

# [ Legalese ]

with Brannon D. Anthony, Esq.



## ESIGN: A Foundation for e-Signature Processes

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The federal Electronic Signatures in Global and National Commerce Act (ESIGN), along with state-adopted versions of the model Uniform Electronic Transactions Act (UETA), establish a foundation for the implementation of e-signature and e-record processes.

### *Federal and State Law Interplay*

ESIGN does not entirely preempt state versions of electronic signature laws; however, any such laws must be based on a "pristine" version of the model UETA. As a result, state laws that are not "pristine" versions of UETA might be preempted in whole or part by ESIGN. With its broad preemption provisions and its interplay with UETA, ESIGN provides a basis to develop a national electronic signature strategy.

### *Recognition of e-Signatures and e-Records*

ESIGN does not require anyone to use or accept an electronic signature or record; however, the law specifically provides that neither a signature nor e-record may be denied legal effect solely because it is in electronic form. Under ESIGN, an electronic signature can be as simple or complex as clicking "I Agree;" a digital signature using PKI technology; an electronic image captured on a peripheral device; or other ways an electronic sound, symbol or process can be attached to or logically associated with an electronic record that is adopted by a person with the intent to sign.

### *Exclusions from ESIGN*

ESIGN excludes certain contracts and records — contracts and records regulated by statutes or laws dealing with probate and domestic law matters and certain provisions of state uniform commercial codes. The specifically excepted areas tend to be specialized, and the great majority of commercial transactions fall within the coverage of ESIGN.

### *Verifications and Acknowledgements*

Verifications and acknowledgments required by law to be given by consumers in writing are expressly permitted to be delivered in electronic form under ESIGN in certain circumstances. ESIGN essentially provides that, if a law requires a disclosure to be provided in writing that includes acknowledgment of

receipt by the consumer, that disclosure may be given electronically if, and only if, the electronic method for providing that disclosure also includes a process or method for capturing acknowledgment electronically.

### *"Statutorily-Required" Disclosures*

ESIGN expressly permits disclosures that are required by law to be provided to consumers "in writing" to be provided exclusively through electronic means if certain conditions are met. These conditions include: obtaining the consumer's consent to receive the disclosures electronically; providing certain disclosures to the consumer to evidence the consumer's consent to receive the required disclosures electronically; receiving the consent to obtain disclosures electronically prior to when the disclosure sought to be electronically delivered is required by statute to be given; and providing a mechanism for the consumer to later access the record of the disclosure that was the subject of the consumer's consent.

### *e-Record Retention*

Under ESIGN, an archived electronic record will satisfy statutory requirements that a contract or other document be retained "in writing," if the electronic record is maintained in a form capable of being retrieved by all parties for later reference. In addition, ESIGN recognizes that records of a transaction may be archived exclusively through electronic means, but failure to archive the records in a way that allows the record to be accurately reproduced could result in the unenforceability of the agreement represented by the electronic record and regulatory sanctions for failing to maintain the proper records.

ESIGN establishes the basic building blocks for a legally compliant e-signature and records process. Once the foundation of ESIGN (and state-adopted UETA) is recognized, designing an effective e-signature process becomes more about process and work flow structure than legal requirements.

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