

Electronic Transactions

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Basics of E-Sign and UETA

- Electronic Signatures in Global and National Commerce Act (“E-Sign”)
- The Uniform Electronic Transactions Act (“UETA”)
- Consumer Disclosures under E-Sign and UETA
- Exclusions from E-Sign and UETA

The Electronic Signatures in Global and National Commerce Act (“E-Sign”)

15 U.S.C. § 7001(a)

- (a) ***In general.*** Notwithstanding any statute, regulation, or other rule of law (other than this [E-Sign Act]), with respect to any transaction in or affecting interstate or foreign commerce—
- (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
 - (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

15 U.S.C. § 7006

- (2) ***Electronic***. The term “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (4) ***Electronic Record***. The term “electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.
- (5) ***Electronic Signature***. The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.
- (9) ***Record***. The term “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

The Uniform Electronic Transactions Act ("UETA")

UETA Section 7

Legal recognition of electronic records, electronic signatures, and electronic contracts.

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

UETA Section 2

Definitions.

- ***Electronic***. Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- ***Electronic Record***. A record created, generated, sent, communicated, received, or stored by electronic means.
- ***Electronic Signature***. An electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
- ***Record***. Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- ***Security Procedure***. Procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record.

Consumer Disclosures under E-Sign and UETA

E-Sign and UETA permit consumer disclosures to be made electronically under certain conditions:

- Affirmative consent which has not been withdrawn;
- Clear and conspicuous statement of the right to paper disclosure and the right to withdraw consent;
- Scope of the consent is provided;
- Disclosure of how to withdraw consent and update information is made;

- Disclosure of hardware and software requirements;
- Consumer consents electronically—manner reasonably demonstrating that the consumer can access the information in electronic form; and
- Revised hardware and software requirements and right to withdraw consent.

Federal Regulations

Uniform standards for the electronic delivery of disclosures required under several federal consumer protection regulations have been adopted—

- Regulation B (Equal Credit Opportunity)
- Regulation E (Electronic Funds Transfers)
- Regulation X (Real Estate Settlement Procedures)
- Regulation Z (Truth in Lending)

TRID Applicability

- TRID Loan Estimate and Closing Disclosure may be provided by electronic delivery methods subject to compliance with E-Sign.
- Consent must be obtained prior to delivery of disclosures.

Exclusions from E-Sign and UETA

UETA Section 3

Scope.

(b) This [Act] does not apply to a transaction to the extent it is governed by any of the following:

- (1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
- (2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];
- (3) [the Uniform Computer Information Transactions Act];
and
- (4) [other laws, if any, identified by State].

Exclusions from UETA in Alabama

Alabama Code § 8-1A-3

Scope.

- (b) This chapter does not apply to a transaction to the extent it is governed by any of the following:
- (1) A law governing the creation and execution of wills, codicils, or testamentary trusts.
 - (2) Title 7, the Uniform Commercial Code, other than Sections 7-1-107 and 7-1-206, Article 2, and Article 2A.
 - (3) A statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.

- (c) This chapter does not apply to any of the following:
- (1) Court orders or notices, or official court documents, including briefs, pleadings, and other writings, required to be executed in connection with court proceedings.
 - (2) Any notice of any of the following:
 - a. The cancellation or termination of utility services, including water, heat, and power.
 - b. Default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.

- c. The cancellation or termination of health insurance or benefits or life insurance benefits, excluding annuities.
 - d. Recall of a product, or material failure of a product, that risks endangering health or safety.
- (3) Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

Electronic Records

- Retention of Electronic Records; Originals
- Laying the Foundation for Admission of Electronic Records

Retention of Electronic Records; Originals.

UETA Section 12

- (a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:
 - (1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
 - (2) remains accessible for later reference.
- (b) A requirement to retain a record in accordance with subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

- (c) A person may satisfy subsection (a) by using the services of another person if the requirements of that subsection are satisfied.
- (d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).
- (e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a).

- (f) A record retained as an electronic record in accordance with subsection(a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this [Act] specifically prohibits the use of an electronic record for the specified purpose.
- (g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Admissibility in Evidence

UETA Section 13

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Comment

Like Section 7, this section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

Alabama Code § 8-1A-13(b) (a non-uniform addition)

- (b) In determining the attribution and authenticity or evidentiary weight of an electronic record or signature, the trier of fact may consider, along with any other relevant and probative evidence, proof of the efficacy of any security procedure applied. This may include a showing that the procedure:
- (1) uniquely identifies the signer or creator of the record;
 - (2) prevents others from using the same identifier; and/or
 - (3) provides a mechanism for determining whether the data contained in the record was changed after it was created or signed. Evidence bearing on the means and the reliability with which the procedure performs these functions may also be considered.

Laying the Foundation for Admission of Electronic Records

- *In re Vee Vinhnee (American Express Travel Related Services Company, Inc. v. Vee Vinhnee)*,
336 B.R. 437 (9th Cir. BAP 2005)
- *Lorraine v. Markel American Insurance Company*,
241 F.R.D. 534 (D.Md. 2007)

In re Vee Vinhnee Standards

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

Electronic Closings (eClosings)

- What is an eClosing?
- History of eClosings
- Process of eClosings / Secondary Market Activity
- Practical Considerations
- Legal Considerations

What is an eClosing?

- An eClosing is the act of closing a residential mortgage loan electronically. This occurs through a secure electronic environment where some or all of the closing documents are executed, delivered, and accessed online.
- An eClosing is often a *hybrid* process in which certain key documents (e.g., the promissory note and security instrument) are printed to paper and traditionally wet-ink signed.
- An eMortgage means a residential mortgage loan where the critical loan documentation, specifically the promissory note (eNote), is created electronically, executed electronically, transferred electronically and ultimately stored electronically. An “eClosing” produces an “eMortgage” only if the promissory note is signed electronically. *Note: This can still include a traditional wet-ink signed and notarized security instrument.*

History of eClosings

- Enactment of E-Sign and UETA in early 2000s
- Fannie Mae and Freddie Mac guidance by mid-2000s
- Delayed during Great Recession
- Renewed interest in mid-2010s, with CFPB pilot program in 2015

Advantages of eClosings

- Faster liquidity in the secondary market
- Operational efficiencies (cost savings)
- Quicker warehouse inventory turn times
- Elimination of inefficient workflows
- Increased data quality
- Consistency and accuracy in the closing process (fewer, if any, post-closing conditions)
- Potential loss of notes eliminated, resulting in better collateral control
- Improved risk management
- Reduced carbon and ecological footprint
- Reduced courier and shipping fees

Process of eClosings / Secondary Market Activity

- Originator
- MERS
- eVaults/eCustodians
- Secondary Market Investors

Originator – The eClosing process starts with the bank or mortgage company that originates the loan

- Coordinates preparation and completion of electronic documents
- Arranges for eNotarization
- Works with vendors and investors

MERS – The MERS eRegistry and MERS eDelivery function are critical to the secondary market process

- The MERS eRegistry is a system of record that identifies who is in control of an eNote. It points to the location of the “authoritative copy” of the eNote, stored by a custodian in a secure eVault.
- MERS eDelivery provides a secure method for distributing eMortgage packages from one MERS eRegistry member to another.
- Fannie Mae and Freddie Mac require an originator to use the MERS eRegistry and eDelivery function when selling an eMortgage to them.

eVaults/eCustodians – Each originator and secondary market holder of an eMortgage must have an eVault. An eVault is a secure, electronic repository for eNotes. An eVault may be operated by a third party eCustodian or by the originator or holder to store their own eNotes

Secondary Market Investors – Secondary market investors must be willing to purchase eMortgages. Fannie Mae and Freddie Mac are the most active secondary market purchasers and generally “set the tone” for other secondary market purchasers.

Example of eClosing Process

- The borrower uses an eClosing system to electronically sign the eNote and other closing documents. A notary eNotarizes the borrower's signature, as applicable.
- The eClosing system “tamper seals” the documents.
- The originator registers the eNote on the MERS eRegistry within one business day of closing. The originator transmits the eNote to the originator's eVault using MERS eDelivery.
- The originator subsequently transmits the eNote and other investor documents from its eVault to Fannie Mae's eVault using MERS eDelivery.
- The originator initiates a transfer of Control & Location of the eNote to Fannie Mae via the MERS eRegistry.
- The originator submits applicable delivery data to Fannie Mae.

Practical Considerations

- Investor Requirements
- Technology Considerations
- eNotarization and County Recording Considerations
- Warehouse Lenders

Legal Considerations

- E-Sign and UETA
- “Transferable Records”
- eNotarization and County Recording Considerations

“Transferable Records”

- E-Sign and UETA do not apply to many of the transactions that are governed by the UCC, including those governed under Article 3 and Article 9.
- E-Sign and UETA have special “transferable records” provisions to address the negotiability of eNotes.
- E-Sign and UETA address “transferable records” at 15 U.S.C. § 7021 and UETA § 16, respectively.

15 U.S.C. § 7021(a)(1)

- (1) ***Transferable record.*** The term “transferable record” means an electronic record that—
- (A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;
 - (B) the issuer of the electronic record expressly has agreed is a transferable record; and
 - (C) relates to a loan secured by real property.

A transferable record may be executed using an electronic signature.

15 U.S.C. § 7021(b)

- (b) ***Control.*** A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

15 U.S.C. § 7021(c)

- (c) **Conditions.** A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that—
- (1) a single **authoritative copy** of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
 - (2) the authoritative copy identifies the person asserting control as—
 - (A) the person to which the transferable record was issued; or
 - (B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

15 U.S.C. § 7021(c) (cont'd)

- (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

15 U.S.C. § § 7021(d) and (e)

- (d) ***Status as holder.*** Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section 1–201(20) of the Uniform Commercial Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under section 3–302(a), 9–308, or revised section 9–330 of the Uniform Commercial Code are satisfied, the rights and defenses of a holder in due course or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.
- (e) ***Obligor rights.*** Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

Important Takeaways from “Transferable Record” Provisions

- Must have an agreement that the eNote is a “Transferable Record”
- Control is critical—the person who controls an eNote is the “holder”
- The MERS eRegistry is widely considered to be a system that reliably evidences the transfer of interests in “Transferable Records”
- The establishment and maintenance of the “Authoritative Copy” of an eNote is very important

eClosing Terminology

Paper World	Electronic World
Negotiable Instrument	Transferable Record (eNote)
Original Note	Authoritative Copy
Possession	Control
Investor/Holder	Controller
Custodian	Location (eVault)
Endorsement	Transfer of Control
Wet Signature	Electronic Signature

eNotarization and County Recording Considerations

- eNotarization is permitted under E-Sign and UETA at 15 U.S.C. § 7001(g) and UETA § 11, respectively.
- eRecording and eNotarization are permitted under the Uniform Real Property Electronic Recording Act. Many states have enacted it in some form. In Alabama, it has been enacted at Alabama Code § 35-4-120 et al.