



THE UNIFORM ELECTRONIC TRANSACTIONS ACT A GUIDE TO EVALUATING NON-UNIFORM AMENDMENTS

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INTRODUCTION

The purpose of this Guide is to assist members of ALTA in evaluating non-uniform amendments that may be proposed to the Uniform Electronic Transactions Act (“UETA”), either as it has already been enacted in the members’ state, or as it is being proposed for enactment in the state legislature. As of this date, the UETA Act has been enacted in 23 states. In most commercial transactions (including real estate), it permits the use of electronic records where state statutes and regulations would otherwise require writings. It also permits the use of electronic signatures where state law would otherwise require a traditional ink signature. Congress has passed, and President Clinton signed, a federal law containing most of the same basic rules called the “Electronic Signatures in Global and National Commerce” (“E-SIGN”). The E-SIGN statute applies to federal laws and regulations. E-SIGN also covers state laws and regulations, but states may substitute their own rules, instead, if the state does one of two things:

- Adopts the Official Text of the UETA as promulgated by the National Conference of Commissioners on Uniform State Laws, or
- Adopts other technology-neutral rules or regulations that are consistent with the rules contained in E-SIGN.

This means that states that have not yet enacted the UETA may wish to do so, in order to retain some control over the applications of electronic records and electronic signatures to commercial transactions (including real estate transactions) in their state. It also means that in states that have already enacted the UETA, there may be proposals to make additional amendments to the UETA to either:

- Conform the state’s UETA to the provisions of the E-SIGN Act or
- Add additional provisions to fill in perceived gaps in coverage of E-SIGN and the UETA.

This Guide will discuss the UETA on a section-by-section basis. It will identify several of the more common amendments that have been proposed to the UETA that merit careful review by ALTA members, because either:

- The amendment might adversely impact use of the UETA or E-SIGN in connection with real estate transactions, or
- The amendment would potentially conflict with E-SIGN, creating significant uncertainties concerning the scope and application of the rules, and confusion over exactly what rules apply to a real estate transaction in a given state.

ANALYSIS

Section 1 – Short Title

What it does: Section 1 of the UETA simply identifies the title of the statute. Amendments are unlikely. Technically, any change to the name would be harmless. However, because it is valuable to identify the statute on a uniform basis across the states, any proposal to change the name should be studied closely, and the purpose for the proposed name change should be determined.

Section 2 – Definitions

What it does: Section 2 of the UETA provides definitions that are used throughout the statute. The definitions are important because in many cases they determine the kinds of transactions that the Act applies to, and the kinds of signatures or records that can be used.

WHAT TO WATCH FOR:

- In the definition of “Electronic Signature,” watch for amendments to the definition adding any of the following: a requirement that the signature (i) “be under the sole control of the signer,” or (ii) is “unique to the person using it,” or (iii) is “attached to or associated with data in such a manner that authenticates the attachment of the signature to particular data and the integrity of the data transmitted.” These additions to the definition create serious questions concerning the effectiveness of most types of electronic signatures. These additions also incorporate into the definition of signature concepts, such as data integrity or attribution of the signature, which are already handled by other areas of the law.
- In the definition of “Governmental Agency,” watch for any change which would exclude the local authorities charged with responsibility for recording and maintaining real estate records.
- In the case of new definitions, which do not appear in the official text of the UETA, try to determine the reason for adding the definition. For example, the addition of the defined terms “Consumer” or “Consumer Transaction” may indicate the inclusion of additional consumer-specific provisions later on in the statute. Any additional consumer protections added to the statute should be carefully evaluated both for compatibility with the consistency requirements of E-SIGN and for the impact they may have on the ability to conduct consumer real estate transactions electronically.

Section 3 – Scope

What it does: Section 3 defines the types of transactions and documents that are included in the UETA, and those that are excluded. In general, E-SIGN prohibits adding any new exceptions to the UETA, beyond those exceptions which are already explicitly listed in the Official Text, or which are listed in the E-SIGN Act.

WHAT TO WATCH FOR:

Watch for any language excluding “real estate conveyances,” “transactions involving or relating to real estate,” or powers of attorney. Also, carefully examine exclusions for “consumer protection statutes,” or statements that a state regulator has authority to exclude consumer protection statutes by regulation. Such provisions are probably invalid under E-SIGN, and could cause confusion concerning the scope and application of the statute.

Section 4 – Prospective Application

What it does: This Section provides that the statute applies to records and signatures that are created or received after the effective date of the statute. Amendments are not likely.

Section 5 – Use of Electronic Records and Electronic Signatures; Variation by Agreement

What it does: This Section establishes that parties must consent to use electronic records and electronic signatures, if the law would otherwise require a paper document or a traditional ink signature. The Section also provides that most of the provisions of the UETA may be modified by agreement.

WHAT TO WATCH FOR:

The E-SIGN Act contains specific consumer consent disclosure requirements and procedures that must be observed when obtaining a consumer's consent to use electronic records and signatures. States enacting or amending the UETA may wish to add the E-SIGN consumer consent provisions to the state law, in order to conform with E-SIGN. The consumer consent provision should contain two significant limitations, both of which are found in E-SIGN:

- Use of the consumer consent procedures should only be required "if a statute, regulation, or other rule of law requires that information relating to a transactions or transactions . . . be provided or made available to a consumer in writing," and
- The amendment should contain the following language: "the legal effectiveness, validity, or enforceability or 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 in accordance with [the consent procedures concerning delivery of electronic consent or the use of a "reasonable demonstration" test]."

Any other amendments adding additional responsibilities, procedures or limitations with respect to consumer consent should be carefully reviewed. Any amendments affecting consent, or limiting the ability to vary the UETA by agreement, should also be carefully evaluated. Most such provisions are probably invalid under the E-SIGN rules.

Section 6 – Construction and Application

What it does: This provision provides basic interpretive rules for effecting legislative intent. It has not been the subject of amendments.

Section 7– Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts

What it does: This Section sets out the three basic rules of the UETA. It provides that electronic records and signatures will have the same force and effect as written documents and traditional ink signatures, except in the types of documents and transactions that are excluded from the statute.

WHAT TO WATCH FOR:

This section represents the core principles of the UETA. Any change from the Official Text should be carefully reviewed. This Section has not been subjected to many amendments, and new amendments are unlikely.

Section 8 – Provisions of Information in Writing; Presentation of Records

What it does: This Section contains some basic protections for parties who are receiving electronic records that are otherwise required to be provided in writing. It includes the right of the recipient to retain a copy, and it confirms that display, formatting and specific delivery rules (such as the use of the United States mail) are not changed by the UETA.

WHAT TO WATCH FOR:

This Section has not been the subject of many proposed changes or amendments in the past. Any change which imposes additional requirements or restrictions with respect to document delivery or record retention, should be carefully reviewed.

Section 9 – Attribution and Effect of Electronic Record and Electronic Signature

What it does: This Section sets out some basic rules for determining when a person will be held responsible for an electronic signature, so that the signature may be enforced against them. This Section has not been the subject of many proposals for amendment.

Section 10 – Effect of Change or Error

What it does: This Section sets up some general liability rules for parties who agree to use a security procedure to detect errors or changes in electronic records, and then fail to use the agreed procedures. There are special rules for errors that result when an individual engages in a transaction with an automated electronic agent (a computer software program designed to make an automatic contract decision without human intervention).

WHAT TO WATCH FOR:

In general, this Section has not been the subject of many proposed amendments. However, in at least one state the rules concerning electronic agents have been changed so that an individual may avoid an error or mistake even if the electronic agent offered an opportunity to detect and correct the error, and the individual failed to take advantage of that opportunity. Any such amendment should be carefully reviewed and evaluated for its impact on the design and use of electronic agents for contract formation and delivery of title policies.

Section 11 – Notification and Acknowledgement

What it does: This Section provides that a notary may utilize an electronic signature when notarizing a document, and that no stamp or seal is necessary. This Section does not change any other requirements for notarization such as personal appearance or confirmation of identity.

WHAT TO WATCH FOR:

Careful review should be given to any amendment which does either of the following:

- Eliminates this provision, or limits its use to only certain classes of transactions or certain types of documents, or
- Requires notaries utilizing electronic signatures, or notarizing electronic documents, to obtain (i) special training or (ii) a special commission in order to notarize electronic documents.

Section 12 – Electronic Records; Originals

What it does: This Section provides that an electronic record may satisfy any state law or regulation concerning record retention. To qualify, the electronic record must accurately reflect the information that was in the original document, and it must remain accessible for later reference. This Section also provides that third parties may provide for storage and retrieval services, and that the electronic record will be treated the same as the original if it is kept in accordance with the rules in this Section.

WHAT TO WATCH FOR:

Watch for any amendment prohibiting the use of third-party service providers. This may adversely impact the ability of the title industry to take full advantage of the UETA. The following changes or proposed amendments should also receive careful review:

- Any proposal to eliminate the rule that an electronic record will be treated the same as an original.
- Any change or additional that permits regulatory agencies to invalidate the rules and require businesses to maintain their records on paper (this should not be confused with the existing provisions in Section 12(g) of the UETA, which permit a government agency to specify additional regulations for keeping the record in an electronic form – this is part of the Official Text of the UETA).

Section 13 – Admissibility and Evidence

What it does: This Section provides that courts will not prohibit the introduction of documents or signatures into court simply because they are in an electronic form.

WHAT TO WATCH FOR:

This Section has not been the subject of many proposed amendments. Any change to this Section should be the subject of careful review, as it may have a negative impact on the ability to use electronic records or signatures with certainty that they will be admissible into evidence in court.

Section 14 – Automated Transactions

What it does: This Section describes some basic rules for permitting parties to use electronic agents (automated software) to enter into contracts and agreements with each other. The UETA provides that, in general, these types of agreements will be enforced. This provision has not been the subject of many proposed amendments.

Section 15 – Sending and Receipt

What it does: This Section provides some basic rules for when an electronic record is “sent,” or when it is “received.” It also provides some basic presumptions concerning where the document is sent from, and where it is received.

WHAT TO WATCH FOR:

Careful examination should be given to any change or amendment to the Official Text which either:

- Changes the basic rules concerning when a document is sent or received, or limits or eliminates the ability of the parties to alter the basic rules by agreement.
- Requires that the information sent to a consumer is not effective until it is actually received and reviewed by the consumer.

Section 16 – Transferable Record

What it does: This Section creates an electronic equivalent to a negotiable promissory note and negotiable documents of title. It establishes a number of specific requirements for the electronic records to be effective as equivalents of the paper negotiable documents.

WHAT TO WATCH FOR:

In general, this Section has not been the subject of many changes or amendments, other than alterations in the reference to other statutes to match local statutory numbering schemes. Any proposed change to the substantive provisions of this Section should be carefully reviewed, since additional limitations or restrictions on the use of transferable records in connection with real

estate transactions may conflict with E-SIGN, or may erect additional barriers to the use electronic loan documentation in connection with real estate mortgage transactions.

Section 17 Through 19 – Government Authority to Send, Receive and Use Electronic Records and Signatures

What it does: These Sections authorize the state, and its political subdivisions, to convert their internal operations and their filing offices to electronic records and signatures as their infrastructure permits.

WHAT TO WATCH FOR:

In a number of states, these provisions have been omitted. Legislatures should be encouraged to include these provisions. They facilitate the eventual adoption of electronic filing systems, by empowering state agencies and county offices to utilize electronic records and signatures on a voluntary basis. In addition, where possible it may be appropriate to encourage the addition of provisions like those which were adopted as part of the UETA in Florida, which provide:

- That county recorders make their index of documents recorded in the official records available for review on the Internet by a specific date, and
- By another date, further into the future, that county recorders provide for retrieval and viewing of filed records over the Internet.

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