

Implementing Electronic Records and Signatures

Margo H.K. Tank

202.974.1015

mtank@goodwinprocter.com

GOODWIN

PROCTER

Why Go Electronic?

- ♦ **The goal – soup to nuts paperless business transactions**
- ♦ **Why?**
 - Improved convenience and accessibility**
 - **24x7 Access**
 - **Opportunity to review and digest information without being exposed to high pressure tactics or investing significant time traveling to commercial locations.**

Why Go Electronic?

- ◆ **Better access to information**

Time and resources for a thoughtful, informed decision

Streaming video and other multimedia presentations can be used to enhance required disclosures and notices

Why Go Electronic?

- ◆ **Better quality control**

Presentation of documents and information can be more carefully controlled than in a paper environment

Systems can be designed to require presentation of information in particular orders and structures, with automated methods for detecting errors, unauthorized changes and inconsistencies

Why Go Electronic?

- ◆ **Enhanced transaction speed**

 - Satisfying customer needs & expectations

 - Time value of money -- Faster recovery of expenses, and shorter time frames to payment, decrease borrowing costs and improve cashflow.

- ◆ **Reduced cost**

 - Up front savings -- Reductions in document processing costs and the automation of manual processes

 - Back-end savings – Reduced custodial and quality control expenses

Review of Legal Barriers to Electronic Loan Documents

- ♦ Writing requirements
- ♦ Signature requirements
- ♦ Notarization
- ♦ Rules of evidence
- ♦ Negotiable instrument rules

The UETA

- ♦ **The state law solution for electronic documents and signatures – the Uniform Electronic Transactions Act**

Created by NCCUSL

Overlay statute

Authorizes replacing writings with electronic records

Authorizes electronic signatures

The UETA

♦ Problems with the UETA

Must be adopted by each state

Process can take years

States add non-uniform provisions

California and Iowa

Doesn't change federal law

- Federal Reserve

- HUD

The Federal E-SIGN Act

- ♦ A federal solution -- the *Electronic Signatures In Global and National Commerce Act*

- Covers state and federal law

- Instant 50 state baseline uniformity

- Adopts the most significant UETA provisions

- Provides specific standards for consumer consent

Goals and Policies

♦ Minimalism

Simple rules

- No complete regulatory scheme
- Relies on –
 - The inherent flexibility and adaptability of the common law, and
 - Existing substantive statutory law

General Rule of Validity

- ♦ The general rule of validity is that 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.

General Rule of Validity

- ♦ The E-Sign Act *only affects* laws imposing writing or signing requirements and does *not* affect -
 - substantive protections of any law, including consumer protection laws; or
 - the content or timing of disclosures required by law.

General Rule of Validity

- ♦ In addition, E-Sign's general rule of validity does *not* affect -

laws governing the creation and execution of wills, codicils, or testamentary trusts;

laws governing adoption, divorce, or other matters of family law;

the Uniform Commercial Code, as in effect in any State (such as Articles 3, and 4 (negotiable instruments) and 9 (secured interests), other than sections 1-107 and 1-206 and Articles 2 (sales) and 2A (leases);

General Rule of Validity

court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

any notice of the cancellation or termination of utility services (including water, heat, and power);

any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, the primary residence of an individual;

any notice of the cancellation or termination of health insurance benefits or life insurance benefits (excluding annuities); or

General Rule of Validity

any notice of the recall of a product, or material failure of a product, that risks endangering health or safety.

- ♦ The use or acceptance of an electronic signature or record is not required (other than by governmental agencies that are not acting with respect to their own contracts).

Electronic Signatures: The Legal Definition

- ♦ E-Sign gives legal force and effect to *electronic signatures*. The law 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.

Electronic Signatures:

The Technological Possibilities

- ♦ The E-Sign legal definition does not specify the technology that an electronic signature must use to be valid. A business can use *any technology*, including an:
 - “I agree” button,
 - digitized image of a handwritten signature,
 - PIN number,
 - digital signature using public/private key cryptography, or
 - biometrics (including a retinal scan).

Intent/Authentication

- ♦ E-Sign answers the question of “Is it a signature?” (legal sufficiency)
- ♦ E-Sign does not answer the question “Is it your signature?”
- ♦ Under E-Sign, the recipient -- not the signer -- still bears the burden of proof of attribution of a signature.

Intent/Authentication

- ♦ A business must be comfortable that the technology it chooses or the process it adopts to show requisite intent.

 - I agree

 - It is my signature

 - I have seen the document in question

- ♦ Challenges

 - Establishing identity and authority in remote transactions

 - Establishing attribution without witnesses or context

 - Establishing intent when using new, unfamiliar signature processes

Consent to the Delivery of Electronic Records to Consumers

- E-Sign gives legal force and effect to electronic records.
- The law defines electronic records as a notice or disclosure or any writing communicated by electronic means.
- Electronic records may be used to satisfy any law that requires that records be provided to consumers “in writing” only if the consumer has affirmatively consented to the use of the electronic records, and has not withdrawn such consent.

Consent to the Delivery of Electronic Records to Consumers

- ♦ Prior to obtaining a consumer's consent, the electronic record provider must deliver a clear and conspicuous statement informing the consumer of:
 - any right or option of the consumer to have the record provided or made available in paper form;
 - the right of the consumer to withdraw consent and any conditions or consequences (which may include termination of the parties' relationship) of such a withdrawal;

Consent to the Delivery of Electronic Records to Consumers

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;

the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer;

how the consumer may after consenting, upon request, obtain a paper copy of the electronic record and whether any fee will be charged for such a copy; and

the hardware and software requirements for access to and retention of the electronic records.

Consent to the Delivery of Electronic Records to Consumers

- ♦ The consumer must consent electronically, by reasonably demonstrating 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:

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, and if it is shown that the consumer actually accesses the electronic records in the relevant format.

Consent to the Delivery of Electronic Records to Consumers

- ◆ After the consumer has consented, if there is a change in the hardware and/or 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 with a statement of the revised hardware and/or software requirements that includes another opportunity to withdraw consent. Moreover, the provider of the electronic records must again comply with the access verification provisions.

Electronic Retention of Records

- ♦ **E-Sign allows copies of contracts and state and federal disclosures to be retained electronically so long as the contract or other record:**

- accurately reflects the information set forth in the contract or other record; and**

- remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.**

Electronic Retention of Records

- ♦ a requirement that a contract or record be retained in its original form is satisfied by fulfilling these requirements.

Electronic Retention of Contracts and Other Records

- ◆ In addition, if a statute, regulation, or other rule of law requires that a contract or other record be in writing, the legal effect of the record may be denied if it is not in a form that is capable of being retained and accurately reproduced for later reference by all parties.

Notarization

- ♦ E-Sign permits an electronic notary signature.
- ♦ It eliminates the requirement of a stamp or seal.
- ♦ E-Sign does, however, preserve any other features of notarization required by state law

Personal Appearance

Confirmation of

- identity
- awareness
- freedom from duress

Implementing Electronic Records and Signatures Consent

♦ Consent required

Both UETA and ESIGN are “opt-in” statutes

For business-to-business transactions, and consumer transactions under UETA, consent may be

- Express
- Inferred from the circumstances

For consumer transactions under ESIGN, consent must be express in most circumstances

Implementing Electronic Records and Signatures Consent

- ♦ **Who has to obtain consent?**

 - Anyone requiring a person to execute an electronic record that would otherwise have to be in writing

 - Anyone delivering information that would otherwise have to be in writing to a person legally entitled to receive or rely upon the information

- ♦ **When to obtain consent?**

 - At the time the specific document is presented

 - At the beginning of the transaction

 - At the beginning of a series of transactions

Implementing Electronic Records and Signatures Consent

- ◆ **Opportunities**

 - Inform the customer – avoid claims of deception or fraud

 - Establish fee structures and incentives to opt in

- ◆ **Challenges**

 - Delivering effective consent disclosures without discouraging customers

 - Developing and implementing a “reasonable demonstration” test

 - Complying with the requirement to update disclosures if technology requirements change

Implementing Electronic Records and Signatures Delivering Disclosures and Notices

◆ Key Requirements

Electronic records are not enforceable against a recipient if the sender inhibits the recipient's ability to print or retain a copy

Electronic Records must be accurate, remain accessible for later reference

All formatting, timing and display requirements must be observed

Implementing Electronic Records and Signatures Delivering Disclosures and Notices

Customer must be able to retain a copy for later reference and transmission

- Electronic – may agree on joint storage location
- Paper

Implementing Electronic Records and Signatures Delivering Disclosures and Notices

♦ Challenges

File Survival

Preserving formatting

Infrastructure investment

Design

Proof of Document Integrity

- ♦ Introduction into evidence will require proof of integrity
 - Identification to original transaction
 - Freedom from alteration

Proof of Document Integrity

- ♦ **Courts evaluating the integrity of an electronic record may be expected to focus on systemic protections --**
 - division of labor**
 - complexity of systems**
 - Encryption of executed documents to prevent undetected alteration**
 - activity logs**
 - security of copies stored offsite to verify content**