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An Overview of Electronic Signatures

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Technology, love it or hate it, has become the medium through which modern business occurs. Seemingly gone are the days of face-to-face negotiations and in-person closings. However, one aspect of transactions has been slower to change – signatures. Due to certain legal requirements and the comfort of possessing a physical copy of a signed contract, many agreements are created, negotiated and performed entirely digitally, but yet physical signed copies are none-the-less exchanged by the parties.

However, this is beginning to change with services like DocuSign exploding in popularity. Yet, many parties are still uncertain about the legality of electronic signatures and what, if anything, is required to ensure that they are binding. The following is intended to provide a general overview of the requirements of various electronic signature laws throughout the country.

I. Legal Basis

A. Uniform Electronic Transactions Act

In 1999, the [Uniform Electronic Transactions Act](#) (“UETA”) was proposed by the National Conference of Commissioners on Uniform State Laws. The predominant goal of UETA was to remove existing legal barriers to electronic transactions. Importantly, UETA provides the following:

- a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation;

- if a law requires a record to be in writing, an electronic record satisfies the law; and
- if a law requires a signature, an electronic signature satisfies the law.

UETA has two key requirements. First, it states that an electronic signature is attributable to a person only if it was an act of that person. While this may seem obvious, this provision ensures that the signature is not ascribed to a machine, as opposed to a person intending to sign a document. The act of a person may be shown in any manner, including through a showing of the efficacy of any security procedure used to determine the identity of the person to which the electronic record or signature is attributable. UETA is technologically-neutral: it neither requires the use of certain digital signature technology, nor does it establish specific security procedures to be used in the authentication of electronic records and signatures. Second, UETA only applies to transactions between parties who have agreed to contract by electronic means, a fact that is determined “from the context and surrounding circumstances, including the parties’ conduct.” Such an agreement between the contracting parties can come in any form, although many contracts include provisions specifically authorizing electronic signatures to clearly denote this agreement.

To date, Colorado and forty-six other states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have all adopted UETA, either in its original form or with minor amendments. The remaining states, Illinois, New York, and Washington, each have their own statutory provisions concerning the validity of electronic transactions involving digital signatures. These statutes are similar to UETA in that they each provide that electronic signatures may not be denied legal effect solely because they are in electronic form.

B. Electronic Signatures in Global and National Commerce Act

In 2000, Congress passed the [Electronic Signatures in Global and National Commerce Act](#) (“ESIGN”). ESIGN contains many similar provisions to UETA and provides that with respect to any transaction in or affecting interstate commerce: “(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.” Similar to UETA, ESIGN is technologically-neutral and goes so far as to specifically preempt any state law proscribing that specific technology be used in the process of creating or authenticating electronic records or signatures.

Generally, where ESIGN and UETA overlap, ESIGN provides that the terms of UETA, if not materially altered when adopted by a state, will supersede the requirements of ESIGN. As such, ESIGN effectively fills-in the gaps created by interstate and foreign commerce and applies where no state-specific electronic signature law applies.

II. Special Concerns

A. General Exceptions

Although most transactions and types of documents are covered under UETA and ESIGN, there are several exclusions. For example, (1) the creation and execution of wills, codicils or testamentary trusts, (2) transactions governed by the Uniform Commercial Code or the Uniform Computer Information Transactions Act, and (3) any other laws specifically identified by a state, are not covered by UETA. It is important to note that although the foregoing are not covered under UETA, this does not necessarily mean that they cannot be completed electronically, as such documents may still be covered under legislation specific to the particular type of document or transaction. In addition, consumer contracts are subject to additional requirements under ESIGN and most adopted versions of UETA.

B. Unintended Contracts

While electronic signature laws have made contracting much more convenient, there have also been some unintended consequences. For example, any e-mail can now create a binding contract. Some courts have concluded that a mere e-mail signature block may constitute a binding signature if the parties have otherwise agreed to contract electronically; other courts require further indications of a party's intent. As a result, those intending to utilize electronic signatures should be careful and be very clear regarding what does and does not constitute a binding signature.

C. Recordable Documents

Although documents processed and signed electronically are legally enforceable between the parties to the transaction under UETA and ESIGN, many documents in real estate transactions must still be recorded so as to create rights with respect to third parties. The laws of many jurisdictions require that recorded documents be manually signed or in paper form as a prerequisite to being recorded. In such states, recorded documents may not be completed using electronic signatures.

However, many states are beginning to permit the electronic signature, filing and recordation of real estate documents. In 2004, the [Uniform Real Property Electronic Recording Act](#) ("URPERA") was proposed by the National Conference of Commissioners on Uniform State Laws. URPERA was drafted with the goal to "remove any doubt about the authority of the recorder to receive and record documents and information in electronic form." The important provisions of URPERA are essentially an extension of the principles contained in UETA and ESIGN, which are as follows:

- if a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document;
- if a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature; and

- a requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature.

Thirty states, the District of Columbia and the U.S. Virgin Islands have adopted URPERA or a similar statute, with five additional states currently considering adopting URPERA. Notably, although a leader in promoting electronic recording, Colorado has not yet adopted URPERA or an equivalent statute with respect to electronic signatures on recordable documents.

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