

# Legal Requirements for Enforceable Electronic Transactions

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# Introduction

- What are the rules for conducting business transactions online?
- Like paper transactions, electronic transactions involve documents (electronic records) and signatures (electronic signatures) that are created, generated, sent, communicated, received or stored by electronic means.

# What is an Electronic Transaction?

● Electronic transactions include:

- Email messages
- Website access
- Electronic Agents
- Telephone

# Legal Authority: ESIGN/UETA

- Enforceability of electronic transactions are primarily governed by ESIGN and UETA.
  - Overlay statutes
  - Federal baseline
  - UETA adopted in 47 jurisdictions
- New ecommerce laws do not address the fundamental legal elements required for the transaction, e.g., meeting of the minds (offer, acceptance, consideration), or capacity (mental, age) to contract.

# Legal Authority: ESIGN/UETA

- New ecommerce laws do address the uncertainties related to writing, signing and original requirements under current state and federal law;
  - Will electronic records meet certain legal requirements such as:
    - Disclosures; Record keeping; Originals; Admissibility
- Ecommerce laws do so by stating that electronic records and signatures cannot be denied legal effect solely because they are in electronic form.

# Legal Authority: ESIGN/UETA

- Legal recognition of the use of electronic records and signatures does not in any way waive the need to comply with underlying substantive law governing the transaction.
- For example, disclosures must be made at the time and in manner required by law.

# Legal Authority: ESIGN/UETA

- Business, commercial and governmental transactions may use electronic records and signatures.
- There are some exclusions from coverage under ESIGN and UETA, such most of the Uniform Commercial Code. However, other legal authority may exist to allow electronic transaction (e.g., Revised Article 9).
- Other exclusions relate to certain types of disclosures (e.g., cancellation of utilities or health insurance, foreclosure, product recalls).

# ESIGN or UETA – Which Law Applies?

- It is likely that both E-SIGN and UETA will apply to the transaction.
- E-SIGN allows state to modify, limit or supercede E-SIGN:
  - By adopting the official version of UETA or
  - By adopting a state alternative that is consistent with E-SIGN.

# Basic Elements of ESIGN/UETA

- Agreement/Consent to engage in business electronically.
- Elements of an Electronic Signature must be met.
- Record Retention (by all parties).

# Parties Must Agree to Engage Electronically

## ● Agreement/Consent:

- UETA – facts and circumstances
- ESIGN – affirmative consent/multiple disclosures/reasonable demonstration.

# Signature Elements

- An electronic signature: any sound, symbol or process, attached to or logically associated with the contract or other record and executed or adopted by a person with the intent to sign.
- Examples:
  - Mouse Click (“I agree” button)
  - Typed name (see *Shattuck v. Klotzbach* (MA 2001))
  - Digital Certificate
  - PIN/Password
  - Sound
  - Biometrics (fingerprint, voiceprint)

# Signature (continued)

- Intent – signature (which includes the process) needs to evidence the signer's intent to be bound by the terms and conditions.
  - Can be determined by context in which signature was made (ceremony, statements made before applying signature).
- Logical Association – requires parties to have recordkeeping process that can provide evidence that a signature was applied to specific document (e.g., signature incorporated as part of record, or signature stored separately but can be associated with record later in time).

# Signatures (continued)

- Need to also consider authentication of signer.
- Are they who they say they are, are they the source of the approved document, do they have the authority to bind.
- Can be done in advance (Digital certificate, PIN), or contemporaneous (out of wallet test).

# Record Retention (as part of the transaction and after)

- Transaction records must be able to be retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or record. Can't inhibit recipient's ability to store or print.
- Need reliable evidence in the event of a dispute.
- Need to satisfy regulatory requirements.

# Record Retention

## ● Acceptable electronic records must:

- Accurately reflect the information set forth in the record, and
- Remain accessible for later reference.

## ● Challenges:

- Document authenticity (letterhead, logos, other indicia of reliability)
- Document integrity (contents sent are same as contents received; document remains intact – content can migrate due to technology advances)

# Standards and Procedures for Electronic Records and Signatures (SPeRS)

- Cross-industry Initiative
- Behavioral Standards
- Technology Neutral
- Can be used to aid businesses with implementation and to assess vendors

