



WHY ENACT UETA? THE ROLE OF UETA AFTER E-SIGN

by Patricia Brumfield Fry

President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000. Forty-nine jurisdictions have enacted the Uniform Electronic Transactions Act (UETA). Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. In some cases, the federal legislation uses the language of UETA without change. Nevertheless, the two are not identical, either in scope or substance. UETA is more comprehensive than the federal legislation, including subjects not addressed by E-Sign. Other issues are addressed differently. This memorandum discusses the role of UETA after E-Sign.

How is UETA more comprehensive than E-Sign?

A. Attribution. Often the issue is not whether a record has been signed, but rather whose signature appears. Even if Patricia B. Fry appears on a record, I cannot be bound if the name was not placed by me, ratified by me, or inserted by someone acting on my authority. UETA § 9 states that an electronic record or signature is attributed to a person if it was the act of the person. This can be proved by any relevant evidence, including the fact some technology or password was used to establish who attached the signature. Section 9 clarifies that the effect of a record or signature on the person to whom it is attributed is determined from the context and surrounding circumstances at the time of the creation, execution or adoption of the record. E-Sign does not address attribution.

B. Effect of Party Agreement. UETA provides that parties may enter into agreements concerning their use of electronic media. For example, UETA § 9 refers to the parties' agreement as a factor in determining the effect of an electronic record and § 10 refers to the parties' agreement to use security procedures. E-Sign contains no provisions on variation by agreement.

C. Send and Receive. UETA § 15 ties the determination of whether something has been sent or received to the communication systems used by the parties and specifies that, unless otherwise agreed, they are sent or received from the parties' principal place of business or residence. E-Sign does not deal with the question of when an electronic record is sent or received.

D. Effect of Change or Error. UETA § 10 contains provisions governing the effect of failure to use an agreed security procedure and the impact of mistakes made by an individual while dealing with an electronic agent. It specifies that the rules of mistake

otherwise apply. E-Sign has no provisions dealing with mistakes or errors in electronic communications.

E. Admissibility. UETA § 13 specifies that electronic records are not to be denied admissibility into evidence solely because the records are in electronic format. There is no parallel provision in E-Sign.

F. Transferable Records. E-Sign Title II provides for electronic analogs to paper negotiable notes in transactions secured by real property, and does so in language which is in material part directly imported from UETA § 16. The provisions of UETA are broader in scope, applying to all documents which would, if on paper, be either a promissory note under UCC Article 3 or a document of title under UCC Article 7.

What does UETA do differently from E-Sign?

To the extent a State has enacted the uniform version of UETA, the UETA treatment of these matters should prevail.

A. Consumer Protection. The federal legislation focuses on regulating the manner of consumer assent to deal electronically, while UETA emphasizes how parties are to comply with State consumer protection rules. The federal provisions call for a study of the extent to which the regulation benefits or burdens electronic commerce and recommendations from the Department of Commerce and Federal Trade Commission on whether they should be modified.

B. Record-keeping. E-Sign § 101(d) follows, in material part, UETA § 12(a), (b), (d) and (e). The federal legislation requires that the record remain accessible "to all persons who are entitled to access by statute, regulation, or rule of law" for the time specified, as a condition to enforceability. Query whether it is sufficient that the record is subject to discovery. UETA requires accessibility for later reference.

UETA § 12(c) specifies that persons may satisfy their record-keeping obligations through the use of third parties. E-Sign is silent. UETA states that retained electronic records satisfy evidentiary, audit and similar requirements. There is no specific parallel in the federal legislation. UETA permits the states to impose restrictions on the use of electronic records for audit or like purposes. E-Sign, in provisions which are not displaced in a state which enacted UETA [See § 104], provides that states may not impose paper requirements through their rule-making power.

C. Automated Transactions. E-Sign § 101(h) states that the fact an electronic agent was involved in contract formation does not affect enforceability, provided that the agent's activity is attributable "to the person to be bound." UETA § 14 states that the use of electronic agents will not defeat contract formation. UETA also has provisions governing changes or errors during the transmission of electronic records. UETA § 10 provides rules on the effect of records when a party fails to use an available security procedure to detect the change or error and a provision for unwinding mistakes made by individuals dealing

with electronic agents. It specifies that in all other cases, other state law governing mistake is applicable. There are no parallel provisions in E-Sign.

D. Effect of Other State Law. UETA defers explicitly to the provisions of other state law for most substantive determinations. Questions of authority, agency, forgery, contract formation, etc., are determined by other state law. E-Sign states in § 101(b) that it does not affect any legal requirement beyond requirements for writings, signatures, and the like.

E. Powers of State Governments. UETA bracketed §§ 17-19 authorize state governments to migrate, in an orderly fashion, to electronic technologies. Some states are far along in the process of migration; others have much work to do. The provisions of UETA are permissive and authorizing; they contain no mandatory provisions. E-Sign restrains the states by limiting their powers.