

Approaching Electronic Signature Platforms

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PRACTICES AI and Technology, Corporate, Fund Formation and Management, Finance, Portfolio Companies and Investors, Corporate Governance, Software, Mergers and Acquisitions, Private Equity

Due to the expanding impact of the Coronavirus (COVID-19), physical distancing and remote work policies have increased adoption by companies of electronic signature platforms such as DocuSign, Adobe Sign, SignNow, and others (hereinafter, the “platforms”) in handling internal approvals and also executing commercial documents. Are documents that are executed through these platforms legally effective and binding? Generally, when executed correctly with the consent of the involved parties, the platform-signed documents are as good as their paper-signed counterparts. However, the mere fact that a document is executed through such a platform does not guarantee that the electronic signature is valid and thus binding.

Applicable Law

The two key acts in the United States that establish the legality of electronic signatures are:

- i. The Uniform Electronic Transactions Act of 1999 (“**UETA**”), published by the Uniform Law Commission to provide a framework for states to address the validity of electronic signatures for transactions related to business, commercial, and governmental matters.

UETA (or an equivalent) has been adopted by 47 states, the District of Columbia, Puerto Rico, and the US Virgin Island. Washington state is pending a June 2020 adoption of the UETA while the remaining two states, New York and Illinois, have implemented their own statutes addressing electronic signatures.

- ii. The U.S. Electronic Signatures in Global and National Commerce Act of 2000 (“**E-SIGN**”) was based on UETA and was enacted by Congress to provide a framework to address electronic signatures on the federal level to provide guidelines with respect to transactions in or affecting interstate or foreign commerce.

To the extent a state has adopted the UETA or comparable “alternative procedures or requirements” that are consistent with subsections I and II of E-SIGN, deference will be given to the enacted state law; otherwise, E-SIGN will apply. However, where applicable, E-SIGN and UETA have the same practical effect.

Exclusions

Importantly, electronic signatures under UETA and E-SIGN are not appropriate for all situations. The Uniform Commercial Code supersedes the UETA and E-SIGN where applicable, though, in most cases, the UCC also supports electronic signatures.¹ As a general matter, electronic signatures may not be effective for (i) documents which are required to be notarized (such as, for example, wills and other testamentary documents, and health and benefits declarations), (ii) real estate transactions (including recordable deeds, mortgages, deeds of trust and leases), and (iii) negotiable instruments. In addition, where documents are required to be filed with a governmental authority, the rules of the governmental authority need to be reviewed to determine whether e-

signed documents are acceptable. Before relying on electronic signatures, it is always advisable to consult with counsel in developing a policy that addresses these issues.

In addition, one needs to be mindful of jurisdictional questions. In cases where officers are located in one or more jurisdictions, the company for which they act is in another jurisdiction and the governing law of the documents they execute are in yet a further jurisdiction, the laws of all such jurisdictions may impact validity of the e-signature. Fortunately, laws validating e-signatures have been adopted in a wide number of jurisdictions, and this is not always as difficult as it might otherwise seem.²

Requirements for a Valid Electronic Signature

Both UETA and E-SIGN state that a signature may not be denied its legal effect and enforceability solely because it is in electronic form. Therefore, it is not a question of whether electronic signatures can bind a signatory – because they definitely can, but rather what makes a valid electronic signature. There are four main components that needs to be considered when assessing the validity of an electronic signature:

1. Consent between parties to conduct transaction through electronic means;
2. A party's intent to sign the electronic signature;
3. Logical linkage between the electronic signature and the associated record; and
4. Authentication of the electronic signature.

Satisfying Requirements with Electronic Signature Platforms

The terms of the main commercial platforms state that its platform satisfies all of the requirements and is in compliance with relevant laws. Platforms can comply with the requirements as follows:

1. Consent between parties to conduct transaction through electronic means;

Platform Compliance – Prompt for the signatory to consent to transacting through electronic documents.

2. A party's intent to sign the electronic signature;

Platform Compliance – Signatories having to affirmatively attach signature or through clicking "submit" buttons.

3. Logical linkage between the electronic signature and the associated record; and

Platform Compliance – Link signatures to documents at the time of signing.

4. Authentication of the electronic signature.

Platform Compliance – Record all document and signature activities.

However, as case law would suggest, in practice validity of electronic signatures is not automatic when platforms are used. A major point of contention to arise in case law relates to production of sufficient evidence and detail of the process in which intent and authenticity is verified. Certain courts have held electronic signatures within documents that were executed on platforms with special identification numbers and date stamps to be insufficient in establishing authenticity of the signature. Other courts have held that merely having a signature at the bottom of a document does

not infer the signing party had the requisite intent to sign. Therefore, platforms do not provide a definite answer for all electronic signature matters. Despite most states having adopted UETA, the analysis of whether the requirements for a valid electronic signature are satisfied is fact specific and may vary between jurisdiction.

Best Practices

Given the above, below are some best practices to consider when executing, or accepting execution of, documents through electronic signatures:

- Determine what the applicable jurisdictions are that will impact execution.
 - Jurisdiction of companies
 - Jurisdiction where signatories are located
 - Jurisdiction governing the documents being signed
- Determine if the underlying document is excluded from, or otherwise problematic, for electronic signatures.
- Seek explicit consent of the parties to execute documents and to transact business under the documents electronically (most often within the terms of the document being executed).
- Confirm that all signatories are acting through official company email accounts or have confirmed their activity through such email accounts.
- Maintain high security throughout the electronic signing process and in maintaining any records.
- Ensure records and verification of every step in the electronic signature process.
 - Most platforms enable downloaded confirmations of the process containing essential information as to the process and signatories.

¹ UETA and E-SIGN states that its exclusions do not apply to UCC Sections 1-306 (formerly 1-107) and 1-206, and Articles 2 (Sales) and 2A (Leases). This does not mean that transactions covered under the remaining UCC sections cannot use electronic signatures. Rather, the provision simply gives UCC deference on the remaining sections. In fact, Articles 8 and 9 both allow for electronic signatures. Signed writings in Article 8 may be in electronic form if mutually agreed upon by parties and Article 9 permits electronic creation of security interest.

² As noted herein, this summary focuses on documents executed in, and governed by, the laws of States in the U.S. However, electronic signature laws have been adopted in many other countries as well, such as the eIDAS (Regulation No 910/2014) in the European Union. Most platforms provide summaries of the laws in various jurisdictions, but one should consult with qualified counsel before relying on the laws of any such jurisdiction.