

electronic RECORDS

& signatures



The federal
E-Sign Act
and
Michigan UETA
place them on legal par with
their paper and ink counterparts.

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The federal Electronic Signatures in Global and National Commerce Act (E-Sign) was signed into law on June 30, 2000 and became effective, at least for the most part, on October 20, 2000.¹ On October 16, 2000, Michigan enacted the Uniform Electronic Transactions Act (UETA),² which is based on a uniform act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL).³

Fast Facts: → An electronic record may be used to satisfy a record retention requirement

→ E-Sign includes consumer consent requirements that the UETA does not

→ Use of electronic signatures and records is strictly voluntary under both laws

Many E-Sign provisions were based on the uniform act promulgated by NCCUSL.⁴ Accordingly, E-Sign and UETA are similar in many respects. There are, however, differences between the laws. This article provides a general overview of E-Sign and UETA and explores some of the differences between the laws.

Base Rule and Definitions

E-Sign and UETA basically provide that a contract may not be denied effect solely because it is in electronic form or bears an electronic signature. Each law defines the terms “electronic records” and “electronic signature” broadly and in technology-neutral terms. An “electronic record” is defined under each law as “a [contract or other] record created, generated, sent, communicated, received, or stored by electronic means.” The term “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.” Each law defines an “electronic signature” 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.”

Application to Transactions

Subject to the exceptions discussed below, E-Sign and UETA apply to electronic records and electronic signatures relating to transactions. E-Sign defines a “transaction” as “an action or set of actions relating to the conduct of business, consumers, or affairs between two or more persons.” The definition is intended to be broadly construed to include a full range of conduct, including, but not limited to, the types of conduct specifically described in the definition (i.e., the sale, lease, exchange, or other disposition of personal property and real property). UETA similarly defines a “transaction” to include business, commercial, and government affairs conduct.

Specific Exceptions

The provisions of E-Sign and UETA do not apply to several kinds of documents, which will still require a written signature. UETA by its terms does not apply to a transaction to the extent it is governed by:

- Laws relating to wills, codicils, or testamentary trusts; or
- The Uniform Commercial Code, except to the extent the transaction is governed by section 1-107 (waiver or renunciation of a claim or right arising of an alleged breach), 1-206 (statute of fraud), Article 2 (sale of goods), or Article 2A (lease of goods).

E-Sign contains these same two exceptions and also specifically states that it does not apply to the following:

- A state statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.
- Court orders, court notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings.
- A notice of any of the following:
 - The cancellation or termination of utility services.
 - Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.
 - Cancellation or termination of health insurance coverage, health insurance benefits, or life insurance benefits (excluding annuities).

- Product recall or material failure of a product that risks endangering health or safety.

- Any document required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

E-Sign requires that the Secretary of Commerce review these exceptions over a three-year period to determine whether they remain necessary for consumer protection. E-Sign also allows a federal regulatory agency to eliminate exceptions within its jurisdiction upon satisfying certain conditions.

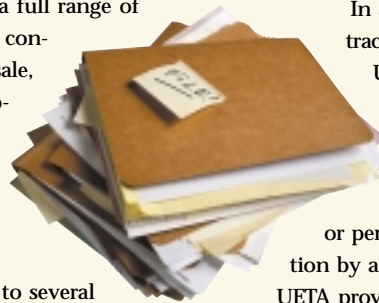
Electronic Agents

In addition to allowing individual parties to create contracts through direct electronic interactions, E-Sign and UETA also validate the formation of contracts through electronic agents. Both laws define an “electronic agent” as “a computer program or an electronic or other 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].” UETA provides that a contract “may be formed by the interaction of the electronic agents of the parties even if no individual was aware of or reviewed the electronic agent’s action or resulting terms and agreements.” In order to bind the contracting party, the actions of its electronic agent must be legally attributable to that party.

Record Retention Requirements

Both E-Sign and UETA provide that an electronic record may be used to satisfy a record retention requirement that is imposed under

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another law, so long as the electronic record accurately sets forth the information in the record and remains accessible to all persons who are entitled to access the record. As long as the accuracy and accessibility requirements are met, a law requiring that a record be retained in "original form" may be satisfied by retaining the electronic record.

There is a special rule for canceled checks. A canceled check retention requirement under other law will be satisfied under both laws if the information on the front and back of a paper check is stored in electronic form in a manner that meets the accuracy and accessibility requirements.

Limited Preemption

E-Sign contains an unusual form of a limited, express preemption of state law. Rather than providing that the federal law preempts all inconsistent state laws, E-Sign sets forth the limited circumstances in which state laws will not be preempted. E-Sign explicitly does not preempt a state enactment, like Michigan's UETA, that adopts the official version of the Uniform Act. A departure from the official version may avoid preemption if it is consistent with the substantive provisions of E-Sign and is technology neutral.

Differences between E-Sign and UETA

E-Sign and UETA differ in many respects. Following is a brief discussion of a few of the more significant differences.

Consumer Consent Requirements

One of the most notable differences between the laws is the consumer consent requirements found in E-Sign. The federal law requires that a consumer affirmatively consent before electronic records can be used to provide her with information that, under other law, must be available to her in writing. Before consenting, the consumer must be provided with a "clear and conspicuous" statement of:

- any right to have the record provided on paper
- the right to withdraw consent and the consequences of withdrawing consent
- the scope of the consent
- how to withdraw consent or update contact information
- how to receive a paper copy after consenting (and the cost of a paper copy)

The consumer must also be provided with a statement of the hardware and software necessary for accessing and retaining electronic records. The consumer must either consent electronically or confirm having consented electronically in a way that "reasonably demonstrates" the ability to access the electronic record.

An "electronic record" is defined under each law as "a [contract or other] record created, generated, sent, communicated, received, or stored by electronic means."



Procedural Issues

UETA contains a number of procedural provisions that are not found in E-Sign including, without limitation, those governing:

- Attribution of an electronic record or signature
- The time when messages are deemed sent or received
- Mistakes in electronic contracting
- Admissibility of electronic records as evidence

What E-Sign and UETA Do Not Do

Both E-Sign and UETA expressly acknowledge what they do not do. Both laws are procedural, not substantive. While these laws override writing and signature requirements, they do not limit, alter, or otherwise affect any substantive requirements imposed under other laws.

Neither law requires a party to use and accept electronic records.

Use and acceptance is strictly voluntary under both laws. With the exception of certain required consumer consents, E-Sign does not affirmatively require that there be any agreement to use or accept electronic signatures for them to be valid and effective. Instead, E-Sign provides that parties are not required to use or accept them. This is slightly different from UETA, which provides that it only applies to transactions between parties who have "agreed to conduct transactions by electronic means." The practical distinction between the laws is likely to be minimal, as the agreement under UETA is not required to be in writing and may be "determined from the context and surrounding circumstances, including the parties' conduct." This same type of conduct should be sufficient to establish a party's intent to have the base rule of E-Sign apply.

Conclusion

E-Sign and UETA remove existing legal impediments to the use of electronic contracts. Because both laws are procedural only and technology-neutral, issues of authenticity, integrity, and security remain open and left for time and the marketplace to resolve. ◆

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Footnotes

1. 15 USC 7001-7006, 7021, 7031.
2. MCL 450.831-450.849.
3. See www.nccusl.org.
4. See www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm.