

Insights: Alerts

Electronic Signatures and Electronic Delivery of Documents as a Social Distancing Business Continuity Strategy

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

Although U.S. law has broadly enabled the use of electronic signatures since 2000, many companies have not fully adopted the use of electronic signatures across their operations. That resistance to the use of electronic signatures, often based on historical practice rather than an actual legal barrier, is especially pronounced with respect to certain documents, such as documents relating to finance and banking, real estate, insurance and corporate governance.

Given COVID-19 risk mitigation strategies, many companies now need to execute documents remotely with most of their personnel and customer base transacting business from home. Using electronic signatures can help streamline document execution by remote personnel and customers, and provide for business continuity where face-to-face business transactions are not feasible. As such, companies should evaluate whether their current processes requiring wet ink may be replaced with electronic signatures. Moreover, in areas where history rather than law was holding companies and government back, the parties are not likely to return to the old ways once the crisis is over, so companies can adopt practices now for the long term.

We caution that electronic signature laws significantly differ across the globe, so a company must engage in a multi-jurisdictional analysis if the company routinely executes documents whose signers are in non-U.S. locations. For example, in many parts of the world outside the U.S., applicable laws require the use of digital signatures, which is a form of electronic signature that uses certain security protocols. In certain parts of the world, while electronic signatures are technically permitted for many types of transactions, the local laws require more cumbersome and less flexible procedures than in the U.S.

1. U.S. electronic signature law (ESIGN¹ and comparable state laws, including those based on UETA²) enables parties to use electronic signatures to execute most types of commercial documents.

ESIGN (the federal law governing electronic signatures) and UETA (the model state law on electronic signatures adopted, with some modifications, in 47 states and the District of Colombia³) grant electronic signatures the same legal status as “wet ink” signatures by stating that a signature may not be denied legal effect solely

because it is in electronic form. Those statutes generally enable parties to execute most documents without “wet ink” signatures, unless a document either (1) falls within an express exception to ESIGN or UETA or (2) substantive law otherwise requires parties to use “wet ink” signatures, or to execute a document in the physical presence of the other party.

Documents expressly excluded by ESIGN and UETA include, among other exceptions, testamentary documents (such as wills, codicils and trusts), matters of family law, court orders or notices, certain notices, and documents to the extent that such documents are governed by the Uniform Commercial Code (“UCC”), other than UCC Articles 2 and 2A, which govern sales of goods and leases and are within ESIGN and UETA's scope. For documents governed by the UCC (other than Articles 2 and 2A), therefore, parties must evaluate relevant provisions within the UCC to determine whether a party may execute such documents with electronic signatures.

Note that the validity of an electronic signature can be challenged for the same reasons as a wet ink signature: incapacity of the person signing, mistake, fraud, duress, and forgery.

2. ESIGN and UETA are Technology Neutral.

ESIGN and UETA neither favor electronic signatures over wet ink signatures nor prescribe any particular form of electronic signature for valid execution. Under both regimes, an “electronic signature” means an “electronic sound, symbol, or process, attached to or logically associated with a contract or other record.” Accordingly, the official comments to UETA state that “[n]o specific technology need be used in order to create a valid signature.”

A signature on a scanned or electronic PDF qualifies as an electronic signature so long as the parties to the transaction have consented to use of electronic signatures. Clicking “I accept” or otherwise manifesting assent, or manifesting assent verbally can also constitute a valid electronic signature.

3. Determining Whether Electronic Notarization or Remote Notarization is Permissible Requires State Specific Analysis.

ESIGN and UETA enable parties to satisfy requirements for notarization through an electronic process, provided that the parties satisfy all other requirements to provide information as required by applicable state law. Therefore, to determine whether electronic notarization is feasible for documents otherwise subject to UETA or E-SIGN in a given state, parties must examine whether the state's notary law affirmatively requires parties to provide required information, such as a notary's certificate or seal with wet ink. Determining whether remote notarization (e.g., notarization conducted pursuant to the parties' interaction via live video) is permissible in a given jurisdiction requires parties to determine whether the state's notary law affirmatively requires the signor's personal appearance of the parties before the notary.

To give organizations comfort that remote notarization will be honored, 22 states passed remote notarization enabling laws before the current crisis⁴, not all of which are in effect or fully implemented. In New York, which typically requires in-person notarization, Governor Andrew Cuomo issued an executive order validating remote notarization through April 18, 2020. The executive order sets forth procedural requirements for effectuating remote notarization, such as the signor proving that they are physically present in New York. At the federal level, senators Mark Warner and Kevin Kramer introduced the Securing and Enabling Commerce Using Remote and

Electronic (SECURE) Notarization Act of 2020, which would set forth a framework for and enable remote notarization nationwide.

4. Special Considerations for Consumer-Transactions: Electronic Delivery of Consumer Notices.

When designing an electronic contracting process that is consumer-facing (rather than in a business-to-business context), bear in mind that certain consumer protection laws and regulations – for example, those relating to insurance transactions or other financial transactions – require consumer disclosures to be provided “in writing” to consumers at or prior to the transactions with consumers.

ESIGN expressly permits disclosures that are required by law or regulation to be provided to consumers “in writing” to be provided exclusively through electronic means, as long as certain conditions are met. These conditions include: (i) obtaining the consumer's consent to receive the disclosures electronically; (ii) providing certain disclosures to the consumer to evidence the consumer's consent to receive the required disclosure electronically; (iii) receiving the consumer's consent to obtain disclosures electronically prior to when in the sales transaction the disclosure sought to be electronically delivered is required by statute to be given; and (iv) providing a mechanism for the consumer to later access the record of the disclosure that was the subject of the consumer's consent.

Failure to comply with the ESIGN electronic disclosure requirements does not render void or voidable the underlying transaction (for example, the application for insurance or the insurance policy ultimately issued), but it could subject the company to regulatory sanctions for failing to provide the required disclosures (such as the replacement notice) in accordance with applicable law. There may also be civil remedies available to consumers if the disclosures are deemed to have not been given effectively.⁵

5. Process is Key, With An Eye Toward Admissibility of Evidence.

When designing and implementing an electronic contracting, electronic signature, and electronic delivery process, keep in mind that the goal of this process is to create contracts or records that, at a future date in time, will withstand evidentiary scrutiny. The process should be carefully designed to address the unique risks of each particular contracting situation. At a minimum, when operationalizing an electronic contracting process, consider how to authenticate the identity of the contracting parties and the content of the document being signed or delivered.

Footnotes

¹Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S. Code §§ 7001 *et cet.*

²Uniform Electronic Transactions Act (UETA).

³Illinois, New York, and Washington have not adopted UETA. New York and Illinois have adopted their own version of an electronic signature law. Washington repealed the state's general electronic signature law in 2019 and relies on ESIGN's broad scope and updates to other state laws to facilitate electronic signatures' use.

⁴The National Notary Association maintains a list of these laws and their implementation status at <https://www.nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know>.

⁵Those implementing ESIGN in the B2C context should also be sure to check the exclusions referenced in the second paragraph of Section 1.

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