

SCHWARTZ & BALLEN
1990 M STREET, N.W. · SUITE 500
WASHINGTON, DC 20036-3418

(202) 776-0700

FACSIMILE
(202) 776-0720

M E M O R A N D U M

June 21, 2000

Congress Passes E-Signature Act

Late last week, Congress approved the Conference Report for S. 761, the Electronic Signatures In Global and National Commerce Act (the “E-Sign Act”). It is expected that the President will sign the bill into law shortly.

The E-Sign Act establishes legal parity between electronic and written signatures and between electronic and paper records for all purposes under federal and state law. This memorandum summarizes the key provisions of the E-Sign Act. If you have any questions, please give us a call.

Scope of the E-Sign Act. The E-Sign Act applies to all federal and state statutes, regulations and other rules of laws, unless expressly excepted. Significant laws excepted from the coverage of the E-Sign Act include all Articles of the Uniform Commercial Code (except UCC Articles 2 and 2A) and provisions governing wills and trusts. (Section 103.) However, a contract or record governed by one of these exceptions is subject to the E-Sign Act for other purposes.

The Act also limits its application to “transactions” that are in, or affecting, interstate or foreign commerce. The definition of “transaction” in the E-Sign Act is broad, and includes actions relating to the conduct of business, consumer or commercial affairs between two or more persons. (Section 106(13))

Legal Recognition of Electronic Signatures and Records. The main operative section of the E-Sign Act provides that a signature, contract or other record relating to a transaction may not be denied legal effect, validity or enforceability, solely because it is in electronic form; and a contract may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation. (Section 101(a))

SCHWARTZ & BALLEN

This provision generally overrides federal or state law that would require a written signature or a paper record, and permits an electronic signature or electronic record to serve as a substitute for a written signature or paper record.

Consumer Disclosures. The E-Sign Act contains special provisions for the use of an electronic record to provide consumers with disclosures or other information required by law to be furnished to consumers. (Section 101(c)) For example, these provisions allow a financial institution to deliver to a consumer, via an electronic record, an initial disclosure statement required under the federal Truth in Lending Act or the Gramm-Leach-Bliley Act's privacy provisions.

The provider of the electronic disclosure must obtain the consumer's consent in order to deliver the disclosure in electronic form. Prior to obtaining this consent, the provider must inform the consumer about the use of the electronic records to receive the required disclosures. In addition, the consumer's consent must be an affirmative consent, and the consumer must consent electronically, or confirm the consent electronically, in a manner that "reasonably demonstrates" that the consumer can access the information in the electronic form that will be used to deliver the disclosures. This electronic consent requirement is intended to ensure that the consumer can actually receive the disclosures electronically.

Electronic Agents. The E-Sign Act recognizes the use of electronic agents (computer programs or services) to form contracts with natural persons. This provision is intended to address, for example, websites and other computer/software services where a person interacts with a computer program to agree to purchase a product or service. (Section 101(h))

Retention of Records. If a statute or other law requires that a contract or other record relating to a transaction be retained, the E-Sign Act permits an electronic record of the information in such contract or record to satisfy the retention requirement. (Section 101(d)(1)) If a statute or other rule of law requires the record to be retained in writing, the electronic record must be retained in a form that is capable of being retained and accurately reproduced for later reference by all parties that are entitled to retain the contract or record. (Section 101(e))

Originals. If a statute or other law requires that a contract or other record relating to a transaction be provided, available or retained in its original form, the E-Sign Act permits an electronic record of the contract or record to satisfy such legal requirement. (Section 101(d)(3))

SCHWARTZ & BALLEN

Checks. The E-Sign Act includes a special provision regarding the retention of check records. If a law requires the retention of a check, that retention requirement can be satisfied with the retention of an electronic record of the information on the front and back of the check. (Section 104(d)(4)) In addition, the Act applies generally to electronic records (such as digital images) of paper checks for purposes of satisfying state and federal record requirements other than UCC Articles 3 and 4. Given the exceptions for UCC Articles 3 and 4, the E-Sign Act does not authorize a fully electronic negotiable instrument (that is, a check that never existed in paper form at any time).

Transferable Records. The E-Sign Act allows for the creation of electronic notes (but not electronic drafts or checks) with the legal characteristics of transferability and negotiability, if they meet certain requirements relating to the creation, retention and control of the electronic note are met. This provision would allow for the creation of fully electronic mortgage notes. (Section 201)

Insurance Industry. The E-Sign Act expressly applies to the business of insurance. (Section 101(i) and (j).) However, it does not permit certain electronic communications from insurance companies to their customers, such as a notice of a cancellation of health insurance. (Section 103(b)(2))

UETA and Other State Law Overrides of E-Sign Act. A state may override the provisions of the E-Sign Act in two limited circumstances. First, a state may adopt the Uniform Electronic Transactions Act in the form approved by National Conference of Commissioners on Uniform State Laws. Second, a state may adopt alternative procedures for the use of electronic records and electronic signatures if such procedures are consistent with the E-Sign Act and are generally technology neutral. The state override of the E-Sign Act only applies to state law matters, and not to any federal law requirements relating to written signatures or paper records. (Section 102)

Regulatory Implementation. The E-Sign Act does not assign any particular agency with jurisdiction for implementation or enforcement of the Act. Instead, a federal or state agency may interpret the requirements of the E-Sign Act with respect to other statutes for which the agency already has interpretive or rulemaking authority. (Section 104(b))

Effective Date. The E-Sign Act is generally effective October 1, 2000. However, with respect to federal and state record retention requirements, the Act has a delayed effective date of March 1, 2001, or June 1, 2001 if the applicable

SCHWARTZ & BALLEN

regulatory agency has announced or initiated a rulemaking with respect to the application of the E-Sign Act to a statute or regulation under its jurisdiction. (Section 107)

* * * * *

Please give us a call if you have any questions regarding this memorandum or the E-Sign Act generally. Please visit our web site, at schwartzandballen.com, for links to the text of the E-Sign Act.