



ELECTRONIC COMMERCE ADVISORY

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“E-Signature” Act Becomes Law

The "Electronic Signatures in Global and National Commerce Act" (the "Act") (Public Law No. 106-229) was signed into law on June 30, 2000 after a little more than a year of legislative debate. The Act provides a legal basis for using electronic records and electronic signatures in interstate and foreign commerce by clarifying their legal status. As a result of the Act, transactions entered into over the Internet will have the same legal effect as those entered into in writing. The Act does not require a party to use or accept electronic records or signatures, but it establishes their validity under federal law. In addition, with a consumer's consent and on certain other conditions, disclosures which are required to be in writing under other laws may now be made electronically. In general, the Act preempts inconsistent state laws, but provides for the supremacy of the Uniform Electronic Transactions Act ("UETA"), a model state law, when it is enacted by a state in the form prescribed by the National Conference of Commissioners on Uniform State Laws. The major provisions of the Act are discussed below.

VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES

The primary provision of the Act is contained in Section 101. This section provides that no statute, rule or regulation with respect to any transaction in or affecting interstate or foreign commerce can deny the legal effect, enforceability or validity of a signature, contract, or other record relating to a transaction solely because it is in electronic, rather than written form, or solely because an electronic signature or electronic record was used in its formation.

Significantly, the Act provides no guidance as to what constitutes an electronic "signature" and does not mandate or prescribe any particular technology, form or method of creating an electronic agreement or signature. In fact, its intent is to be technologically neutral. As a result, an "electronic signature" can be any ". . . 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." A "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." In refusing to promote or endorse a particular method or technology, the Congress intended to take a market-based approach, acknowledging that no uniform technology or model for electronic signatures has been established in the marketplace. The Act enables parties to a contract to agree upon the desirable technology and means to enter into the contract. The question of whether a person acted with "the intent to sign the record" when electronically executing a contract or record is a factual question and the Congress intended the same common

law principles to apply to the determination of whether there was intent to enter into an electronic agreement as would be used in a comparable situation involving a paper agreement.

The provisions of Section 101 of the Act do not apply to certain documents and instruments including testamentary instruments, statutes or rules of law governing adoption, divorce or matters of family law, instruments under the Uniform Commercial Code, and certain judicial documents. Also, for consumer protection purposes, certain notices must still be provided in writing. They include notice of cancellation or termination of utility service, notice of default, acceleration, repossession, foreclosure or eviction under a mortgage on a primary residence of an individual, notice of cancellation or termination of health or life insurance benefits, product recall notices and any documents required to accompany any transportation or handling of hazardous materials, pesticides or other toxic or dangerous materials.

PREEMPTION OF STATE LAW

The Congress recognized that the regulation of commercial transactions has traditionally been left to the states, but acknowledged that the lack of uniform state laws governing electronic transactions may be hampering the development of electronic commerce. Thus, the Act is intended to provide a federal framework for recognizing the validity of electronic documents and electronic signatures until such time as comprehensive (and uniform) state laws in this area have been adopted. To accomplish this, Section 102 of the Act provides the conditions under which state statutes or rules will supersede its provisions.

The Congress clearly intended to favor adoption of a uniform body of state law in this area. In furtherance of that goal, the Act provides that a state law which adopts the UETA, as it has been approved and recommended by the National Conference of Commissioners on Uniform State Laws, will supersede the provisions of Section 101 of the Act. As of this date, 19 states have adopted the UETA (although in varying forms) and several other states are considering its adoption.

It is less clear whether non-uniform UETA laws and other state statutes relating to electronic signatures and electronic agreements will supersede the Act. A state law other than the UETA will supersede Section 101 of the Act only if it does not contain alternative procedures or requirements for the use or acceptance of electronic signatures or electronic records which are inconsistent with the Act, or require or accord greater legal status or effect to specific technologies or technical specifications for electronic signatures or records. Consequently, the numerous state digital signature and similar laws will have to be evaluated on an individual basis to determine whether they will be preempted by the Act. In addition, in order for a state statute which is enacted after June 30, 2000 to preempt Section 101 of the Act, it must specifically refer to the Act. Also, if a state enacts a non-uniform version of the UETA, it appears that the sections which vary from the UETA uniform version will preempt Section 101 of the Act only on the same conditions described in this paragraph which apply to non-UETA statutes.

In order to assure that the goals of the Act are not frustrated by conflicting state laws, the Act provides that a state cannot circumvent its provisions by modifying the UETA to impose non-electronic delivery methods for documents.

ELECTRONIC DISCLOSURES IN CONSUMER TRANSACTIONS

Section 101(c) of the Act eliminates legal barriers that prohibit sending and receiving notices and disclosures electronically. This section of the Act does not affect any existing requirement under any consumer protection law other than a requirement that a notice or disclosure be in writing.

This section of the Act provides that if a statute, regulation, or other rule of law requires that information relating to a transaction in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available such information fulfills that requirement, provided the provider of the record complies with the Act's detailed conditions. The conditions are as follows. The consumer must affirmatively consent to the use of electronic records. The consumer must be told that he or she may withdraw such consent, and how to do so, and the consumer must not have revoked his or her consent to have the disclosure made electronically. Also, the party making the disclosure must notify the consumer, in advance, of any option to have a paper record, any fee to receive a paper copy and the right to withdraw consent. Also, in order to ensure that the consumer will be able to obtain the information electronically, the notice must also inform the consumer about the hardware and software requirements (and any required changes) in order to access or retain the electronic record, and the consumer must consent electronically in a way that adequately indicates that the consumer is able to access the information in an electronic form.

Under this Section, the failure to obtain or confirm consent of a consumer electronically, as required above, will not affect the validity or enforceability of any contract executed by such consumer. Similarly, the withdrawal of consent by the consumer will not affect the legal validity, effectiveness or enforceability of any electronic record provided prior to such withdrawal. Although this clause is somewhat unclear, it appears to assure parties to an electronic agreement that such agreement will be valid and enforceable even if a consumer refuses to authorize disclosures to be provided to him or her electronically.

The potential impact of Section 101(c) of the Act is enormous when viewed in the context of the numerous consumer protection statutes which currently require written documents. For example, for over three decades, the federal Consumer Credit Protection Act, encompassing consumer credit statutes such as the Truth-In-Lending Act (the "TILA"), and the Electronic Fund Transfers Act (the "EFTA"), has required all disclosures to consumers to be made in writing. Bank and nonbank creditors, as well as providers of electronic fund transfer services, were forced to make paper disclosures, even in connection with fully electronic programs. Similarly, the Federal Arbitration Act generally requires arbitration agreements to be in writing to be enforceable. Based on the Act, banks and broker-dealers entering into on-line agreements with customers that contain arbitration provisions can now operate in a quicker, more efficient manner, with the comfort of relying on the Act to validate their electronic contracts and disclosures.

In connection with the consumer statutes such as the TILA and the EFTA, the Federal Reserve Board (the "FRB") staff has been considering rulemakings which would have permitted electronic disclosures in lieu of written disclosures for the past eighteen months or more. It is now assessing the need for its rulemaking in light of the Act. The Act preserves the existing rulemaking authority of federal and state regulatory agencies and self-regulatory organizations, but gives these agencies and organizations limited authority to interpret Section 101 of the Act with respect to statutes under their authority. It provides, however, that they cannot adopt any rule, regulation or guideline which (i) is inconsistent with Section 101, (ii) imposes (or reimposes) any requirement that a record be in paper form, (iii) adds to its requirements, (iv) imposes methods which are not substantially equivalent to the Act's requirements, or (v) imposes unreasonable costs. The Act preserves any requirement by any governmental agency or self-regulatory organization regarding the standard and format of records which must be filed with such agency or organization.

RETENTION OF ELECTRONIC RECORDS

Section 101(d) of the Act contains the conditions under which retaining an electronic record will meet a statutory or regulatory requirement which requires retention of a contract, agreement, or record in writing, or in its original form. Under this Section of the Act, the record must accurately reflect the information in the contract or record and must remain accessible to all persons who are entitled to access pursuant to the relevant statute, regulation or rule. However, the provider of the electronic record bears the risk of retention and reproduction since the legal effect, validity or enforceability of an electronic record or contract can be denied if the contract or other record cannot be retained and accurately reproduced later by all parties to the contract or record.

OTHER PROVISIONS

Other provisions of the Act cover various additional topics. For example, Section 201 contains provisions relating to transferable records, including notes under Article 3 of the Uniform Commercial Code. Section 105 requires various governmental studies to be conducted as to the effectiveness of electronic signatures and documents. And Section 301 discusses principles relating to the use of electronic signatures in international transactions.

EFFECTIVE DATES

The Act will become effective on October 1, 2000 with a few exceptions. Record retention which is required by any federal or state law, rule or regulation will become effective on March 1, 2001 (unless on such date any federal or state regulatory agency has proposed, but has not completed, a rulemaking relating to record retention requirements). The requirements of the Act will become effective with respect to certain federally guaranteed mortgage loans and student loans on June 30, 2001 (with certain exceptions).

This Advisory is for information purposes and is not intended as legal advice. For more information on the "E-Signature" Act or other electronic commerce topics, please contact Anita L. Boomstein at (212) 837-6474 or via e-mail at boomstei@hugheshubbard.com.