

The Law of Electronic Signatures and Records

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Introduction

Electronic signature and records legislation has revolutionized the way business and commercial transactions are conducted. Passage of E-SIGN by Congress in June 2000, and the progressive adoption of UETA by most states, has empowered parties to most transactions to do business electronically, confident that their contracts are legally enforceable. These legislative changes also made the need for an exposition of the law of electronic signatures and records increasingly apparent. Lawyers and business executives seeking to enter into and to document transactions in electronic commerce need a reference that explains these laws and relates them to developments in the marketplace.

Confronted with the huge potential change in the market for goods and services that widespread use of electronic signatures and records has triggered, market participants have developed a set of business conventions that build on both traditional legal principles and new laws, tailored to meet the business needs of particular fields of commerce. With these conventions in mind, we wish to provide more than a statement of the current law of electronic signatures and records. Rather, we seek to put these laws in context, considering the realities of the digital marketplace. For businesspersons and their advisors, understanding the environment in which the law of electronic signatures and records will be applied is as important as knowing the law itself. To that end, we offer practical examples related to the use of electronic signatures and records in particular industries. Several contributed articles in Part III discuss specific industry and government issues as well.

We bring two perspectives to this work that we hope will benefit our readers. First, we are all practicing lawyers advising clients on the day-to-day business of providing services electronically. We primarily focus on the field of financial services, but since many electronic transactions have a nexus to financial services, we deal with a wide segment of electronic commerce. Second, we were active participants in the public policy debate that led to state and federal legislation clarifying the law of electronic signatures.

The three authors have acted as counsel for the Electronic Signatures and Records Association, whose members have included both technology leaders and financial services firms.

Jerry Buckley, Margo Tank and David Whitaker also acted as Counsel and Co-Reporters to a cross-industry initiative called SPeRS, Standards and Procedures for electronic Records and Signatures (www.spers.org). SPeRS is a set of guidelines, procedures, checklists and strategies for developing systems to create, deliver, sign, manage and transfer legally enforceable electronic records and signatures in commercial and consumer transactions. It is intended to help companies develop cross-discipline system design teams for implementing electronic commerce. One of the authors, David Whitaker, was a participant in the NCCUSL process that produced the landmark UETA. We closely followed state enactments of UETA. (A table comparing state versions of UETA with the official version adopted by NCCUSL is included in Appendix D.) The interplay of our roles as legal counselors to business clients and public policy advocates informs our approach to this work; we hope it provides valuable insight for our readers.

As we work to shape business agreements for our clients, we encounter areas of the law that present interpretive challenges. We also deal with the very practical side of business law: development of standard contract terms and standard forms of disclosure. Sample contract terms and disclosures are included in this book where appropriate.

If it was not obvious before, the Covid pandemic and resulting need to conduct transactions remotely demonstrated the wisdom of creating legal certainty around the validity of electronic signatures and records. The trend toward use of digital contracts executed electronically, while already underway, was accelerated during the pandemic.

Twenty-four years after enactment of the federal ESign Act and the almost universal enactment by states of the Uniform Electronic Transactions Act, these statutes have proven to be remarkably durable. And even as advances in digital commerce like the introduction of the block chain and Smart Contracts have emerged, the principles articulated in ESign and UETA have proven flexible enough to accommodate these developments. That is not to say that these new methods of contracting electronically do not need to be examined to assure that they are compliant with the rules related to electronic signing and the proper retention processes to assure continued validity and enforceability under the standards promulgated in the UETA and ESign, but so far it has not been deemed necessary to amend the foundational electronic signature statutes to accommodate technological advances.

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We are grateful to the editors and staff of Thomson Reuters for their assistance in our regular updates of this text.

Preface*

In any society in which the written word is a source of empowerment, the advent of a new technology for recording and disseminating words has a potentially profound impact on human relations. Gutenberg's press ushered in a new era, making writings available to a wider reading public, and ultimately provided the intellectual basis for the evolution to democratic government.

It has been over 24 years since the passage of the federal Electronic Signatures in Global and National Commerce Act (ESIGN Act or ESIGN)¹ and the issuance of the Uniform Electronic Transaction Act² (UETA) by the Uniform Law Commission for adoption by the states. While these laws, which confer on electronic records and signatures the same status as paper records and ink signatures, may not have as profound an impact on society as Gutenberg's invention, these simple changes in law have had, and will continue to have, far-reaching effects.

ESIGN and the UETA were enacted with the purpose of validating the use of electronic signatures and records in commerce and spelling out the conditions under which both businesses and consumers could enter into agreements to do business electronically.

Over the 20 years following enactment of ESign and UETA, we found use of electronic signatures and electronic records gaining significant momentum as the benefits and efficiencies of digital transactions became more and more apparent. But then came the COVID-19 pandemic, and the use of electronic records to effectuate transactions became not simply an efficient way of doing business, but a necessity. Suddenly the need to engage in remote transactions due to the widespread and long lasting "sheltering in place" requirements had significant implications for the use of electronic signatures and records. Remote online notarization went from being a rarity to a commonplace occurrence, as governmental authorities scrambled to change administrative rules and policies in order to capture the social distancing

* This book is not intended as legal advice to any person or firm.

¹ 15 U.S.C.A. § 7001 et seq. (2000).

² UETA was developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved by NCCUSL in July 1999.

benefits of electronic commerce.

Similarly, and as will be discussed elsewhere in this volume, about \$700 billion in Small Business Administration Payroll Protection Act loans to small businesses had to be disbursed in short order. For this niche lending industry that had hitherto operated chiefly in paper, the authority granted by the ESIGN Act played a substantial role in the salvation of millions of small businesses. Funds were limited and electronic origination mechanisms were a tailwind to hasten funds to where they were needed.

Changes in ways of doing business brought on by the COVID-19 pandemic have become embedded in the way business is conducted, particularly in relation to electronic records. There will be no turning back. Embraced out of necessity in many contexts, digital solutions are taking root and have become a part of the expected way of doing business. It is fortuitous that the legal framework provided by the laws that this volume describes was in place when the crisis struck and that the benefits of digital technology could be used to bridge to chasm in commerce that otherwise would have been impassable, making what is a bad enough economic crisis all the worse.

As electronic contracting and digital transaction management continues to expand, questions inevitably arise regarding the meaning and application of these seminal laws, ESIGN and UETA. Disputes involving electronic signatures and electronic records regularly reach the courts. Our goal in authoring and regularly updating this book is to help reduce uncertainties by presenting readers with a clear explanation of the terms used in electronic signatures and records legislation, the context in which the laws were adopted, and the ways in which we believe the drafters intended them to be interpreted. To this effort we bring a collective history of close, contemporaneous observation of the drafting process in which we, in various capacities, participated, as well as our individual insights from over 60 years combined experience as counsel and advisors to companies and trade associations seeking to implement electronic signature and records in a variety of contexts, particularly in the areas of finance and health care.

Unlike most major federal legislation, the ESIGN Act does not have the benefit of a Conference Report or Joint Statement of Managers explaining the final version of the bill reported by the

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House-Senate Conference Committee.³Furthermore, the E-SIGN Act is self-effectuating, that is it does not call for any agency to adopt regulations to facilitate its implementation. Therefore, there is little authoritative, official commentary available to practitioners seeking to interpret this law. In this context, a commentary like the present text, prepared by authors familiar with the drafting process as well as practical implementation in a transactional context, we hope will be helpful in explaining the drafters' intent.

This work is written in an evolving e-commerce environment. The text is intended to be a comprehensive statement of the U.S. law of electronic records and signatures at the date of publication.⁴However, the laws we are writing about and their uses are not static. We will continue to update this work on a regular basis to keep it current with developments in the marketplace and in the legislative, regulatory, and judicial contexts where these laws will be applied, interpreted, and amended. Hence, this updated edition.

The evolution of the digital media as a mechanism for the delivery of a wide range of services over the last 24 years, when viewed in perspective, has been transformative, but the process is ongoing. There is a growing awareness that Big Data and Artificial Intelligence applications will impact all aspects of the digital economy, including the use of electronic signatures and records in ways that are not yet fully appreciated. Furthermore, introduction of block chain technology and Smart Contracts must take into account the requirements of E-Sign and the UETA. And it is of course recognized that cyberattacks pose risks to electronic records that will need to be monitored. These developments are largely beyond the scope of this book at present, but their impact on the ways in which electronic records will be created, stored and used cannot be ignored.

When the first edition of this book went to print, the authors were serving as reporter and legal counsel to the Drafting Committee on Standards and Procedures for Electronic Records and Signatures ("SPeRS"). The SPeRS initiative developed industry-driven rules of the road for the use of electronic records and

³ Legislative history is made even murkier by the fact that conferees conducted their negotiations through staff behind closed doors.

⁴ Except for Chapter 21, this text focuses on the law of the United States and the states. It does not review the electronic commerce, electronic signature, or other similar laws of the European community or elsewhere outside the United States.

signatures.⁵

Recognizing that this work may be used as a reference tool for a particular statute, we have attempted to make the ESIGN and UETA chapters into free-standing texts to the fullest extent possible, avoiding excessive cross-referencing. However, because the principles of law underlying both statutes are very similar, there is necessarily some duplication in the chapters. While this aspect of the work may be annoying to anyone who reads the entire text, we ask your indulgence of our decision to make the ESIGN and UETA chapters independent of each other.

The authors wish to recognize the work of John Kromer, who served as a co-author for the original text of this book. We thank him for his efforts in launching of this book. We also want to recognize the important role played by Andrea Lee Negroni in contributing to and coordinating our efforts to produce the original text. In addition, we would like to thank Andrew W. Grant and Liz Caires, both attorneys at DLA Piper LLP, and Edward W. Somers, a partner at Orrick, Herrington and Sutcliffe, for their contributions.

Finally, coauthors Buckley and Tank want to recognize the extraordinary contribution of our colleague David Whitaker to our mutual efforts to produce this work. This book is a collaborative production, but David's commitment deserves special acknowledgment.

⁵ Participants in the SPeRS initiative were financial services and technology companies as well as trade associations representing the insurance, banking, securities, and software industries.



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