

The Federal E-Sign Act: Positives and Pitfalls

PwC General Counsels Forum

City Club

January 18, 2001

Presented by:

**Marc Pearl &
David Cynamon**

What We Will Cover

- Overview - How We Got Here
- Contract Formation
- Record Retention
- State Preemption
- Consumers

What E-Sign Sets Out To Do

- ▶ Legitimize business conducted by electronic means
- ▶ Continues the advancement of e-commerce
- ▶ Establishes uniformity in intrastate, interstate & foreign commerce
- ▶ Eliminates the obstacles and uncertainties to efficient interstate online transactions posed by different states' laws
 - While allowing states to maintain their own measures if they conform to the federal standards
- ▶ Only applies where the parties have mutually agreed to conduct their business electronically or accepted use of an e-signature.

What E-Sign Is

▶ **Technology Neutral**

- States prohibited from adopting statutes or regulations requiring (or accord greater legal status to) specific technology for the *generation, storage, communication or authentication* of electronic records/signatures.

▶ **Medium Neutral**

- E-signatures, contracts, records & notices are not denied legal effect, solely because they are in an electronic format

Electronic Signatures in Global and National Commerce Act

Public Law #106-229

▶ National Law

- Signed into law on June 30, 2000
- Contract Formation - Effective 10/1/2000
- Record Retention - Effective 3/1/2001

▶ State Initiatives

- *Uniform Electronic Transactions Act (UETA)* - 7/1999

▶ Global Initiatives

- *EU E-Signature Directive* - 199/93/EC - 12/1999
- Argentina, Australia, Bermuda, Canada, Columbia, Czech Republic, Hong Kong, India, Malaysia, Peru, Philippines, Singapore, Slovenia, South Korea, Switzerland, Thailand

UETA States (as of 1/1/2001)

- | | |
|--------------|------------------|
| ‣ Arizona | ‣ Maryland |
| ‣ California | ‣ Minnesota |
| ‣ Delaware | ‣ Nebraska |
| ‣ Florida | ‣ North Carolina |
| ‣ Hawaii | ‣ Ohio |
| ‣ Idaho | ‣ Oklahoma |
| ‣ Indiana | ‣ Pennsylvania |
| ‣ Iowa | ‣ Rhode Island |
| ‣ Kansas | ‣ South Dakota |
| ‣ Kentucky | ‣ Utah |
| ‣ Maine | ‣ Washington |

What E-Sign Does NOT Cover

Certain Transactions Exempt

- ▶ UCC transactions (except for sale/lease of goods)
- ▶ Adoption, divorce and other family law matters
- ▶ Creation and execution of wills or trusts
- ▶ Court orders
- ▶ **“Essential Consumer Services”** - e.g. notices of cancellation/termination of utility services and health or life insurance (*but not cable/phone*)
- ▶ *Secretary of Commerce to review these exceptions over three years to determine if they warrant continued exclusion.*

Contract Formation - §101(a)

- ▶ **Core provision of E-Sign...**

- Ensures that electronic signatures, contracts, records and notices are not denied legal effect solely because they are in electronic format.
- ▶ No new substantive contract rules imposed, nor are existing laws governing contract formation changed.
- ▶ No requirement for the use or acceptance of electronic transactions.

Contract Formation Issues

- ▶ Law of Unintended Consequences
- ▶ Questions regarding electronic communications (e.g. solicitations) in advance of a contract's formation.
- ▶ Questions regarding “intent to sign” or an “intent to engage in any other legal act” - governed by other law, regardless of whether electronic or on paper.
- ▶ Questions surrounding a device embedding an “electronic signature” when a claim of no express authorization.
- ▶ Questions surrounding what constitutes a “signature” in the first place.

Contract Formation Pitfalls

- ▶ What constitutes the formation of an electronic contract?
- ▶ Should a particular technology be required to guarantee the sanctity of the e-signature?
- ▶ Should the use of e-mail/website disclaimers become SOP?
- ▶ How can a company protect against new and broader opportunities for forgeries?

Record Retention - §101(d)

- ▶ ***Medium Neutrality*** ensures that e-signatures, contracts, records and notices are not denied legal effect solely because they are in electronic format
- ▶ Legal barriers to collecting/storing electronic documents - eliminated (including requirements to keep originals) if they are *accurate and accessible*.
- ▶ Electronic notarization, acknowledgement, and verification are provided for.

Record Retention Issues

- ▶ Could a state deny overall enforceability of a contract if the record does not meet retention requirements?
 - E.g. What if a state has a general requirement of the contract being in “writing”?
- ▶ What is a company's responsibility to a consumer when the company changes technology?

Record Retention Pitfalls

- ▶ Will electronic records become fertile ground for discovery in litigation (e.g. e-mail in the Microsoft antitrust case)?
- ▶ Does the medium-neutral aspect of the Act create evidentiary issues?

State Preemption - §102(a)

- ▶ Key goal was to develop a nationwide standard while preserving the ability of states to “modify, limit or supersede” E-Sign through adoption of UETA.
- ▶ A state cannot abandon technological neutrality.
- ▶ But a state cannot rely upon §3(b)(4) or §8(b)(2) of UETA to create exceptions beyond those authorized by or inconsistent with the federal act.

State Preemption Issues

- ▶ What if a state adopts “some” provisions of a UETA that are inconsistent with E-Sign?
- ▶ What occurs when a dispute arises between a UETA state and a non-UETA state?
- ▶ Will parties raise an issue over ostensibly “intrastate” transactions if a state’s UETA enactment is inconsistent with E-Sign and E-Sign appears to govern?

State Preemption Pitfalls

- ▶ Will the issue of “intrastate” transactions be raised if a state’s UETA enactment is inconsistent with the E-Sign Act?
 - Does E-Sign govern?
- ▶ Are there ramifications for a state that has “modified, limited or superseded” E-Sign through adoption of UETA?

Consumers

- ▶ E-Sign specifically addressed the concern of consumers who might have been “unwittingly” bound by contractual terms online -
 - Provides for Affirmative Consent:
“Opt-in”
 - Expressly preserves existing consumer protections
- ▶ Legal effectiveness will not be denied solely because of the failure to obtain electronic consent or confirmation
- ▶ FLEXIBLE “OPT-OUT” - Consumer may withdraw such consent and request an “alternative” format without penalty.

Consumers (cont.)

- ▶ Must receive “**clear and conspicuous**” notice regarding such things as:
 - Having the record provided non-electronically
 - Being informed whether consent applies to the specific transaction or to all
 - Procedures for withdrawing consent
 - Obtaining paper copies

Consumer Pitfalls

- ▶ What is the responsibility of a business to determine the identity - business or consumer - of a client when transacting business?
 - What happens when a client has dual identity?
- ▶ Do legal challenges await if a company bundles the opt-in and clear and conspicuous notice requirements in a click-through terms of service agreement?

E-Sign Issues Not Addressed

- ▶ No provisions for when an electronic message is deemed to have been sent or received.
- ▶ No provision for determining to whom a communication shall be attributable in the absence of an acknowledgment.
- ▶ Transferable “Negotiable Instruments” only covered in UETA [§16]. E-Sign addresses only mortgage loans [§201(a)(1)].

E-Sign Resources (hyperlinked)

- ▶ The E-Sign Act
- ▶ The Uniform Electronic Transaction Act (UETA) with comments
- ▶ Shaw Pittman Client Alert - *Go to: Subject Listing, Non-Profit Organizations, Publications, Alerts - "E-Sign"*

Thank You

Contact Us At:

- ▶ **Marc Pearl** - (202) 663-8993 -
marc.pearl@shawpittman.com
- ▶ **David Cynamon** - (202) 663-8492 -
david.cynamon@shawpittman.com

2300 N Street, NW - Washington, DC 20037

<http://www.shawpittman.com>