

Contact: Jim Whitter, 202/624-7825, <jwhitter@nga.org>  
September 22, 2000

## **What Governors Need to Know About E-SIGN: The Federal Law Authorizing Electronic Signatures and Records**

### **Summary**

On June 30, 2000, President Clinton signed into law the Electronic Signatures in Global and National Commerce Act (E-SIGN). The act is intended to eliminate barriers to the use of electronic signatures and electronic records only in interstate or foreign commercial transactions. The key provision of the act is contained in E-SIGN §101, which states that electronic signatures and records may not be denied legal effect or validity solely because they are in electronic form.

The federal act provides a framework for the use and retention of electronic records and signatures in three basic steps. First, it recognizes that electronic signatures and electronic records are as legally effective, valid and enforceable as manual signatures and paper writings. Second, it recognizes that laws should be neutral as to the specific technologies and means used to create such records and signatures. And third, it requires that the legal effect, validity or enforceability of a document may be denied if it is not retained in a manner that accurately reproduces the document and is accessible to the parties of interest.

E-SIGN preempts state laws that:

- recognize only paper records or handwritten signatures, or invalidate signatures or contracts solely on the basis that they are created or maintained in electronic formats; and
- address private-sector interstate or foreign consumer, commercial or financial transactions that deal with real property, personal property, or services.

State actions that do not affect these transactions are not covered under E-SIGN. Additionally, E-SIGN specifically excludes state contract and procurement actions from the law's impact. The act also allows states to establish, in state rules or guidelines, standards and formats for records that are filed with state agencies, as well as to set some retention standards for records retained by the private sector under state law.

States that have adopted the Uniform Electronic Transactions Act (UETA), as approved and recommended by NCCUSL in 1999 without exceptions, will not have that law preempted when E-SIGN comes into effect October 1, 2000. Those states that have not adopted UETA, have adopted it with changes, or have adopted a different law that addresses the validity of electronic signatures or records, may have their electronic signature and records laws or sections of those laws preempted by the

federal act under certain prescribed circumstances. A state law that modifies, limits, or supercedes the provisions of E-SIGN §101 must pass three tests to avoid preemption.

- It must specify procedures or requirements for the use or acceptance of electronic signatures and records.
- The procedures or requirements must be consistent with the provisions of E-SIGN.
- The procedures or requirements cannot require the use of a specific technology or give a specific technology greater legal preference.

States should take the following steps to prepare for E-SIGN.

- Analyze their current laws affecting electronic signatures and electronic records that could modify, limit, or supercede E-SIGN §101 to determine the potential for preemption.
- Take steps to ensure state government operations recognize and accommodate the use of electronic signatures and electronic records by the private sector.
- Help businesses in the state prepare to use electronic signatures and electronic records legally and effectively.
- Continue to move forward with state electronic government and electronic commerce initiatives.

### **Background**

The New Economy is revolutionizing modern life. Governors know that the future of their states depends on how they manage and embrace these changes. Because communication and information sharing is so important in the New Economy, states have taken many steps to support electronic commerce and electronic government for their citizens and will continue to do so in the future.<sup>1</sup> Enabling the use of electronic signatures and electronic records is a key component of these efforts.

People have traditionally relied on paper and handwritten signatures to enter into contracts, disclose information, and otherwise conduct business. However, with more and more business conducted through information systems such as the Internet, people have begun to use electronic methods to accomplish the same results as paper records and handwritten signatures.

Many state and federal laws include requirements for handwritten signatures and paper records, and thus could create barriers to the use of their electronic counterparts. To address this issue, all 50 states have passed laws authorizing the use of electronic signatures and records, either for all transactions or for specific purposes.<sup>2</sup> Some of these laws allow the use of any electronic method agreed to by the parties in a transaction, while others set specific criteria or encourage the use of particular technologies.

On July 29, 1999 The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Electronic Transactions Act (UETA) to submit to state legislatures for adoption. Twenty-two states have adopted UETA so far, most with exceptions to the version approved by

NCCUSL (see discussion of UETA on page 5), and seven more have introduced it for consideration in their state legislatures. Several other states will likely consider UETA in the next legislative session.

Congress has also been concerned about the legal framework governing use of electronic signatures at the federal level and a lack of uniformity in state electronic signature and electronic record law. E-SIGN was passed to establish a nationwide policy for the acceptance and use of electronic signatures and records in interstate or foreign commercial, financial and consumer transactions. Although E-SIGN defers to UETA or alternative state laws consistent with E-SIGN, the federal legislation raises several questions for all states, whether or not they have passed legislation.

### **What Transactions Could be Impacted by E-SIGN?**

E-SIGN addresses the use of electronic signatures and electronic records only in business, consumer or commercial transactions involving interstate and foreign commerce. It states, “a signature, contract or other record relating to such a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” Contracts used in interstate and foreign commerce are similarly protected if an electronic signature or record is used in their formation.<sup>3</sup> The federal act has an effective date of October 1, 2000, except for the sections addressing record retention requirements mandated by federal or state laws or regulations, which take effect on March 1, 2001. However, if a state has “announced, proposed, or initiated, but not completed” a record retention rule on March 1, 2001, E-SIGN’s record retention provisions will not become effective until June 1, 2001 for items covered by the rulemaking.<sup>4</sup>

The act also includes a series of consumer protections in §101(c) that describe specific procedures a company must follow if it wishes to use electronic communication to provide notices it is required to supply in writing under current law. E-SIGN requires a company to get affirmative consent that demonstrates the consumer’s ability to access the information electronically. It also prohibits some types of notices, such as eviction notices or termination of health insurance benefits, from being provided electronically.<sup>5</sup>

In addition to the consumer notices discussed above, the following areas are excepted from E-SIGN.<sup>6</sup>

- Transactions governed by state laws on the creation and execution of wills, codicils, or testamentary trusts or adoption, divorce, or other matters of family law.
- Court orders and notices, or other required official court documents.
- Transport documents required to accompany hazardous or toxic materials.
- Contracts or records governed by articles 3-9 of the Uniform Commercial Code (UCC), which address such issues as checking and electronic funds transfer systems, paper-based negotiable instruments and rules on letters of credit and investment securities.<sup>7</sup>

State laws or regulations determine the use of electronic signatures or records in these areas.

### **How Will E-SIGN Affect State Government Actions?**

E-SIGN does not compel a state to accept electronic signatures or electronic records in governmental activities, contracts it is a party to, or filings it accepts from the general public or regulated entities. The

federal act is intended to remove barriers to the use of electronic signatures and electronic records by the private sector when engaged in interstate or foreign commercial or financial transactions, as opposed to governmental transactions. Thus, the federal act should serve to complement rather than inhibit ongoing state efforts to promote electronic commerce and electronic government. E-SIGN also preserves the ability of states to set performance standards for record retention by private entities under state regulatory oversight. The implications of E-SIGN for these aspects of state government activity are discussed in more detail below.

**Electronic Government.** Section 101 of the federal act limits its scope to “any transaction in or affecting interstate or foreign commerce.” “Transaction” is defined in §106(13) as “relating to the conduct of business, consumer, or commercial affairs between two or more persons,” including the “sale, lease, exchange, licensing, or other disposition of” real property, personal property, or services. Government affairs are not included in the E-SIGN definition of “transaction.” Therefore, E-SIGN does not affect state actions to provide electronic government services to citizens and businesses, streamline the regulatory process, or increase the efficiency of state agency operations.

**States as Parties to Contracts.** States retain the same rights as any other party to determine whether or not they wish to use electronic signatures or records in contracts they enter into.<sup>8</sup> In the major area that states enter into contracts with the private sector—procurement—the federal act gives states wide latitude. Section 102, which describes how state laws are permitted to modify or supercede E-SIGN, specifically excludes state laws and regulations governing procurement. This means states can establish rules and procedures as they deem necessary for the use or acceptance of electronic signatures and records when they are purchasing goods or services from the private sector. For example, if the state decides to only enter into electronic procurement contracts using a particular type of encryption for a signature, E-SIGN does not prevent it from doing so.

**Regulatory and Other Filings.** The federal act recognizes that states need to control how and when information is submitted to their agencies. It specifies in §104(a) that nothing in the act “limits or supercedes any requirement” by a state regulatory agency that establishes standards or formats for filings submitted to that agency, including non-electronic standards and formats.

**Oversight Functions.** E-SIGN preserves state authority to establish performance standards to ensure the accuracy, integrity, and accessibility of records it requires the private sector to retain under state laws and regulations. The federal act mandates that these record retention requirements do not “require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification” to achieve the performance standards goal. However, states may impose technology-specific requirements if they serve an important governmental objective and are substantially related to achieving that objective.<sup>9</sup> A state may even require retention of paper if such a requirement is essential to serve a compelling law enforcement interest. State law enforcement extends well beyond criminal conduct, and includes such matters as health and safety mandates.

#### **How Will E-SIGN Affect Current State Electronic Signature and Electronic Record Laws?**

E-SIGN does not necessarily preempt state laws on electronic signatures and records. For example, state laws concerning transactions with government agencies are clearly outside the scope of E-SIGN.

A state law should not be preempted unless it modifies or contradicts the basic federal concept that signatures, contracts and other records in commerce are not illegal on the sole grounds they are electronic. For those state laws that do seek to modify, limit, or supercede E-SIGN §101, the act provides two exemptions to preemption in §102(a)—an unmodified version of UETA, or applying specific tests to other state laws.

**Uniform Electronic Transactions Act.** If a state has passed UETA without changing it from the 1999 version approved and recommended by NCCUSL, the state's enactment of UETA supercedes E-SIGN as it applies to state law.<sup>10</sup> Although UETA §3(b)(4) allows states to make changes to its scope, E-SIGN would preempt any such changes that are inconsistent with the federal act. E-SIGN also preempts states from requiring the use of paper for some types of notices and disclosures, although UETA allows this under §8(b)(2). States that have exempted broad areas of state law or otherwise varied from the uniform provisions of UETA will need to examine these changes carefully to see if they meet the tests described in E-SIGN §102(a)(2)(A).

**Other State Laws.** Section 102(a)(2)(A) of E-SIGN lays out three tests a law or regulation that seeks to modify, limit, or supercede §101 must pass to avoid preemption.

- It must specify the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records.
- The alternative procedures or requirements must be consistent with Titles I and II of E-SIGN.
- The alternative procedures or requirements cannot require the use of or give greater legal status or effect to a specific electronic signature or records technology.

The state laws most likely to be preempted by E-SIGN are those that only recognize a specific technology as creating a valid or legally enforceable electronic signature or record. For example, a state law would probably be preempted after E-SIGN takes effect if it requires private sector participants engaged in interstate or foreign business, consumer or commercial affairs to use a specific type of encryption technology in order for an electronic signature to be recognized as valid.

**Voluntary Systems.** Several states have adopted alternative electronic signature and record laws that include certain legal benefits for those who elect to comply with the state law. For example, some state laws establish a state-regulated public key infrastructure (PKI) electronic signature system that government and private sector entities can use. If a state-licensed vendor provides the approved PKI technology, that electronic signature is presumed in state court to be attributed to the party to the transaction. Other state laws create equivalencies that give the use of electronic signatures meeting certain non-technology specific and outcome-based characteristics the same validity and effect as handwritten signatures, without denying the validity of any other electronic signature technology.

E-SIGN should not affect these types of state laws, including those dealing with licensing provisions for certificate authorities and other providers of electronic signature and records services. Provided the system is voluntary, states are free to set legal standards for specific types of electronic signatures and records in any substantive area traditionally governed by state laws. E-SIGN only prohibits these state laws from denying validity, legal effect, or enforceability to specific technologies for the creation of

electronic signatures or records. This interpretation allows states to give a greater presumption in areas such as attribution, party obligations, burden of proof, or manifest assent to a contract that would apply in state courts. Furthermore, E-SIGN §101(b)(1) preserves requirements imposed by state laws on the rights and obligations of persons engaged in interstate and foreign commercial transactions other than a requirement that contracts or other records be written, signed by hand, or in non-electronic form.

### **Can States Still Enact Laws or Regulations on Electronic Signatures and Records?**

States can still enact new laws on electronic signatures and records after E-SIGN comes into effect. These laws will need to pass the same tests applicable to current laws. Additionally, any new electronic signature or record laws, other than UETA, that modify, limit, or supercede E-SIGN must reference E-SIGN.<sup>11</sup> Under E-SIGN §101(b)(1), states clearly retain the authority to govern the underlying rights and obligations of persons under their jurisdiction. In other words, a substantive consumer right to receive a notice in five days would still apply (though under E-SIGN, the notice may be permitted in electronic form.)

The ability of state agencies to issue regulations, within the scope of their jurisdiction, that interpret E-SIGN with respect to state statutes is provided for in §104(b) of the act. These regulations must meet the same test as applied to current laws under E-SIGN §102(a)(2)(A). The state agency also must have a substantial justification for issuing the regulations, and the regulations cannot impose additional requirements to those in E-SIGN §101. For example, agencies may impose a requirement that a record be in tangible or printed form with a compelling law enforcement justification. In addition, a state may avoid the additional requirements under §104(b) by simply interpreting the state version of UETA and not the federal E-SIGN act (assuming the state has enacted UETA in a uniform fashion, in compliance with E-SIGN's requirements, and explicitly indicates in the state act that UETA supercedes E-SIGN.)

### **Should States That Have Not Passed UETA or Alternative State Laws Yet Do So?**

States can consider enacting UETA as a uniform state law. UETA covers a number of issues not addressed in the federal legislation, and was written to mesh well with current state commercial and contract law. Further, UETA defers to existing state law whenever possible, leading to a different approach than E-SIGN on some issues.

E-SIGN also provides legislative incentives to states that enact UETA. The technology-neutrality requirements of E-SIGN can be avoided when a state enacts UETA, but any other state law is subject to this federal requirement. UETA also clearly provides that use or acceptance of electronic records is voluntary for all parties: citizens, businesses or government. While it is widely agreed that E-SIGN cannot require states to accept or use electronic records, enacting UETA and superceding E-SIGN would clarify any ambiguity on this point.

Some of the differences between UETA and E-SIGN include the following.<sup>12</sup>

- UETA contains transactional provisions that address *attribution*, the effect of *party agreements*, *sending and receiving* of records, the effects of *changes and errors* in transmission, and

*admissibility* into evidence in court. E-SIGN does not address these issues, but instead allows state laws to control these matters.

- E-SIGN Title II provides for electronic *transferable records* secured by real property. UETA contains broader provisions on transferable records, including promissory notes and documents of title.
- *Consumer protection* in E-SIGN focuses on specific methods to ensure consumer assent to electronic notices, while UETA emphasizes how parties comply with state consumer protection rules. In addition, under UETA, an electronic record cannot be enforced against a person if that person was prevented or hindered from printing or storing the record.
- UETA explicitly defers to other state laws on substantive determination of issues such as authority, agency, and contract formation, while E-SIGN simply states that it does not affect any legal issue beyond requirements for writings and signatures.

Another viable option for states is to adopt alternative laws that are consistent with E-SIGN and do not invalidate the use of certain technologies in the creation or maintenance of electronic signatures or records. This option allows states that do not want to be bound by UETA's transactional provisions, but instead favor E-SIGN's approach allowing state statutes and common law to control such substantive issues, to proceed accordingly.

### **What Should States Do to Prepare for E-SIGN?**

**Analyze existing state electronic signature and record laws that could modify, limit, or supersede E-SIGN §101.** This will help states identify laws that could be preempted and the potential effects of that preemption. Nothing in E-SIGN prohibits the use of particular technologies or procedures in interstate or foreign commercial transactions. In most cases, technologies and procedures used by the private sector to conduct interstate or foreign business should not be affected, even if specific state laws are preempted. However, in states that require the use of a specific technology for an electronic signature or record to be considered legally valid in such private sector transactions, it will be important to understand these requirements no longer apply.

**Ensure state government can accommodate the use of electronic signatures and records by the private sector.** Given technological improvements, the increased demand for use of electronic signatures, and the national scope of the E-SIGN act, the use of electronic signatures and records may significantly increase in the near future. In the interest of supporting and facilitating the use of these technologies, state agencies should seek to accommodate their use in all areas of government activities.

Record retention standards will be a key part of ensuring that state regulations are followed by the private sector. States should review their current policies and make any necessary changes to ensure the accuracy, integrity, and accessibility of electronic records. States can extend the effective date for the record retention provisions of E-SIGN to June 1, 2001, by announcing, proposing or initiating the rulemaking process applicable to record retention requirements prior to March 1, 2001. The rulemaking process does not need to be completed prior to March 1, 2001; however, given the time needed to set new rules in most states, it would be best to begin this process as soon as possible.

Regulators may also have to determine whether a regulated entity's use of electronic signatures and records meets regulatory requirements under their jurisdiction beyond simple record retention. For example, state banking regulators often have authority over the safety and soundness of transactions, and would need to decide whether a particular electronic signature implementation meets agency standards. States should provide training for these regulators to explain the security implications of various electronic signature and record technologies so the regulators will be better prepared to make such determinations. States also need to collaborate with federal regulatory agencies to develop rules and regulations in those areas of shared regulatory jurisdiction.

States should also help their courts prepare for the new technology. Courts will be reviewing electronic records used in transactions between parties involved in civil and criminal trials, and must be able to make legal judgments based on that evidence. Electronic signatures and records can be a challenge for courts because there is little precedent governing their use. Many determinations about the validity, attribution, and repudiation of paper documents and written signatures are made based on precedent, but it will be some time before similar rules develop for their electronic counterparts. States may want to work with organizations such as the National Association of Attorneys General to develop appropriate training materials for judges and state attorneys.

**Help businesses and citizens in the state prepare to use electronic signatures and records effectively.** Citizens and businesses need to be able to process electronic transactions in order to succeed in the New Economy. States could create a competitive edge for their economies in national and international commerce by using the following strategies.

- Reach out to businesses and the public to help them understand their rights and responsibilities in using and creating electronic signatures and records. Electronic transactions can be a boon to a state's economy, but the benefits will only come if people feel secure in their use. A state web page is an excellent place for this type of information, which should be publicized widely.
- Communicate with the business community about the interactions between E-SIGN and state electronic signature laws that are not preempted by the federal act so it is clear what standards apply in various situations.
- Demonstrate leadership by using appropriately secured electronic signatures and records in state transactions. When citizens and businesses see that their government uses this technology reliably and with confidence, they will be more willing to depend on it in their own transactions.

**Continue to move forward with electronic government and electronic commerce initiatives.** E-SIGN is intended to promote the use and acceptance of electronic signatures and records in private interstate or foreign commercial transactions. Nothing in the federal act should serve to delay or inhibit what states are currently doing to help businesses and citizens take advantage of the New Economy or to improve the operations of state government.

A key area for future state consideration will be multi-state cooperation on legal and technical standards. The interstate and international scope of electronic commerce makes it important to avoid

conflicting or inconsistent state requirements on electronic commerce as much as possible. States can also save resources by working together on standards in areas such as electronic filing, record retention, and security, while minimizing the burden on those who do business across state lines.

### **Additional Resources**

#### **Legislation**

[Enacted version of E-SIGN](#)

1999 NCCUSL version of [UETA](#)

#### **Articles and Websites**

[A Preliminary Analysis of Federal and State Electronic Commerce Laws](#), Patricia Brumfield Fry

[Congress Passes E-Signature Act](#), Schwartz & Ballen

[E-SIGN of the Times](#), Robert A. Witte and Jane K. Winn

[Why Enact UETA? The Role of UETA After E-SIGN](#), Patricia Brumfield Fry

The Clinton Administration is drafting E-SIGN guidance for federal agencies. It will contain detailed discussions of the application of E-SIGN that may be of interest to state agencies. No release date is currently scheduled for the guidance, but the US Department of Commerce will announce its release in the [Federal Register](#).

---

<sup>1</sup>For more information on what states are doing on the New Economy, see <<http://www.nga.org/NewEconomy/Links.asp>>. For more information on state electronic commerce and electronic government initiatives, see <<http://www.nga.org/InfoTech/index.asp>>.

<sup>2</sup> For a discussion of electronic signatures and records and the types of laws that states have passed, see the NGA *Issue Brief* "Policies Concerning the Acceptance of Electronic Signatures: States Take the Lead," April 4, 1999, at <<http://www.nga.org/Pubs/IssueBriefs/1999/Sum990419DigitalSigs.asp>>. For a current summary of e-commerce and digital signature legislation introduced and adopted by states, see <<http://www.mbc.com/ecommerce.html>>.

<sup>3</sup> E-SIGN §101(a)(1) and 101(a)(2).

<sup>4</sup> E-SIGN §107(b)(1)(B).

<sup>5</sup> The list of consumer information prohibited from electronic distribution is contained in E-SIGN §103(b)(2).

<sup>6</sup> E-SIGN §103.

<sup>7</sup> E-SIGN does apply to sections 1-107 and 1-206 and Articles 2 and 2A of the UCC.

<sup>8</sup> E-SIGN §101(b)(2).

<sup>9</sup> E-SIGN §104(b)(3).

<sup>10</sup> There is some dispute as to whether states that passed UETA prior to the passage of E-SIGN will automatically supercede all aspects of E-SIGN, or just in those areas specifically addressed by UETA. For example, E-SIGN includes a number of consumer protection procedures with no direct counterpart in UETA. Since the state could not have known about these provisions when it passed UETA, some attorneys argue the provisions would not be superceded by UETA. To supercede such provisions of E-SIGN, states may need to amend their adoption of UETA to say that they specifically intend to supercede E-SIGN.

---

<sup>11</sup> E-SIGN §102(a)(2)

<sup>12</sup> This analysis is based on “Why Enact UETA? The Role of UETA After E-SIGN” by Patricia Brumfield Fry, <<http://www.nccusl.org/whatsnew-article2.htm>>.