

### How Valid Are Electronic Signatures in E-Commerce Transactions?

09.21.2000

On Oct. 1, most of the provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign) will take effect. Electronic signatures, contracts entered into electronically, and contracts entered into through an "electronic agent" instead of a human, can no longer be held invalid solely because they are electronic.

Why was E-Sign needed? Signatures and contract formation have typically been issues of state law. The Internet has sped ahead of that law. Web site visitors click on buttons that say "I agree," "complete order" or "submit bid." People send e-mail messages intending to form agreements. But are they enforceable? In some areas, courts have agreed.

Statutes of frauds and other laws also often require a signed "writing." If the agreement is solely electronic, is it a "writing"?

Under E-Sign, an "electronic" record will fulfill "writing" requirements if it is an accurate reflection of the information in the original and remains accessible to all people who are entitled access to it, in a form capable of being accurately reproduced for later reference, whether by transmission, printing or otherwise.

E-Sign provides a little bit of legal "catch-up," in the electronic world, but does not attempt to leap ahead of technology.

Some states have required electronic signatures to be of a specific type to be enforceable. Congress viewed such requirements as hampering innovation, limiting consumer choice and ignoring the rapid pace with which electronic technologies are being developed.

Thus, "technology neutrality" is mandated in E-Sign.

#### Transactions

Generally, signatures, contracts and other records related to any "transaction" in or affecting interstate or foreign commerce come within the scope of E-Sign.

Several subject area exemptions are mentioned below. A "transaction" is an action or a set of actions related to the conduct of business, consumer or commercial affairs between two or more people, including sales, leases, exchanges, licenses or other dispositions of all types of personal property, services and interests in real property.

The scope is very broad and would appear to apply to almost any a transaction other than one that is purely intrastate or between two governmental entities.

"Electronic signature" is defined by E-Sign 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."

This recognizes the basic principal that any mark or symbol adopted or intended by a person as his or her signature will be that person's signature, even if it is electronic in form. E-Sign defines "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities."

So, many forms of communication are covered.

A contract requires a "meeting of the minds" between two people. When placing orders over the Internet, there usually is a person on one end (placing the order) but only a computer on the other end.

The computer program is acting as a party's "agent" to form contracts. E-Sign says that contracts may not be denied validity solely because an "electronic agent" is used in contract formation.

Other defenses would, of course, continue to be available. E-Sign defines an "electronic agent" as a computer program or other electronic or automated means "used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response."

Typical issues of contract "formation" and defenses to contract, such as fraud and mistake, are not altered by E-Sign.

Consider, for example, that an electronic "mark" can serve as a signature if it is intended as a signature.

That intent must still be proven. A "digital" signature, which is a type of electronic signature, can be used to establish intent and authenticity. Such technologies may actually give electronic documents higher levels of integrity and security than paper documents.

Paper documents must be compared word for word to establish that no change has been made.

Digital technologies can create a "hash" over an electronic document's text when it is electronically signed. If the text is altered, the "hash" will not match, alerting the parties that the text has been changed.

Since those technologies are changing rapidly, Congress decided to remain "technology neutral" and did not even address "digital" signatures in E-Sign.

## Other Key Provisions

E-Sign does not require anyone to accept electronic communications or contracting.

It is an "opt in" law. Congress also felt that consumers still need protecting in certain areas. Thus, if a party that is required under other law to provide consumer disclosures in "writing," E-Sign permits the disclosure to be given electronically, but imposes specific E-Sign notices and procedures be followed before the consumer disclosure is delivered.

E-Sign also imposes performance requirements that, if met, will allow electronic records to fulfill certain requirements to keep papers originals.

## **State Law**

States may limit, modify or supercede E-Sign by enacting, without material substantive changes, the Uniform Electronic Transaction Act (UETA) in the form approved in 1999.

In states such as California that enacted UETA with broader changes, their laws may modify, limit or supercede E-Sign if they are consistent with E-Sign, technology-neutral and specifically refer to E-Sign.

## **Exemptions**

E-Sign created several exemptions where pen and paper can continue to be required.

These include wills, codicils or testamentary trust; adoption, divorce and other family-law matters; Uniform Commercial Code transactions other than under Section 1-207 (discharge of claims), Section 1-206 (certain writing requirement), Article 2 (sale of goods) and Article 2A (leases); court orders, notices and filings; notices of cancellation or termination of utilities services; default, acceleration, foreclosure and certain other notices under credit agreements secured by, or leases of, an individual's primary residence' notices canceling or terminating health or life insurance benefits (other than annuities); product recall notices or product material failure notices regarding risks endangering health or safety; and certain hazardous-materials transportation and handling documents.

## **Summary**

The acronym "E-Sign" is appropriate.

While E-Sign addresses several e-commerce issues (signatures, contracts, consumer notices, e-records retention), with regard to signatures and contracts, the law's scope is narrow.

E-Sign validates the most basic element of e-commerce, a signature, and the simple fact that a contract or record of a contract may be electronic. E-Sign leaves to the states the more standard issues of contract formation and defenses to contract. Reprinted with permission of the San Diego Daily Transcript.

Reprinted with permission of the San Diego Daily Transcript.

© 2000 San Diego Daily Transcript.