective for the product being offered online. The signature choices could range from a simple click through process (*e.g.*, an “I Agree” button), to a PIN number, to a single string of numeric code that is encrypted, to biometric measurements (such as a retina scan or thumbprint), a digitized picture of a handwritten signature, or any combination thereof.
 - b. The creation of an electronic signature may even involve multiple steps and consideration of surrounding circumstances. For example, assume that a financial institution requires that each customer using its Internet banking site for the first time must enter the sixteen digit number from the customer’s ATM card plus the associated secret PIN, and is then presented with a copy of the institution’s Internet banking agreement together with an accompanying dialog box indicating the customer’s assent to the agreement’s terms. The customer is required to affirmatively “click-through” the dialog box, affirming consent to the agreement’s terms, before accessing the on-line banking services. The combination of the identification process plus the “click-through” would constitute an electronic signature.
 - c. Although the definition of an “electronic signature” requires intent, neither E-SIGN nor UETA provide any guidance on how to establish such intent. E-SIGN leaves the purpose of the signature, the legal consequences of the signature, and the question of whether the signature may properly be attributed to a particular person to other laws and the surrounding factual circumstances. If the authenticity of an electronic signature is in dispute, the person seeking to enforce the signature will be required to prove that the signature was executed by the person against whom enforcement is sought. This means that parties accepting electronic signatures will need to be satisfied that the signature is

sufficiently verifiable, under the circumstances and for the contemplated purpose, to counterbalance the risk of such a dispute.

2. A “record” is defined under ESIGN and UETA as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” ESIGN §106(9); UETA 2(13).
 - a. This definition encompasses not only traditional writings, but also anything stored on magnetic or optical media (such as a computer hard drive or CD-ROM). Essentially, all that is required is that the information may be stored and retrieved for review. There is no requirement as to where storage physically occurs. For example, if an individual uses the Internet to review information stored on a server two thousand miles away, that information is still a record. The requirement that the record be “retrievable in perceivable form” is an objective, and not subjective, requirement. To qualify, it is not necessary that the specific recipient be able to comprehend the information contained in the record, just that *someone* could comprehend it. For example, a data file stored on a hard drive which displays information in Spanish is a record for purposes of ESIGN, even if the person reviewing the record does not speak Spanish.
 - b. An “electronic record” is defined under ESIGN and UETA similarly and is “a record created, generated, sent, communicated, received, or stored by electronic means.” ESIGN §106(4); UETA 2(7). Essentially, the term is intended to cover any type of record which is generated or stored electronically; as such, it would cover records created on a computer and stored on any type of media.
 - c. Note that whether or not a record is “signed” has no bearing on whether it meets a requirement that it be in writing. This section of ESIGN applies only where other law requires a “writing.” This section is not applicable to most contracts, unless the contract is subject to a statute of frauds requirement that it be in writing. Thus, electronic records required to be in writing, such as leases or security agreements, must be capable of being retained and accurately reproduced for later reference (the recipient must be able to store or print the record) in order to rely on ESIGN’s presumption of validity.

D. Scope

1. The law *only affects* laws imposing writing or signing requirements. ESIGN §101(b)(1).
2. The law does *not* affect -
 - a. substantive protections of consumer protection laws (ESIGN §101(b)(1));
 - b. the content or timing of disclosures required by law (ESIGN §101(c)(2)(A)) or;

- c. any requirement by a federal regulatory agency, self-regulatory organization, or state regulatory agency that records be filed in a specified standard. ESIGN 104(a).
3. In addition, this law does *not* apply to -
- a. laws governing the creation and execution of wills, codicils, or testamentary trusts;
 - b. laws governing adoption, divorce, or other matters of family law;
 - c. the Uniform Commercial Code, as in effect in any State, other than Sections 1-107 and 1-206 and Articles 2 and 2A;
 - d. court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
 - e. any notice regarding the cancellation or termination of utility services (including water, heat, and power);
 - f. any notice regarding default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;
 - g. any notice regarding the cancellation or termination of health insurance benefits or life insurance benefits (excluding annuities); or
 - h. any notice regarding the recall of a product, or material failure of a product, that risks endangering health or safety. *See* ESIGN §103.

E. Delivery of Electronic Records to Consumers

- 1. ESIGN provides that electronic records may be used to satisfy any law that requires that records be provided or made available to consumers “in writing,” so long as the consumer has affirmatively consented to the use of electronic records and has not withdrawn such consent. ESIGN §101(c)(1)(A). “Consumers” are individuals who obtain through a transaction products or services which are used for personal, family and household purposes. ESIGN §106(1)
- 2. If no information is required to be provided “in writing,” or if there is no consumer involved, then there is no need for the ESIGN consumer consent provisions.
- 3. ESIGN allows parties to continue to rely on consent obtained prior to October 1, 2000 in accordance with existing law permitting electronic delivery. ESIGN §101(c)(5).
- 4. Prior to obtaining consent, the electronic record provider must provide a clear and conspicuous statement informing the consumer:

- a. (i) of any right or option of the consumer to have the record provided or made available in paper form, and (ii) the right of the consumer to withdraw consent and any conditions or consequences (which may include termination of the parties' relationship) or fees in the event of such withdrawal;
 - b. whether the consent applies (i) only to the particular transactions which gave rise to the obligation to provide the record, or (ii) to all identified categories of records that may be provided during the course of the parties' relationship;
 - c. of the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer;
 - d. how the consumer may, after consenting, and upon request, obtain a paper copy of the electronic record, and whether any fee will be charged for such copy, *see* E-SIGN §101(c)(1)(B)(i)-(iv);
 - e. of the hardware and software requirements for access to and retention of the electronic records. E-SIGN §101(c)(1)(C)(i).
5. Importantly, a consumer must consent electronically, or confirm his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent. E-SIGN §101(c)(1)(C)(ii).
- a. With respect to the "reasonable demonstration" requirement, the statutory language suggests that the demonstration requirement must be effected by the consent.
 - b. The legislative history suggests that "reasonable demonstration" may be flexibly satisfied by a consumer's e-mail confirming that the consumer can access the electronic records, a consumer's acknowledgement or affirmative response to a provider's query asking if the consumer can access the electronic record, or if it can be shown that the consumer actually accessed the electronic records in the relevant format. *See* S. CONF. REP. No. 106-761, at S5282(2000).
6. Additionally, after the consumer's consent, if there is a change in the hardware and software requirements needed to access or retain the electronic records that creates a material risk that the consumer will not be able to access or retain subsequent electronic records, the consumer must be provided a statement of the revised hardware and software requirements that also repeats the right to withdraw consent. Also, the provider of the electronic records must again comply with the access verification provisions. *See* E-SIGN §101(c)(1)(D)(i)-(ii).
7. The method of providing electronic records must provide verification or acknowledgement of receipt (whichever is required) *if* a law that was enacted prior to E-SIGN expressly requires a record to be provided by a specified method that requires verification or acknowledgement of receipt. E-SIGN §101(c)(2)(B).

8. An oral communication or recording of an oral communication will not qualify as an electronic record for purposes of the consumer consent provisions, unless other law provides to the contrary. E-SIGN §101(c)(6).

F. Federal Preemption

1. E-SIGN provides that state law may modify, limit or supercede the provisions of Section 101 (the general validity provisions) under certain circumstances. Pursuant to Section 102(a)(1), if a state were to enact the official UETA (the version that was approved and recommended to the states by NCCUSL) then state law would govern. This provision, however, is subject to further conditions. Section 3(b)(4) of UETA permits states to exclude any state law from the benefits of UETA. For example, California's UETA excluded more than 65 statutes, most of which were consumer protection statutes. E-SIGN addresses this loophole by expressly providing that “any exception to the scope of [UETA] enacted by a State under section 3(b)(4) of [UETA] shall be preempted to the extent such exception is inconsistent with this title.” E-SIGN §102(a)(1).
2. Pursuant to Section 102(a)(2), a state could supercede E-SIGN if the state were to adopt another law that specified alternative procedures or requirements for the use and acceptance of electronic signatures and records, provided that the other law is consistent with E-SIGN and the alternative procedures do not require, or give greater legal status or effect to use or application of a specific technology or technological specification. In addition, such state law must, if enacted after the enactment of E-SIGN, specifically refer to the federal law. If the state alternative met the above conditions, then E-SIGN would no longer govern. With respect to federal law requirements, E-SIGN would still apply.

G. Regulatory Authority

1. E-SIGN also provides that state and federal regulatory agencies, such as the Securities and Exchange Commission (“SEC”) may interpret E-SIGN pursuant to their rulemaking authority under another statute. Any interpretation, however, is subject to a variety of limitations. The regulatory action would only be permissible if:
 - a. the action does not impose or reimpose any requirement that a record be in tangible or printed form;
 - b. the regulation is consistent with E-SIGN;
 - c. the regulation does not add to the requirements of E-SIGN;
 - d. there is substantial justification for the regulation;
 - e. the method is substantially equivalent to the requirements imposed on records that are not electronic records;
 - f. the method will not impose unreasonable costs on the acceptance and use of electronic records; and

the Electronic Financial Services Council (www.efscouncil.org), a trade association whose mission is to promote the deliver of financial services electronically.

2. Focused on the behavioral aspects of the interaction between the parties to the transaction, and not on the technology used, creation of SPeRS will:
 - a. Permit businesses to establish a common understanding with vendors concerning design parameters for routine functions, without having to develop detailed custom specifications;
 - b. Assist in establishing industry standards for commercially reasonable, enforceable structures and processes; and
 - c. Provide the customer with a “common experience” across various online transactions, increasing the customer’s comfort level with the transactions.

3. SPeRS is divided into five sections:

- Authentication
- Consent
- Agreement, Notices and Disclosures
- Electronic Signatures
- Record Retention

Each section will provide high-level standards to guide system designers, compliance officers and lawyers in developing processes that will meet the new legal requirements.

4. Illustrative of the issues the industry is addressing in SPeRS are:

- Standardized language for explaining the electronic signature process;
- Conventions for the use of hyperlinks, dialog boxes and other devices used in referencing, displaying, and drawing attention to information and disclosures; and
- Sample procedures for describing and offering the option to download or print out documents the customer is entitled to retain.

Each standard is supported by plain English discussions underlying the issues, checklists outlining specific strategies and options for implementing the standards, examples and illustrations and legal commentary.

5. Participation in this initiative is still growing and extends well beyond the financial services industry, as the issues being addressed cut across industry lines, the common element being the use of electronic media, not the specific features of any product or service. Current Drafting Committee members include: Adobe, AIG, Charles Schwab, CitiMortgage, Dell Financial Services, Fannie Mae, First American Title Insurance, Freddie Mac, GE Mortgage

Insurance, Harland Financial, Harris Investors, Intuit, Massachusetts Mutual, MGIC, New River, PriceWaterhouse Coopers, Principal Financial Group, Republic Mortgage, RouteOne LLC, Swiss Re, TIAA-CREF, Verisign, Wave Systems, Wells Fargo Home Mortgage, Zions Bank.

6. In addition to industry participants, trade associations including: the American Council of Life Insurers, the American Bankers Association, the American Financial Services Association, the Mortgage Bankers Association, the Securities Industry Association and the Software Information Industry Association are also involved in the drafting process.
7. For a full list of members, to purchase the SPeRS Manual or to join the SPeRS go to www.spers.org, or call Margo Tank at 202-349-8050.