

# “SIGN ON THE DOTTED LINE”

## WHAT THE PASSAGE OF THE NEW ELECTRONIC SIGNATURE ACT ACCOMPLISHES

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When Senator Abraham first introduced Senate Bill 761 in March of 1999, he envisioned a global market where consumers could buy, sell and trade freely on the Internet. Senator Abraham’s dream has now become a reality. The newly enacted Electronic Signatures in Global and National Commerce Act (the “Act”) is the nations first uniform electronic signature legislation. With President Clinton’s signature, the new legislation became effective October 1st, 2000.

The Act gained recognition and acceptance for its time and money saving aspects. Crossing party lines, the Senate approved the electronic signature measure with an 87-0 vote. The House passed the Act by a 426-4 vote. Supporters believe that the new electronic signature legislation will promote e-commerce because contracting parties will feel more comfortable entering into contracts and doing general business online. House Commerce Committee Chairman Thomas Bliley, is quoted as saying, “[e]lectric signatures and records will help grow the digital economy by giving American consumers greater confidence in their online business transactions.”

The States are also considering enacting the Uniform Electronic Transactions Act (“UETA”). The purpose

of UETA is to develop a uniform system for the use of electronic signatures. Although the drafters of UETA are nearing its completion, there are no guarantees that all 50 states will enact it. In response to this concern, the Act was enacted at the federal level. However, the Act provides that it is superseded to the extent that the states adopt UETA or enact state legislation that complies with provisions of the Act.

Within the past few years over 40 states have enacted electronic signature legislation to foster growth in the e-commerce market. However, the inconsistency of the legislation from state to state has deterred many potential e-commerce consumers from transacting over the Internet. The uncertainty of their contractual obligations from state to state made many consumers hesitant about doing business on the Internet. The Act should diminish that fear by establishing guidelines for contracting on the Net. Now consumers will be able to purchase almost anything via the Internet. And businesses will be able to contract for parts and services at the click of a button. The Act now makes transacting over the Internet a virtual reality (pun intended).

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### Validity

Section 101 of the Electronic Signatures in Global and National Commerce Act details the provisions that make electronic signatures, contract, and records valid. The scope of the new legislation does not preempt any other law regarding formation or enforceability. Nor does it require that parties, other than a governmental agency, use or accept electronic signatures or records. In addition, electronic records can be used to satisfy any other law requiring that contracts or other records relating to a transaction be retained in paper form so long as the record accurately reflects the content of the contract and the record remains accessible to all persons who are entitled to access. Furthermore, electronic records are also considered originals for purposes of this Act. If a law requires acknowledgement or notarization it may also come in electronic form.

### Agents

The new legislation is applicable to electronic agents as well. Congress specifically addressed insurance agents and brokers in the Act. Section 101(j) exempts insurance brokers from liability for any deficiencies in the electronic procedure if the agent has not engaged in negligent, reckless, or intentionally tortious conduct, the agent was not involved in the development or establishment of such electronic procedures, and the agent did not deviate from such procedures.

### Consumer Rights and Disclosure

When dealing with consumers, the new legislation requires that certain disclosures be made. The Act defines consumers as individuals who obtain, through transactions, products or services which are used primarily for personal, family or household purposes. In determining whether a customer is a consumer, certain

precautions should be taken. Businesses can utilize questionnaires or other screening processes to identify consumers from non-consumers for purposes of compliance with this Act.

The use of an electronic record satisfies the consumer disclosure requirements if the consumer affirmatively consents and the consumer, prior to consenting, is provided with a “clear and conspicuous” statement informing the consumer of certain rights and obligations. Some of those rights and obligations include the right to receive a paper record of the transaction, the obligation to provide the consumer with a statement of the hardware and software requirements for access to and retention of the electronic records, and the obligation to make consumers aware of changes to hardware and software requirements. Electronic consumer consent is another element necessary to satisfy the requirement. The consent must “reasonably demonstrate” that the consumer can access electronic information. However, lack of consumer consent may not invalidate an electronic agreement. Other consumer rights include the preservation of consumer protections established by any other law.

### Security

Security issues are sure to arise whenever confidential information is exchanged between two parties. Additional safety measures will be necessary to aid in the safe passage of confidential information over the Internet. Although not prescribed in the Act, businesses and their customers can agree to verify the authenticity of electronic signatures with the use of a password, thumbprint, or retinal scans. The Act defines electronic signatures as electronic sounds, symbols, or processes,

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. The simplicity of the definition makes it possible for multiple parties to have the same electronic sound, symbol, or process. The Act does not address a method of making an electronic signature distinct to one party or transaction. As a result, businesses and consumers will have to take great care in verifying that the electronic signature is valid before entering into an agreement.

### Special Exceptions

Currently, section 103 of the Act exempts wills, codicils, testamentary trust, adoptions, divorces or other family law matters from the Act. Other exemptions to the new legislation include notice of the cancellation or termination of utility services, health or life insurance or a recall of a product. However, section 103 is subject to review and evaluation after a three-year period. If it is determined that these exceptions are no longer necessary for the protection of consumers, the prohibition will be removed, and consumers will be able to contract for these services over the Internet as well.

### Transferable Records/Transactions

Section 201 of the Act allows transferable records to be executed by the use of electronic signatures. Transferable records include notes under Article 3 of the UCC if the electronic record is in writing, the issuer of the electronic record expressly agrees it is a transferable record, and it relates to a loan secured by real property. By extending the Act to real estate notes, consumers will have the ability to finance the purchase of a

home over the Internet.

### International Transactions

In response to the ever-expanding global market, the new legislation provides for the promotion of international e-commerce as well. The legislation removes paper based obstacles in an attempt to make international e-commerce transactions easier. By taking a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions, the new legislation makes it easier to transact international business over the Internet.

### Hanson Bridgett

#### Intellectual Property Practice Group

Hanson Bridgett recognizes the growing popularity of e-commerce as an opportunity for old and new businesses to expand their markets. The Electronic Signatures in Global and National Act signals the beginning of a new industry. The broad language of the Act leaves room for judicial interpretation in many areas. Careful planning should go into the implementation of the Act in day to day business transactions. As with any new undertaking, obtaining sound advice from attorneys knowledgeable in the area is recommended. Getting good advice early on can help your business transition into the market successfully.

*If you have any questions about the Act's provisions or implications, please contact Jonathan Storper, Esq.*

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