

THE E-COMMERCE REVOLUTION: E-SIGN and UETA

by Susan Hepner Siegfried *

The Electronic Signatures in Global and National Commerce Act ("E-Sign") was signed into law by then-President Clinton on June 30, 2000. 15 U.S.C. §§ 7001 et seq. (2000). The Virginia General Assembly passed the Uniform Electronic Transactions Act ("UETA") in the same year. VA. CODE ANN. §§ 59.1-479 *et. seq.* (2001). Both laws were intended to smooth the way for conducting business electronically by giving validity to electronic records and signatures.

This article is only a summary of E-Sign and UETA and is not intended to provide an exhaustive discussion of these laws.

E-SIGN

E-Sign is an "overlay" law in that it does not amend any laws specifically but provides that a signature, contract or other record relating to a transaction may not be denied validity solely because it is in electronic form. 15 U.S.C. § 7001. Therefore, if a state statute requires a "writing," the simple fact that the record or signature is in electronic form would not affect the validity of the record or signature.

E-Sign defines the term "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." *Id.* § 7006(5). Under E-Sign, the use of a PIN number, a digital signature (usually defined as one using public key infrastructure technology), or any number of things, including a typed name, might be considered an electronic signature. From a contracting standpoint, what is relevant is whether the signature can be attached to the record, and whether it can be attributed to the person against whom enforcement is sought. The law does not require any person or entity to agree to use or accept electronic records or electronic signatures. Moreover, E-Sign and UETA are technology neutral, i.e. they do not endorse any particular technology.

E-Sign also states that a contract or other record may not be denied legal effect solely because it involved the action of an electronic agent, provided the action of any such electronic agent is legally attributable to the person to be bound. *Id.* § 7001(h). "Electronic agent" is defined as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performance in whole or in part without review or action by an individual at the time of the action or response." *Id.* § 7006(3).

E-Sign specifically provides that it does not apply to, among other things, wills, family law matters, court orders or matters governed by the Uniform Commercial Code, other than §§ 1-107 and 1-206, and Articles 2 and 2A. *Id.* § 7003. E-Sign also does not apply to notice of the cancellation of utilities, or default, acceleration, or foreclosure. *Id.*

E-Sign contains consumer protections regarding mandatory disclosures. Where statute, regulation, or other rules of law require that information relating to a transaction be provided to a consumer in writing, the disclosure may be made in electronic form only if the consumer consents electronically in advance, and certain other conditions are met. *Id.* § 101(c).

E-Sign also contains records retention standards. It states that if law or regulation requires the retention of records for a particular transaction, the retention requirement may be met by retaining an electronic record,

provided certain conditions are met. *Id.* § 101(d). One requirement is that the record remain capable of being reproduced for later reference. *Id.* Therefore, it is important to ensure that the document remains retrievable despite changing technology.

E-Sign provides that if notarization or acknowledgment of a signature or record is required, that requirement is satisfied if the electronic signature of the person notarizing the record is "attached to or logically associated with the signature or record." *Id.* § 7001(g).

E-Sign addresses the electronic creation and execution of notes secured by real estate by creating a category of electronic documents known as "transferable records." E-Sign defines a "transferable record" as an electronic record that

- (A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;
- (B) the issuer of the electronic record expressly has agreed is a transferable record; and
- (C) relates to a loan secured by real property.

Id. § 7021.

E-Sign states specifically that a transferable record may be executed with an electronic signature and sets forth conditions for determining who is a holder in due course of the transferable record. Among other things, E-Sign requires that there be only a single authoritative copy of the transferable record which is unique, identifiable and unalterable. *Id.* § 7021(c). This is a requirement that is dependent on technology that will be able to ensure that only one authoritative copy exists. Writers on the subject of E-Sign have opined that the technology is not yet in place to meet this requirement. There are industry groups in the process of developing standards for such technology. This requirement does not preclude making other copies of the transferable record, provided it is clear which copy is for informational purposes, and which copy is the "authoritative" copy.

UETA

UETA was drafted as a model law by the National Conference of Commissioners on Uniform State Laws in 1999. In 2000, the Virginia General Assembly enacted UETA, with only minor changes.

UETA, like E-Sign, provides that a record or signature may not be denied legal effect simply because it is in electronic form. VA. CODE ANN. § 59.1-485.

UETA allows, but does not require, parties to conduct business electronically. UETA specifically states that it applies to transactions "between parties each of which has agreed to conduct transactions by electronic means." *Id.* § 59.1-483(b). Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. The consent may not be contained in a standard form contract unless that term is conspicuously displayed and separately consented to. *Id.* Parties could also execute a separate agreement the primary purpose of which would be to consent to conducting the transaction electronically. *Id.*

The following provisions contained in VA. CODE ANN. § 59.1-485 are very similar to E-Sign:

- (A) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (B) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

- (C) If a law requires a record to be in writing, an electronic record satisfies the law.
- (D) If a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law.

UETA also addresses the issue of what evidentiary weight is to be given to a particular electronic signature. VA. CODE ANN. § 59.1-491 states that the trier of fact shall consider whether the electronic signature is:

- (A) unique to the signer,
- (B) capable of verification,
- (C) under the signer's sole control,
- (D) linked to the record in such a manner that it can be determined if any data contained in the record was changed subsequent to the electronic signature being affixed to the record, and
- (E) created by a method appropriately reliable for the purpose for which the electronic signature was used.

That section provides that "the trier of fact may also consider any other relevant and probative evidence affecting the authenticity and/or validity of the electronic signature."

Like E-Sign, UETA contains provisions regarding notarization, transferable records and formation of contracts by electronic agents. *Id.* §§ 59.1-494, 489, 492.

UETA allows parties to alter the effect of its provisions by agreement unless a provision of UETA states otherwise. *Id.* § 59.1-483(d).

Because the objectives of E-Sign and UETA are the same, i.e., to facilitate e-commerce by providing validity to electronic signatures, some have wondered why we have both laws. According to one speaker on the topic, Congress was concerned that it might take several years for all of the states to pass UETA, and therefore wanted to enact a very broad law that would give nationwide validity to electronic records and signatures.

How E-Sign and UETA play out in the area of real estate law remains to be seen. The July/August 2001 issue of the American Bar Association's PROPERTY AND PROBATE JOURNAL included two thoughtful articles that discuss the impact of E-Sign and UETA on real estate transactions, "Has E-Sign Murdered the Statute of Frauds?" and "E-Commerce in Real Estate Transactions."

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