

Requirements of the Electronic Signatures in Global and National Commerce Act (E-Sign)

The structure of this Act is complex and any final decisions regarding the appropriateness of implementation processes for the Act should be reviewed by authoritative legal counsel. This summary is not an exhaustive or authoritative one. It is intended only to capture broad issues raised in the Act. In summary, the Act applies to any transaction in or affecting interstate or foreign commerce, and includes the numerous safeguards. Selective highpoints of safeguards contained in the Act are as follows.

No Consumer Requirement to Use Electronic Records:

Section 101(b)(2) does not require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

Affirmative Consent by the Consumer is Required:

Section 101(c)(1)(A) stipulates that the consumer must affirmatively consent to the use of an electronic record and has not withdrawn such consent. However, the legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer, per Section 101(c)(3).

Informed Consent by the Consumer is Required:

Section 101(c)(1)(B) stipulates that the consumer, prior to consenting, must be provided with a clear and conspicuous statement informing the consumer of any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form and the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and to update information needed to contact the consumer electronically.

Breadth of Consumer's Consent Must be Clear:

Informed consent also requires informing the consumer of whether the consent applies only to a particular transaction or to identified categories of records that may be provided or made available during the course of the parties' relationship.

Conditions and Consequences of Withdrawal of Consumer's Consent:

The consumer must also be informed of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of withdrawal of consent to use electronic records and describing the procedures the consumer must use to withdraw consent. If revised future hardware and software requirements limit the consumer's ability to use electronic records, the consumer has the right to withdraw consent for electronic records without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence. Withdrawal of consent

does not affect the legal validity of electronic records agreed to prior to withdrawal of consent.

Consumer Options for Requesting Paper Copies:

The consumer must be informed how, after the consent, the consumer may request a paper copy of an electronic record, and whether any fee will be charged for such copy.

Consumer Demonstration of Capability:

Prior to consenting to an electronic transaction, the consumer must be provided with a statement of the hardware and software requirements for access to and retention of the electronic records and consents electronically, or confirms his or her consent electronically in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

Software and Hardware Upgrade Issues for Consumers:

If a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record, the person providing the electronic record must provide the consumer with a statement of the revised hardware and software requirements and the right to withdraw consent for electronic records.

Verification or Acknowledgement of Records:

If a prior law expressly requires a record to be verified or acknowledged through a receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt.

Electronic Oral Communications:

Oral communication or recording of such communications does not qualify as an electronic record for purposes of this Act unless otherwise provided by law.

Accessibility and Accuracy Over Time:

If a contract or other record of a transaction must be maintained pursuant to statute, regulation, or other rule of law, that requirement is met by retaining an electronic record that accurately reflects the information, remains accessible to all persons entitled to access, and can be accurately reproduced for later reference.

Notarization of Documents:

If notarization, acknowledgment, verification, or sworn statements under oath are required, an electronic signature will be valid if the person is authorized to perform those acts and if all other information required to be included by other applicable statutes is attached or logically associated with the electronic record.

Document Integrity When Third-Party e-Agents are Used:

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

Impact of the Laws of the Individual States:

A State statute, regulation, or other rule of law under certain circumstances may modify, limit, or supersede the Act only if such statute, regulation, or rule of law constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999.

Excepted Requirements for Specified Transactions:

As a generalization, the provisions of the Act are not intended to apply to wills, codicils, or testamentary trusts; govern adoption, divorce, or other matters of family law; the Uniform Commercial Code of any State; court orders or notices, the cancellation or termination of utility services; certain specified credit agreements or rental agreements secured by a primary residence; cancellation of certain types of insurance; product recalls; or handling or transportation of hazardous materials.

Standards for Accuracy, Integrity, and Accessibility:

A Federal regulatory agency or State regulatory agency may interpret the Act to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of certain provisions of the Act if the requirement serves an important governmental objective; and is substantially related to the achievement of that objective. In addition, under certain circumstances, a Federal regulatory agency or State regulatory agency may interpret the Act to require retention of a record in a tangible printed or paper form.

Software and Hardware Neutrality

Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware.

Roles of the Department of Commerce, USPS, and FTC:

The Secretary of Commerce shall conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers compared with the delivery of written records via the United States Postal Service and private services. The Secretary shall also conduct a joint review of the process with the Federal Trade Commission for other purposes.

Transferable Records and Proof of Control:

The Act sets out requirements that must be met to demonstrate the conditions under which a person is deemed to have control of the authoritative electronic record and be authorized to transfer the control of that record to a third party.