



Finance / Financial Services & Products ADVISORY ■

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Utilization of Electronic Signatures and Records: What You Need to Know

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A large portion of the workforce currently working from home and other social distancing measures in place to limit the spread of the coronavirus (COVID-19) have created logistical continuity of business issues that directly impact day-to-day operations in the structured finance and financial services sectors. The mechanics of executing contracts and other essential documents remotely is a significant matter affecting daily business. This raises the issue of whether and under what conditions electronic signatures, as opposed to traditional “wet” signatures, are acceptable and enforceable. Subject to compliance with applicable laws, e-signatures are enforceable for most transactions; however, certain documents cannot be e-signed, or take on different legal characteristics when e-signed, requiring each situation to be analyzed to ensure that the subject document pertains to a transaction that works well with e-signatures under the applicable laws. In assessing whether an e-signature is acceptable, consideration is given to the type of document, the type of related transaction, and the requirements under applicable laws.

Laws Governing Electronic Signatures and Records

Both federal and state laws

Both federal and state laws permit e-signatures and records and determining which statute applies depends on the nature of the underlying transaction. The Electronic Signatures in Global and National Commerce Act (E-SIGN), a federal law, applies to transactions “in or affecting interstate or foreign commerce” where each party has agreed to conduct the transaction electronically, although under choice-of-law provisions both interstate and intrastate transactions are generally governed by the Uniform Electronic Transactions Acts (UETA). These statutes provide parties to business transactions a framework for relying on an e-signature as legal for purposes of government and commercial transactions. UETA has been adopted in substantially similar forms in all states except Illinois, New York, and Washington. In New York, the Electronic Signatures and Records Act (ESRA), which is similar in scope to UETA, governs e-signatures and treats e-signatures to be as legally binding as are handwritten signatures. Typically, if there is a conflict between E-SIGN and UETA or ESRA, the state law will govern; however, E-SIGN stipulates that state laws must provide equivalent protection to federal laws for e-signatures and contracts. In addition, any provisions of state law that are inconsistent with E-SIGN, other than provisions that are included in the official text of UETA, are generally preempted by E-SIGN, at least for transactions affecting interstate commerce.

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What constitutes an e-signature?

Under E-SIGN, UETA, and ESRA, an “electronic signature” is defined 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.” Such a broad definition provides the signatory with numerous ways he or she can indicate affirmative consent to the terms of the document. This includes alternatives such as click-throughs, the use of PINs or passwords, digitized signatures, and biometrics. However, both federal and state laws require methods in place to confirm and verify the identity of the electronic signatory. UETA requires security procedures, and ESRA has procedures for a certification authority to ensure that the purported signatory submitting the e-signature is the required individual.

E-SIGN and UETA each define an “electronic record” as “a record created, generated, sent, communicated, received, or stored by electronic means.” ESRA defines an “electronic record” as “information . . . produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.” Under these laws, the electronic record and e-signature must be linked together to remain enforceable – for example, the e-signature must be on the electronic document.

When executing a document electronically, there are numerous methods that will satisfy the E-SIGN, ESRA, and UETA standards for an e-signature. Examples include selecting an image based on a particular font to represent a signature and placing that signature on a signature line electronically, clicking “I agree” on the electronic form, using biometrics to indicate acceptance of an agreement, and employing a third-party vendor specialized in e-signatures to set up e-signature processing.

The Validity of Electronically Executed Contracts

Under the provisions of E-SIGN, UETA, and ESRA: (1) a signature or record cannot be denied legal effect or enforceability solely because it is in electronic form; (2) if a law requires the record to be in writing, an electronic record satisfies the law; and (3) if a signature is legally required, an e-signature satisfies the law.

There are four major requirements for an e-signature to be considered valid under E-SIGN, UETA, and ESRA: (1) each party intended to execute the document; (2) the parties have consented to do business electronically (under UETA, consumer consent disclosures may also be required); (3) the e-signature must be associated with the record, and the system utilized in consummating the transaction must keep a record reflecting the process by which the signature (or other form of e-signature) was created or generated; and (4) records of the transaction and e-signature must be retained electronically.

No special disclosure language is required when entering into contracts electronically. Electronic signatures are even permissible under E-SIGN and UETA as long as the e-signature of the notary, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record. An electronic notarization takes place when the notarial seal, signature, or certificate is created, placed, and stored electronically. However, all other elements of a traditional, paper notarization apply to an electronic notarization, including the requirement for the signer to physically appear before the notary. Remote online notarization (RON) is a type of electronic notarization where the notary and signer are in different physical locations. In states that permit RON, the signer appears before the notary via online audio-video technology, while an in-person appearance may occur when processing a digital document, enabling the signer and notary to see and hear each other simultaneously. Without the authority to conduct RON, electronic notarization may not supersede the long-held notarial principle that “personal appearance” requires physical presence.

Compliance with both UETA (or ESRA, as applicable) and E-SIGN are recommended because in states that have adopted UETA, E-SIGN will generally be preempted and not apply.

Situations Where E-Signatures Cannot Be Utilized

Categorical exceptions

Certain types of transactions are categorically excluded from E-SIGN, UETA, and ESRA. For example, all three Acts exclude transactions under Articles 3 through 9 of the Uniform Commercial Code (UCC), as enacted in any state, to the extent an agreement is governed by such UCC provisions. The UCC, however, has its own provisions for electronic authentication. ESRA was amended in 2011 to cover e-signatures for the conveyances of real property, subject to compliance with the conditions related to the conveyance. None of UETA, ESRA, or E-SIGN affects the checking system, paper-based negotiable instruments, or rules governing letters of credit or investment securities. In addition, the creation and execution of wills, codicils, or testamentary trusts are not permitted under E-SIGN, UETA, or ESRA, nor do they apply to records or contracts governed by any statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.

Court orders or notices or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings are not within E-SIGN's purview. E-SIGN also does not cover any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. In addition, E-SIGN excludes any notice regarding:

- The cancellation or termination of utility services (including water, heat, and power).
- 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.
- The cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities).
- Recall of a product, or material failure of a product, that risks endangering health or safety.

Provisions under the UCC that permit e-signatures

While E-SIGN, UETA, and ESRA do not apply to transactions under Articles 3 through 9 of the UCC, Article 5 (Letters of Credit), Article 8 (Investment Securities), and Article 9 (Secured Transactions) permit the use of e-signatures and records for most purposes, in accordance with the terms specified in the UCC. Under Article 8, securities (other than certificated securities) may be transferred electronically and contracts for their sale or purchase do not have to be in a physical writing. Under Article 9, e-signatures and records can be utilized to create a security interest in personal property. E-signed mortgage notes and other promissory notes are not promissory notes under the UCC and do not enjoy perfection by physical possession under Article 9, nor can they support holder in due course status under Article 3. However, if such notes are maintained in a secure eVault having authoritative copies and certain other features, E-SIGN and UETA themselves give rights equivalent to physical holders under UCC Article 3 and Article 9.

Special Considerations for Consumer Transactions

E-SIGN Section 7001 sets forth detailed consent requirements for the electronic provision of legally required disclosures to consumers. Specifically, Section 7001(c) imposes significant consumer disclosure and consent provisions on electronic records when “a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing” if four criteria are satisfied: (1) the consumer must “affirmatively consent to such use” and must not have withdrawn consent; (2) the consumer must be provided with “a clear and conspicuous statement” that meets four conditions specified in E-SIGN; (3) before consenting, the consumer must be provided with a “statement of the hardware and software requirements for access to and retention of the electronic records”; and (4) the consumer is required to affirmatively 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.”

UETA generally provides that, as long as the parties agree to or consent to conduct their transactions electronically, if a law requires a document (or requires certain information) to be sent “in writing,” an electronic record capable of retention satisfies this requirement. UETA also provides that, if another law requires a record to be sent, communicated, or transmitted by a specified method, the record must be “sent, communicated, or transmitted by the method specified in the other law.”

Conclusion

E-signatures have become more relevant to businesses with the current social distancing measures in place. While the key concepts underlying the various laws applicable to e-signatures may be similar, the preemptive authority and interplay between these laws requires nuanced analysis. In addition, companies should be attentive to the detailed requirements of the applicable e-signature laws and their implications for contract validity, record retention, and future communications with consumers.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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