

Federal Preemption under the ESIGN Act

The Constitutional doctrine of federal preemption is front and center in the Courts and Congress at present. State regulators are challenging the powers of federal financial regulators to preempt state laws,¹ and members of Congress are proposing to redefine the scope of federal financial regulators' preemptive authority.²

For those who are seeking to promote the electronic delivery of financial services, availability of national standards is crucial. A patchwork of inconsistent state rules for doing business electronically has the potential to hobble the use of electronic media. The Internet is a borderless medium that instantaneously reaches a national and international market. This article will explore how Congress in the year 2000 sought through the preemption provisions of the Electronic Signatures in Global and National Commerce Act³ (the ESIGN Act or ESIGN) to resolve the interplay between state and federal laws as they relate to electronic records and signatures. The content of this article is based on a discussion of preemption contained in *The Law of Electronic Signatures and Records*.⁴

ESIGN and UETA

In 1999, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") issued its final draft of the Uniform Electronic Transactions Act (UETA). Since that time, approximately 47 states and the District of Columbia have enacted the UETA in some form. Some states, however, have enacted non-uniform versions of the UETA. The differences range from minor stylistic changes to significant variations from the NCCUSL text.

Due in part to concerns about non-uniform UETA enactments, Congress passed a federal electronic signature and record statute. Enacted in 2000, the ESIGN Act borrowed many concepts from the UETA. It also contained some significant differences. Most importantly, ESIGN places special obligations on those who wish to electronically provide disclosures to a consumer, if the disclosures are otherwise required to be provided to the consumer "in writing."

Both UETA and ESIGN are technology neutral statutes designed to put electronic records and signatures on equal footing with their paper counterparts. Accordingly, they both operate as "overlay" statutes amending thousands of state and federal laws. Neither statute changes the substance of underlying laws. For example, all of the elements of a contract (such as offer, acceptance, capacity and consideration) must be present in an

¹ See *Wachovia Bank, N.A. v. Watters*, 334 F.Supp.2d 957 (W.D. Mich. 2004), *appeal docketed*, No. 04-2257 (6th Cir. Oct. 14, 2004); *Wachovia Bank, N.A. v. Burke*, 319 F. Supp.2d 275 (D. Conn. 2004).

² S. 2973, 108th Cong. (2004) (introduced by Sen. Corzine); H.R. 5251, 108th Cong. (2004) (introduced by Rep. Frank).

³ 15 U.S.C § 7001 *et seq.*(2000).

⁴ JEREMIAH S. BUCKLEY ET AL., *THE LAW OF ELECTRONIC SIGNATURES AND RECORDS* (Glasser LegalWorks, 2004)

electronic context. UETA and ESIGN also do not change the standards for validity of a signature, except to allow the signature to be in electronic form.

UETA and ESIGN have three main precepts:

- Electronic records and signatures cannot be denied legal effect or enforceability solely because they are in electronic form;
- If a law requires a record to be in writing, an electronic record satisfies the law; and
- If a law requires a signature, an electronic signature satisfies the law.

Together, these principles provide for the equality of electronic and non-electronic records and signatures.

However, in light of the fact that some states have enacted electronic signature legislation that varies from the text of ESIGN and the UETA as reported, it was necessary for Congress to set out rules for when ESIGN will preempt contradictory state laws and to describe the appropriate interaction between ESIGN and UETA. The resultant preemption provisions of ESIGN set up a unique interaction between state and federal laws.

Constitutional Doctrine of Preemption

The doctrine of federal preemption, rooted in the supremacy clause of the United States Constitution,⁵ applies in three situations:

- where Congress has expressly preempted state law;⁶
- where federal law dominates or occupies a particular field, resulting in an inference that Congress intended state law to be preempted;⁷ and
- where state law is nullified to the extent that it conflicts with federal law, because compliance with both state and federal law or regulations is a physical impossibility, or because compliance with state law stands as an obstacle to the accomplishment of the objectives of Congress.⁸ Federal regulations have no less preemptive effect than federal statutes.⁹

⁵ U.S. Constitution, Article VI, cl. 2.

⁶ See *Pacific Gas and Electric Co. v. State Energy Resources and Development Comm'n*, 461 U.S. 190, 203-04 (1983); *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (hereafter, "*de la Cuesta*").

⁷ See *de la Cuesta*, 458 U.S. at 153. See also *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) ("A federal statute, for example, may create a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" [citations omitted]).

⁸ See *Barnett Bank*, 517 U.S. at 31-37 and cases cited therein; *de la Cuesta*, 458 U.S. at 153-156, 159 and cases cited therein. See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

⁹ *de la Cuesta*, 458 U.S. at 153-54.

Subject to a unique savings clause for certain parallel state laws, ESIGN expressly preempts state law with respect to all commercial, consumer, and business transactions “in or affecting interstate or foreign commerce.”¹⁰ This provision invokes in full breadth the Constitution’s commerce clause, which empowers the United States Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹¹

The extent of Congress’s authority under the commerce clause has generally been viewed as very broad, and many transactions that might otherwise be considered to be local, or intrastate, have been held to “affect” interstate commerce. Local activity can be reached by Congress if it exerts a substantial economic effect on interstate commerce.¹² Congress is permitted to establish laws protecting the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and persons or things moving in interstate commerce, even though the threat may come only from intrastate activities.¹³ Congressional authority extends to regulating acts which are individually trivial in their impact on interstate commerce, but which in the aggregate may have substantial national consequences.¹⁴

ESIGN’S Special Preemption Provisions

ESIGN’s preemption provisions are a core element in the legislative approach Congress adopted to permit the nationwide use of electronic signatures and records. With certain specific exceptions, ESIGN allows a state statute, regulation, or rule of law to “modify, limit or supersede the provisions of Section 101 of the Act” if and only if:

- The statute, regulation, or rule of law constitutes an enactment of UETA as approved and recommended for enactment by the NCCUSL in 1999 without any modifications pursuant to Section 3(b)(4) of UETA and without any provisions designed to circumvent the purposes of ESIGN by imposing specific technology requirements, or
- The statute, regulation, or rule of law (other than UETA):
 - (a) Prescribes alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures which are (i) consistent with the requirements of Title I and Title II of ESIGN, and (ii) do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specifications for effectuating electronic records or signatures, and

¹⁰ ESIGN § 7001(a).

¹¹ U.S. Constitution, Section 8, Clause 3.

¹² *Katzenbach v. McClung*, Ala. 1964, 85 S.Ct. 377, 379 U.S. 294, 13 L.Ed.2d 290.

¹³ *U.S. v. Michael R.*, C.A. 9 (Ariz.) 1996, 90 F.3d 340.

¹⁴ *U.S. v. Payne*, S.D. Ohio 1994, 841 F. Supp. 810, *affirmed*, 59 F.3d 171, *cert. den.*, 116 S. Ct. 347, 516 U.S. 935, 133 L.Ed.2d 243.

- (b) Does not seek to circumvent Title I or II of ESIGN by imposing nonelectronic delivery methods under Section 8(b)(2) of UETA.

State statutes, regulations, or rules of law governing procurement by a state or any state agency or instrumentality are not preempted, thus providing to states the same freedom to set the terms of their electronic procurement transactions as private parties. In addition, certain specific types of state laws, discussed below, are excepted from the general preemption provisions of ESIGN.

Note that the ESIGN preemption provision covers not only statutes and regulations, but also other rules of law. Presumably, such other rules of law include common law rules developed by state courts. Given the ESIGN requirement that alternative state rules be technology neutral, this raises interesting questions concerning the extent to which preemption can be applied to the law resulting from court rulings that favor one type of technology over another, either explicitly or implicitly. The potential distinctions in this area are subtle. For example, ESIGN apparently prohibits judicial adoption of a common law rule explicitly granting special treatment to electronic signatures based on asymmetric encryption. At the same time, it may prove easier, as a practical matter, to convince a jury that a disputed signature created with asymmetric encryption is authentic than to prove the authenticity of other types of disputed signatures. In other words, while state courts presumably cannot announce rules that explicitly favor a particular technology, the application of neutral evidentiary rules to electronic records may still result in certain technologies being favored.

Rationale for the Unique Preemption Provisions of ESIGN

The preemption provisions of ESIGN are unique, reflecting the competing legislative priorities facing Congress as it constructed the ESIGN statutory scheme. The authors of ESIGN were not writing on a tabula rasa. Electronic signatures and records had been the focus of an intense and successful effort by NCCUSL to develop a uniform state law.

The drafters of ESIGN borrowed both its conceptual underpinnings and most of the text in Sections 101 and 106, from UETA. NCCUSL had spent several years developing UETA. If Congress had preempted UETA just as it was being promulgated, without permitting states the option of adopting it, Congress might have been criticized for hijacking NCCUSL's work product and unfairly injecting federal law into an area traditionally reserved to the states. Many in Congress would have been offended by such charges. Insensitivity to NCCUSL was also to be avoided, as the organization has a 110-year history of producing high-quality uniform laws for state enactment and has produced model laws in ground-breaking areas. Congressional interference might have been perceived as discouraging NCCUSL's important work.

In addition, the principal sponsors of ESIGN were of the view that state laws are to be overridden only with good cause. A competing consideration for the congressional sponsors, however, was the compelling position that the Internet is a borderless medium and a resource to be fostered and promoted. Since enactment of UETA by the states was

likely to take years, the sponsors of ESIGN reasoned that the absence of a uniform national standard for such a long period would impede the development of e-commerce. This was a prime policy motivation for Congress to accelerate the UETA adoption process by enacting ESIGN.

Another consideration favoring adoption of a federal law was that some of the first states to adopt UETA excluded a wide swath of transactions from its scope. This threatened the core premise of UETA, establishment of a uniform national standard.¹⁵ To avoid the creation of a patchwork of varying state laws, Congress was compelled to establish a minimal, uniform national standard.

However, while compliance with ESIGN may be sufficient to establish the validity of an electronic signature or record, Congress did not seek to assert that ESIGN was the final word on electronic signatures and records. UETA contains some helpful amplification of terms and considerations related to electronic signatures and records that are not contained in ESIGN, and Congress deferred to the right of the states to adopt UETA, thereby allowing parties to take advantage of the more fulsome provisions of UETA where it is enacted as reported by the NCCUSL.

By adopting these preemption rules, Congress was not only deferential to UETA, but affirmatively promoted its adoption by the states. Far from diminishing the likelihood of UETA being adopted, ESIGN may be repaying its intellectual debt to UETA drafters by smoothing the way for adoption of the unmodified official text, a process that is proceeding reasonably quickly.¹⁶

Having deferred to UETA, the congressional authors of ESIGN adopted a more traditional federal preemption stance with respect to other laws, declaring any provisions of state law which seek to “modify, limit or supersede” ESIGN to be preempted to the extent that they are inconsistent with the premises of ESIGN.

Exemption from Preemption Pursuant to Enactment of UETA: Four Scenarios

Some states adopted UETA before enactment of ESIGN. Other states, while enacting UETA after ESIGN, varied from the official text as approved and recommended by NCCUSL. In these cases, a question arises as to whether UETA text as adopted enjoys the benefits of the exemption from preemption provided by ESIGN. The date at which UETA was adopted, pre- or postenactment of ESIGN, does not matter. What does matter is whether in enacting UETA the state varied from the official NCCUSL text. In answering that question, there are four potential scenarios that need to be considered.

[1] state enacts UETA exactly as reported by NCCUSL

¹⁵ For example, California’s adoption of UETA expressly excepted dozens of consumer protection statutes. *See* Cal. Civil Code § 1633.3(b) (West 2000).

¹⁶ According to the National Conference of Commissioners on Uniform State Laws, forty-three states have already adopted UETA and six have introduced bills for its adoption. *See* www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp.

If a state adopts UETA exactly as reported by NCCUSL, the state version of UETA is exempt from preemption under ESIGN. For transactions that do not involve federal writing or signature requirements, parties subject to the law of that state could simply comply with UETA. ESIGN requirements and limitations that go beyond the requirements of UETA, such as the requirement for preconsent consumer disclosures under ESIGN Section 101(c), or the additional exemptions from coverage in ESIGN, could be ignored. However, because of the wide variety of federal writing requirements affecting commerce, and the desire of most businesses to create a single functional process that is valid across a wide variety of jurisdictions, compliance with ESIGN's additional requirements and limitations is advisable in almost all cases.

If the parties to an electronically effectuated transaction want to operate under UETA but are located in different states, one of which has adopted UETA while the other has not, they will be confronted with interesting choice of law questions, some of which are not resolvable by contract provisions specifying applicable law. Where one party to the transaction is a consumer as defined in ESIGN, the safer course may be to provide the consumer consent disclosures required by ESIGN. A number of states enacting UETA have at the same time enacted the ESIGN consumer consent provisions as part of state law. Since such provisions cannot be said to be inconsistent with the provisions of ESIGN, it would obviously not be preempted by ESIGN.¹⁷

[2] state enacts UETA substantially as reported by NCCUSL,
but makes stylistic changes

In this scenario, the state has enacted UETA substantially as reported by the NCCUSL, but with stylistic changes to comport with the state's legislative drafting practices. If these changes do not affect the substance of UETA as reported, the congressional objectives in enacting the preemption provisions would still be satisfied, and there would be no reasonable basis for denying the benefits of the exemption from preemption.

[3] state enacts UETA substantially as reported
by NCCUSL but adds provisions

If a state adds amendments to the official text that are minor and do not affect the substance of UETA, then it would seem appropriate to treat the core text of UETA as having been enacted "as reported" by the NCCUSL, thus conferring on the adopted version of UETA the benefits of exemption from the ESIGN preemption provisions. The minor additions could be considered separate enactments of the legislature, not exempt from preemption, and subject to analysis under the standards of Section 102(a)(2) of ESIGN.

On the other hand, if the additions to UETA are sufficiently substantial or are so integrated into the text of UETA as to change the meaning of UETA, then the adoption as

¹⁷ This assumes that when the ESIGN consumer consent provisions were adopted, the adoption included all the relevant limitations contained in ESIGN.

a whole should be preempted, to the extent it fails to meet the Section 102(a)(2) standards. The congressional objective in enacting ESIGN along with the special exemption for the text of UETA “as reported” was to create a national standard. If states choose to substantively modify the reported text of UETA, they should not expect their enactment to be accorded deference or to have the courts pick through their versions to extract those parts that are not modified and give them special status outside the ordinary preemption standard set out in Section 102(a)(2). ESIGN places a high value on national uniformity, and in enacting it Congress did not want to subject persons doing business electronically to the expense and uncertainty of parsing what parts of a state law are preempted and what parts are not.

[4] state enacts UETA but omits provisions

If a state enacts UETA but omits significant or vital portions of it, then it is surrendering the right to claim the benefits of an exemption from the preemption provisions of ESIGN. Minor omissions from the reported text may perhaps be tolerated without damaging the public policy objectives of ESIGN. However, as in the case of substantive additions, substantive omissions from the official text frustrate the goal of an easily understood national standard and promote a reversion to the patchwork of state laws which ESIGN attempts to avoid. Thus, if a state enacts UETA with more than minor, nonsubstantive omissions, the entire state enactment should be subject to the preemption provisions of Section 102(a)(2) of ESIGN.

Prohibition of Exceptions to UETA and Circumvention of ESIGN

Congress demonstrated its intent to preserve the right of parties to do business under a uniform set of nationwide rules by preempting the right of states to adopt variations of UETA which would mar the uniform standard created by ESIGN. First, it barred states from enacting any exceptions to the official text of UETA as reported, despite the fact that UETA itself in Section 3(b)(4) provides for the right of states to enact exceptions. It is this very provision and the exercise of it by early enactors like California that led Congress to enact ESIGN because the use of the exception power under UETA threatened to deprive large swaths of commerce of the benefits which UETA seeks to confer.

As a further demonstration of its intent to use its preemption powers to prevent states from burdening the electronic delivery of goods and services in interstate commerce, Congress specifically closed what might have been another loophole in UETA that would have reintroduced requirements for nonelectronic delivery methods. Section 8(b)(2) of UETA provides that if another law requires that a record be delivered by a method which may not be electronic, that method must be used. In Section 102(c) of ESIGN, Congress left in place any state law requiring specific, nonelectronic delivery requirements which were enacted as of the date of the ESIGN’s passage, but prohibited the use by states of UETA Section 8(b)(2) to impose new, nonelectronic delivery requirements to circumvent ESIGN. Congress also took steps to limit the discretion of state regulators beyond the limitations imposed by UETA, which permits state regulators to reimpose writing

requirements for purposes of record retention. ESIGN eliminates that authority, for the most part.

These provisions reflect a congressional policy decision to protect electronic signatures and records from parties hostile to the electronic delivery of certain products and services to consumers. These parties were largely responsible for persuading the California legislature to exclude consumer transactions from the California UETA and were successful in persuading the Clinton administration to oppose enactment of ESIGN when it was considered in the House of Representatives. Congress considered the arguments advanced by these groups at length and provided in ESIGN specific consumer protections to promote understanding of the nature of the electronic contracting process; nevertheless, some of these parties continued to argue that certain consumer transactions should be outside ESIGN procedures. Recognizing that these parties might seek to use state enactment of UETA as a forum to raise these issues again, Congress determined to preempt this possibility.

This context is important to understanding congressional intent not only vis-à-vis UETA, but generally when it exercised its preemption powers under ESIGN. It was aware of the hostility on the part of some to what ESIGN was designed to accomplish, and it sought to use its power of preemption to head off state law provisions which would thwart its purposes. When it wants to defer to the states to enact stronger consumer protections, Congress has demonstrated that it knows how to do so. For instance, the Truth-in-Lending Act preempts state laws that impose lesser standards upon lenders, but sets up a procedure to allow states to enact stronger consumer protections.¹⁸ The Real Estate Settlement Procedures Act (“RESPA”) preempts state laws which are inconsistent with it, but only to the extent of the inconsistency.¹⁹ In enacting ESIGN, Congress took the extraordinary step of specifically exempting UETA from preemption, but then closed off states’ ability to impose alternative procedures or requirements inconsistent with a uniform, nationwide set of rules for the use or acceptance of electronic records or electronic signatures.

Enforceability of Statutes and Regulations other than UETA that Address Electronic Records and Signatures

If state laws other than UETA attempt to modify, limit, or supersede ESIGN by specifying alternative procedures or requirements for the use or acceptance of electronic records or signatures to establish the legal effect, validity, or enforceability of contracts or other records, then those alternative procedures or requirements must be consistent with Titles I and II of ESIGN.

The preemption language used and the context in which it is used indicate an intent by Congress to occupy the field, leaving very little flexibility to the states to add to or to subtract from federal electronic signature requirements. ESIGN’s provisions overlay and override any state law in effect as of the date of ESIGN’s enactment, and if any state

¹⁸ 15 U.S.C. § 1667e (2002).

¹⁹ 12 U.S.C. § 2616 (2002).

thereafter seeks to enact a new law which would affect the provisions of ESIGN, the state statute must declare its intent to amend ESIGN and must conform to the strictures set out in ESIGN regarding inconsistent alternative procedures or requirements. To the extent that any state enactment touches the field occupied by ESIGN and/or UETA, the intent of Congress is to preempt such law if it is inconsistent with ESIGN. For all practical purposes, while a state may enact new laws touching on electronic signatures and records, these laws will be preempted if they impede parties' rights to use the uniform national procedures prescribed by ESIGN and/or UETA.

Section 102(a)(2)(A)(ii) provides that, in general, a state may not adopt requirements which accord greater legal status or effect to the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures. There are exceptions for certain state functions and activities.

A particularly complex issue is raised by additions to UETA, or any other state electronic record and signature law that addresses issues on which ESIGN is silent. For example, a state might provide that UETA's default rules on sending and receipt may not be varied by agreement in consumer transactions. ESIGN is silent on the subject of sending and receipt, except for its implicit endorsement of the default rule in UETA, which allows variation by agreement. Under the general principles of federal preemption, such a special rule should be permissible so long as it is not an obstacle to the accomplishment of Congress's objectives.²⁰ Of course, to a certain extent any variation from the official text of UETA or ESIGN frustrates the objective of a uniform national law. But if that was an overriding objective of Congress, then the special deference shown to UETA and other consistent state enactments would not be in the statute at all.

The fact that Congress permits state alternatives to supersede ESIGN suggests that Congress left to the states the opportunity to fine-tune electronic record and signature laws around the edges. Under the reading of ESIGN, one must assess the extent to which the amendment serves either to facilitate and clarify the use of electronic records or signatures, or conversely, attempts to establish new burdens or roadblocks. Additional rules which add (i) complexity, or (ii) new or state-specific burdens that do not also apply to paper transactions, should be preempted as obstructionist. On the other hand, additional rules that simply clarify, or attempt to provide a protection analogous to one which already exists for equivalent paper transactions, should not.

²⁰ See *Barnett Bank*, 517 U.S. at 31-37 and cases cited therein; *de la Cuesta*, 458 U.S. at 153-156, 159 and cases cited therein. See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

An Interpretation of How ESIGN and State Electronic Signature Laws Interact

It is not unreasonable to argue that even in states where UETA or another electronic record statute is appropriately adopted, if parties were to choose simply to conform their conduct to the requirements of ESIGN, the validity of their electronic signatures and records should be beyond challenge. It is clear that Congress intended to establish a national baseline for use of electronic records and signatures. As a matter of policy, it would be reasonable to permit parties to comply with the provisions of ESIGN and operate across the United States without the need to analyze electronic record and signature laws on a state-by-state basis.²¹

Some would argue that militating against this interpretation is the language from ESIGN Section 102(a) permitting a state to “modify, limit or supersede” ESIGN. The use of the verb “supersede” may suggest to some that UETA, or another consistent state law, replaces ESIGN with respect to state statutes, regulations, and common law. However, such a reading is not compelled by the language of ESIGN. Congress sought to create a national standard in ESIGN while permitting states to adopt UETA and other *alternatives* to ESIGN that are “not inconsistent with” the federal statute. To the extent necessary to give those laws effect in states that adopt them, Congress permitted the states to supersede *the preemptive provisions of ESIGN*. However, to argue that in doing so Congress intended to grant the states “reverse preemption” authority, allowing them to supplant all of ESIGN in areas within the state’s jurisdiction is to take a step too far. It is not necessary to read Congressional deference to UETA (and other state laws “not inconsistent with” ESIGN) as a surrender of authority to the states to replace the Congressionally established national rules embodied in ESIGN. The better view would be that Congress chose to allow certain limited state alternatives to ESIGN to exist alongside ESIGN and be available to parties whose transactions fall within the jurisdiction of any state that chooses to enact such alternatives. But parties conducting electronic transactions in a national market need not advert to the various states’ alternatives when using electronic records, but rather can, if they chose, simply comply with the national rules embodied in ESIGN.

As a practical matter, however, the differences between the two approaches, one assuming that ESIGN is always available and the other assuming the precedence of UETA or other consistent state law, are probably minimal. Most of the operative provisions in ESIGN Section 101 are intended to mirror, either in language or in result, equivalent provisions in UETA.

²¹ While the language of parallel provisions of ESIGN and UETA differ in certain respects, the differences are minor and arguably irrelevant. In the limited circumstance, if any, where a variation on language in the provisions of ESIGN or UETA might render compliance with ESIGN insufficient to satisfy the requirements of UETA, parties doing business in a state that has adopted UETA need only look to UETA and no other state law to determine if they have properly effectuated their transaction electronically.

Specific Exceptions to Preemption

Because it was adopting an overlay statute that had universal applicability to federal and state laws and contained a strong preemption standard, Congress thought carefully about what types of laws should not be subject to the provisions of ESIGN. Section 103 of ESIGN sets out specific types of laws excepted from the provisions of Section 101 of ESIGN. The exception of specific state laws from the operation of ESIGN is a further indication of the congressional intent to adopt a strict preemption standard with respect to any other state laws that might be at variance with the purposes of ESIGN.

Regulatory Interpretations of State Law and ESIGN

Section 104 of ESIGN acknowledges that state agencies may have authority under state law to issue orders or guidance regarding the interaction of a state statute and ESIGN. Congress did not prohibit the issuance of such guidance but provided that a state regulatory agency is preempted by Section 101 of ESIGN from adopting any regulation order or guidance unless:

- Such regulation, order, or guidance is consistent with Section 101 of ESIGN; it does not add to the requirements of Section 101; the agency finds in connection with issuance of the regulation, order, or guidance that there is a substantial justification for such issuance; and
- The methods selected to carry out the purpose of the regulation are (a) substantially equivalent to the requirements imposed on records that are not electronic records, and (b) will not impose unreasonable costs on the acceptance and use of electronic records; and the method selected to carry out the purpose of the rule or regulation does not require or accord greater legal status or effect to the implementation or application of a specific technology or technology application.

Section 104(b)(3) permits a state regulatory agency to interpret Section 104(d) of ESIGN to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained if the performance standard serves an important governmental objective and is substantially related to the achievement of that objective, including a requirement that a record be in tangible printed or paper form if (i) there is a compelling government interest relating to law enforcement and national security for imposing such a requirement and (ii) such requirement is essential to attaining such interest. Even in such a case, however, state regulatory agencies have no authority to impose or reimpose requirements that a record be intangible, printed, or in paper form.

Such restrictions demonstrate the intent of Congress to hold state agencies to a very high standard if they seek to interpret or amplify upon the provisions of ESIGN. When read in connection with the preemption language contained in Section 102 of ESIGN, Congressional intent to protect the uniform national rules spelled out in ESIGN is clear.

The substantive and procedural requirements spelled out in Section 104 for state agencies provide clarification and amplification of the general preemption language contained in Section 102.

A Longer Perspective on ESIGN Preemption

In addition to its desire to protect and promote a national set of rules related to electronic signatures and records, Congress may have felt comfortable establishing a strong set of preemption rules under ESIGN because all transactions covered by ESIGN are contemplated to be voluntary, that is, the parties have the option to use electronic signatures and records, but are not compelled to do so. In preempting the ability of states or state agencies to impose or reimpose tangible record requirements, Congress reserved to the people the freedom to voluntarily conduct their business in an electronic environment, free from unreasonable interference by either state or federal authorities.

Whenever Congress preempts state law, it evokes the historic tensions that have existed in the American federal form of government since its earliest days.²² However, what is most interesting about ESIGN preemption is that it is arguably responsive to both Hamiltonian and Jeffersonian sides of the federalism debate. The federalist or Hamiltonian view that the federal government should foster commerce and one national economy by establishing national standards runs through ESIGN with its emphasis on promoting new technology in the context of a borderless, national set of rules for electronic signatures and records. Simultaneously, the Jeffersonian view that freedom is best served if power is reserved to the people is also fostered by the ESIGN preemption provisions, with the right of the people to contract electronically fostered and protected from interference by both state or federal authorities.

As time goes by it can be expected that UETA will be enacted in most states. Ultimately, UETA and ESIGN will stand side by side, the principal difference in most states being that ESIGN requires more fulsome consumer disclosures and UETA spells out specific delivery and receipt rules. However, even after UETA is adopted by a state, UETA and ESIGN will continue to have an interactive relationship since the preemption provisions of ESIGN will continue to protect UETA from encroachment by subsequent state enactments or rulemaking related to electronic signatures and records which might interfere with the national uniform standards envisioned by both statutes.

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²² In this regard, the preemption provisions of the ESIGN Act may be of interest to Constitutional historians for two reasons: first, because of the unique interplay between state and federal law that grows out of the specific exception of UETA from the preemption scheme, and second, because of the more subtle issues of federalism addressed in the ESIGN preemption arrangements.