



LEVETT ROCKWOOD P.C.

Attorneys-at-Law

NEWSLETTER

October 2000

A Courtesy To Our Clients and Friends

ELECTRONIC SIGNATURES GET FEDERAL APPROVAL

Effective October 1, 2000, the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN") authorizes use of "electronic signatures" nationwide in most business transactions.

Electronic signatures. E-SIGN does not require anyone to use or accept electronic signatures or electronic records. It simply prohibits anyone from denying the validity of a signature or a document solely because it exists in electronic form—that is, it confirms that a reliably created electronic document is as legally binding as a pen-and-paper document.

E-SIGN defines "electronic signature" as any "electronic sound, symbol or process attached to or logically associated with a contract or record and executed or adopted by a person with the intent to sign or authenticate" a document.

While E-SIGN is meant to help streamline e-commerce, its flexible definition of an electronic signature is expected to generate many challenging legal questions. For example, how will the recipient of an electronic transaction know whether the sender "intended" a particular sound, symbol or process to constitute a signature? The law apparently intends to allow several choices. Possibilities might include a digital image of a handwritten signature, an encrypted key for personal identification, or something as simple as a name typed at the end of an email message by the sender. Many options likely will develop over time.

Electronic records. E-SIGN also authorizes the general use of electronic records in place of paper documents. An "electronic record" is defined as "a contract or record created, generated, sent, communicated, received, or stored by electronic means." Under E-SIGN, electronic records can be used in place of most paper documents as long as the electronic record accurately reflects the information in the document and is accessible by those who are entitled to access the information.

The law also allows documents to be notarized electronically, though it leaves open the question whether the notary must be physically present to witness an "electronic signature." (Until

this question is resolved, we recommend that the notary be physically present.)

Limits and Exclusions. E-SIGN is not intended to change any legal rules or alter any contract laws other than to authorize the use of electronic documents. To assure consumer protection, E-SIGN requires the following safeguards in consumer transactions:

Consent. Consumers must affirmatively consent to use of an electronic (rather than paper) document.

Disclosure Statement. Prior to consenting, consumers must receive notice of the right to receive the documents in hard copy plus the right (and method) to withdraw the consent.

Confirmation. If a consumer consents to receipt of electronic records, the company must confirm that the consumer will be able to access the documents electronically.

Further, E-SIGN does *not* apply to certain categories of documents, including:

- wills and other records governed by trust and estate law
- adoption, divorce and other family law matters
- court orders and other official documents
- consumer notices relating to cancellation of vital services, such as health insurance or utility services
- security agreements, financing statements and several other documents under the Uniform Commercial Code (though it does apply to sale and lease transactions)

Effect on State Law. A confusing aspect of E-SIGN is its relationship to the laws of the several states that have already adopted their own electronic signature laws. The purpose of E-SIGN is to establish uniform national rules. As a result, the federal law expressly pre-empts any "inconsistent" state laws. Since E-SIGN only pre-empts "inconsistent" state laws, questions of interpretation may arise in some states as electronic signatures become more popular.

Another confusing area is E-SIGN's effect on recordation of deeds and other land records. The law expressly applies to any real estate transactions that are "in or affect interstate commerce." It is not always clear, however, which transactions fit this category. Also, until registration offices become properly equipped, electronic registration of deeds will not be possible.

Conclusion. E-SIGN will likely facilitate the continued growth and development of e-commerce. However, it leaves open many questions such as how to authenticate electronic signatures, how to implement consumer consent, and how to reconcile the federal law with potentially conflicting state laws. Court decisions will be required in these areas and other areas before the objectives at E-SIGN can be fully achieved.

If you have any questions about the new law, or would like further information, please feel free to contact **Ed Chansky** or **Kristine Cunnane** of our office at 203-222-0885.

