

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

What is the Uniform Electronic
Transactions Act?

What is the Role of State Law Since the
Enactment of the Federal E-Sign Act?

Addresses

- www.nccusl.org
- www.uetaonline.com
- www.law.upenn.edu/bll/ulc/ulc.htm

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UNIFORM STATE LAW

- Approved by National Conference of Commissioners on Uniform State Laws in 1999
- Enacted in 22 States: AZ, CA, DE, FL, HI, ID, IN, IO, KS, KY, ME, MD, MN, NE, NC, OH, OK, PA, RI, SD, UT, VA
- Introduced in another 7 states: AL, CO, DC, MI, NJ, VT, WV

What is UETA

- It IS an electronic record and signature statute. UETA leaves existing law in place while providing that electronic records, signatures and contracts shall not be denied validity based solely on the medium.
- NOT a contract statute
- NOT a digital signature statute

Excluded Transactions

Negotiable Instruments

Article 3 of the UCC

Bank Deposits and Collections

Article 4 of the UCC

Funds Transfer

Article 4A of the UCC

Letters of Credit

Article 5 of the UCC

Secured Transactions

Article 9 of the UCC

Excluded Transactions

- Wills and Testamentary Trusts
- Other Laws Identified by Legislature

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Three Pillars of UETA

- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form
- If a law requires a writing, an electronic record satisfies the law
- If a law requires a signature, an electronic signature satisfies the law

Meeting the Writing Requirement

If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.

Capable of Retention

An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

Format or Delivery

If another law requires a record to be posted or displayed in a certain manner, or sent or communicated by a specified method, or be formatted in a certain manner:

- it must be posted or displayed in the manner specified
- it must be sent, communicated, or transmitted by the specified method
- it must be formatted in the specified manner

Electronic Signature

An “electronic sound, symbol, or *process* attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”

UETA §2(8)

Electronic Signature

- Includes
 - traditional ink signatures
 - typed names
 - a click-through on a software program’s dialog box combined with some other identification procedure
 - biometric measurements
 - a digitized picture of a handwritten signature
 - a complex, encrypted authentication system

Signature vs. Attribution

- UETA answers the question “is it a signature?”
- UETA says attribution must be proven
 - May be proven by any means, including surrounding circumstances or efficacy of agreed-upon security procedure
 - Burden of proof is on person seeking to enforce signature UETA §9(a)

Intent and Authentication

- Signer must intend to “authenticate” a document at signing
- Four basic types of authentication
 - I agree to it
 - It came from me
 - I’ve seen it
 - I got it
- Purpose of signature derived from surrounding circumstances, just as on paper
- Need “indicia of intent”, just as on paper

Automated Transaction

- A contract may be formed by interaction of electronic agents, w/o human action.
- A contract may be formed by interaction of electronic agent and human.
- Terms of contract are determined by applicable substantive law.

UETA §14

Change or Error in Transmission

If the parties have agreed to use a security procedure to detect changes or errors, and the change or error would have been detected by conforming, other party may avoid effect of the changed or erroneous record.

UETA §10(1)

Error in Automated Transaction

An individual may avoid error if:

- Electronic agent did not provide error correction process
- Gives prompt notice of error
- Takes reasonable steps to return or follow reasonable instructions
- Has not used or received benefit

UETA §10(2)

Electronic record-keeping

- Legal requirements satisfied by electronic record of information
- Must be accurate, remain accessible
- May out-source
- Governmental agency may specify additional requirements.

UETA §12

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
 - activity logs
 - security of copies stored offsite to verify content

SENDING AND RECEIVING RECORDS

UETA §15

Time of sending UETA §15

Unless otherwise agreed, an electronic record is sent when it:

- Is properly addressed to information system designated or used by addressee;
- From which addressee is able to retrieve;
- In a form capable of being processed by that system;
- Enters system outside control of sender.

Time of Receipt

UETA §15

Unless otherwise agreed, electronic record is received when it:

- Enters information processing system recipient has designated or uses;
- Is in a form capable of being processed by that system.

Place of sending and receipt

Unless otherwise agreed, electronic record is deemed sent from or received at a party's place of business. If there is no place of business, it is deemed sent from or received at the party's residence.

UETA §15

Transferable Record

- UETA Transferable Record
 - Promissory notes
 - Documents of title
- An electronic record meeting certain criteria has the two primary attributes of a negotiable document:
 - Freedom from most defenses
 - Freedom from most third party claims

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Transferable Record

- The criteria:
 - The electronic record contains only the same terms and conditions that are permitted in a paper negotiable note or paper document of title
 - The electronic record is electronically signed
 - The issuer of the record has agreed that it should be treated as a *transferable record* under the UETA, and...

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Transferable Record

- The identity of the person entitled to enforce the record can be reliably determined from
 - the record itself or
 - a method employed for recording, registering, or otherwise evidencing the transfer of interests in the record
- *Then* - The person entitled to enforce the record gets the same rights as a holder of an equivalent paper document

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Transferable Record

- Caution: The UETA sets standards for systems that will “reliably determine” the identity of the person entitled to enforce the record -- these standards are not easy to meet and will require sophisticated systems

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Transferable Record

- Potential:
 - Key step in full “dematerialization” of conventional mortgage, document of title and commercial paper transactions
 - Significant impact on transaction speed and administrative cost efficiencies
 - New business models for financing

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The Federal E-SIGN Act

- A federal solution -- the *Electronic Signature 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
 - Sets boundaries for regulatory authority

The Federal ESIGN Act

- Like UETA...
 - Adopts UETA definitions of
 - Electronic
 - Electronic Agent (non-material language variation)
 - Electronic Record
 - Electronic Signature (non-material language variation)
 - Information
 - Person
 - Record
 - Transaction (with additional language)
- [See § 106]

The Federal ESIGN Act

- Like UETA...
 - Adopts (in restated form) the three pillars of the UETA [See § 101(a)]
 - Adopts (in restated form) “Opt-in” rule [See § 101(b)(2)]
 - Adopts preservation of formatting requirements [See § 101(b)(1)]
 - Adopts record & check retention rules (with added specificity) [See § 101(d)]

Continued

The Federal ESIGN Act

- Like UETA...
 - Permits electronic originals [See § 101(d)(3)]
 - Adopts the rules on notarization
 - Adopts the rules for electronic agents (in modified form) [See § 101(h)]
 - Adopts the exceptions for
 - Wills, codicils and testamentary trusts
 - Articles 3 through 9 of the UCC
 - Preserves substantive legal rights and obligations [See § 101(b)(1)]

Continued

The Federal ESIGN Act

- Makes explicit (implicit in UETA)...
 - Preservation of content and timing of consumer disclosures [See § 101(c)(2)(A)]
 - Preservation of any rule concerning the proximity or physical location of any warning, notice or disclosure [See § 101(f)]
 - Application to insurance laws [See § 101(i)]

CONTINUED

The Federal E-Sign Act

- Grants (with important limits) federal and state regulatory agencies authority to:
 - Determine when and if government documents will be filed electronically, and to specify formats and other requirements [See § 104(a)]
 - Provide interpretive rules within substantive jurisdiction (See § 104(b)(1))
 - Establish record retention requirements for records required to be available for government inspection, review or audit [See § 104(b)(3)]

The Federal E-SIGN Act

- Unlike the UETA...
 - Limited to commercial (including consumer) and business transactions in or affecting interstate commerce [See § 101(a)]
 - Adopts specific standards for consumer consent to use electronic records and signatures [See § 101(c)(1)]
 - Permits substitution of electronic delivery of consumer disclosures, if delivery includes acknowledgment of receipt, for other delivery requirements [See § 101(c)(2)(B)]

CONTINUED

The Federal ESIGN Act

- Unlike the UETA...
 - Excludes recordings of oral communications from definition of electronic record for purposes of consumer transactions [See 101(c)(6)]
 - Adds exclusions and exemptions from statute [See § 102]
 - Expressly limits regulatory authority to impede or obstruct effective use of the statute [See §§ 102(c), 104(b)(2), 104(c)]
 - Limits Transferable Records to promissory notes secured by an interest in real property [See § 201(a)(1)(C)]

The Federal ESIGN Act

- Unlike the UETA...
 - No variation by agreement
 - Retention rules require that the record be available to all parties at risk of unenforceability

The Federal ESIGN Act

- Consumer Consent – a closer look
 - Special procedure required if statute, regulation or other rule of law calls for a writing
 - Basic rules
 - Consumer must affirmatively consent
 - Other party must provide disclosures prior to consent in clear and conspicuous statement
 - Consent must demonstrate ability to receive documents

The Federal ESIGN Act

- Consumer Consent – a closer look
 - Clear and conspicuous disclosure of
 - Consumer's right to have documents provided on paper
 - Consequences of withdrawal of consent
 - Fees
 - Termination of transaction
 - Scope of transaction covered by consent
 - Procedure for withdrawing consent and updating contact info
 - Procedure and fees for obtaining paper copies
 - Hardware and software requirements for accessing and retaining records

The Federal ESIGN Act

- Consumer Consent – a closer look
 - “Reasonable demonstration” [See § 101(c)(1)(C)(ii)]
 - Consumer consent must
 - Be electronic or be confirmed electronically
 - include a “reasonable demonstration” of consumer’s ability to access information in the electronic form(s) provided
 - Legislative history attempts to set standard
 - Test is not intended to “burden commerce”
 - Email confirming receipt of test files is sufficient
 - Failure to include “reasonable demonstration” in consent process may not be used as basis to invalidate contract [See § 101(c)(3)]
 - Query: How to handle transactions where consumer gets paper but business retains electronic records?

The Federal ESIGN Act

- Consumer Consent – a closer look
 - Change in hardware or software requirements triggers new procedure
 - Notification to consumer of new requirements
 - Statement of right to withdraw consent without fees and without any previously undisclosed penalty
 - New “reasonable demonstration” of ability to access records
 - Consumer consent provisions may be modified or eliminated by federal regulator to relieve burden on commerce

The Federal ESIGN Act

- Federal Preemption – a closer look
 - State may supercede requirements of Section 101 with
 - Adoption of the Official Text of the UETA (before or after ESIGN enactment)
 - Adoption of other rules that
 - Are consistent with ESIGN Act rules
 - Do not favor a specific technology (except for rules governing procurement)
 - If enacted after ESIGN, make specific reference to ESIGN Act
 - [See § 102]

The Federal ESIGN Act

- Federal Preemption – a closer look
 - Three potential interpretations of exception for states enacting UETA
 - Official Text or nothing – any non-uniform amendments invalidate entire statute
 - Official Text survives – any non-uniform amendment is invalid
 - Official text plus consistent provisions – non-uniform amendments okay if consistent with ESIGN

The Federal ESIGN Act

- Federal Preemption – a closer look
 - State can establish rules governing filing of records without regard to ESIGN
 - Consumer consent and retention and access rules only apply to transactions governed by state law if underlying state statute or rule of law requires a writing
 - UCITA
 - Other state statutes?