

Transacting in a Remote Work Environment:

A Primer On Electronic Transactions and Electronic Signatures

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Introductions



Jackie Camp

Partner

T: +1 336.574.8069

E: jackie.camp@wbd-us.com



Alyse Young

Associate

T: +1 336.721.3505

E: alyse.young@wbd-us.com



Joseph Speight

Associate

T: +1 336.574.8059

E: joseph.speight@wbd-us.com

Overview of Federal and State Law

Federal Law – The Electronic Signatures in Global and National Commerce Act (the “ESIGN Act”)

- Purpose and History
 - Effective October 1, 2000.
 - Implemented a national, uniform standard for electronic transactions.
- Key Elements
 - A record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
 - If a law requires a record to be in writing, an electronic record satisfies the law; and
 - If a law requires a signature, an electronic signature satisfies the law.
- Exceptions

State Law – Overview of State Approaches

- *Majority Approach* – Adoption of the Uniform Electronic Transactions Act (“UETA”)
 - Goal is to remove barriers to electronic commerce and to provide parties a legal framework for using electronic signatures and records in business transactions.
 - Adopted by 48 states, the District of Columbia, Puerto Rico and the Virgin Islands.
- *Minority Approach* – New York and Illinois, which have other statutory provisions making electronic transactions or digital signatures legally enforceable, but have not adopted the UETA.

Interaction between the ESIGN Act and UETA

- **Preemption** – Generally, the ESIGN Act broadly applies to any transaction in or affecting interstate or foreign commerce and preempts any inconsistent state law.
- **Exceptions** – Exceptions to federal preemption include:
 - State adoption of the UETA without amendment (subject to certain exceptions); or
 - If enacted after June 30, 2000, makes specific reference to the ESIGN Act **and** specifies alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures if such alternative procedures or requirements: (i) are consistent with the ESIGN Act and (ii) do not require or prefer certain specific technology or technical specifications.

Remote Notaries

- Around 20 states permanently allow remote notaries.
- Another approximately 25 states have emergency remote notary authorizations.
 - Including NC
 - Must use real-time, direct audiovisual communication
- CA and SC have neither permanent nor emergency remote notary authorization.



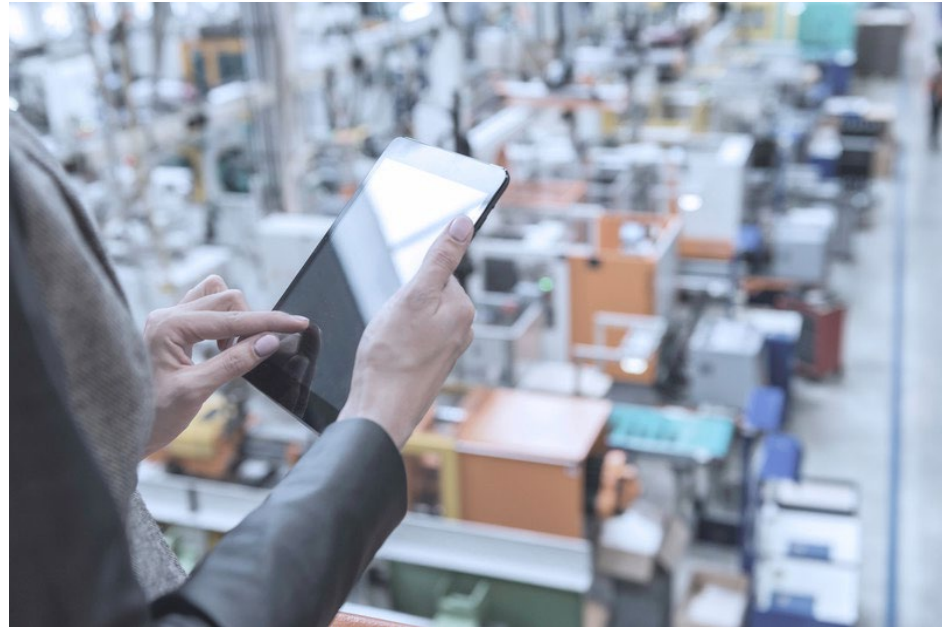


North Carolina Uniform Electronic Transactions Act (the “NC UETA”)



NC UETA: General Framework / Key Elements

- **Purpose**
- **Voluntary**
- **Provision of Records**
- **Attribution**
- **Document Retention**



NC UETA: Key Operative Definitions

- **Electronic** – means “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”
- **Electronic record** – means “a record created, generated, sent, communicated, received, or stored by electronic means.”
- **Electronic signature** – means “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.”



NC UETA: Key Operative Definitions

- Notably, the definitions of “electronic”, “electronic record” and “electronic signature” are nearly identical under the ESIGN Act and the NC UETA.



NC UETA: Exceptions

- Unilaterally generated electronic records
- Specified transactions governed by other laws
- Specified health, safety and consumer protection notices and records



NC UETA: Transferable Records

“**Transferable Record**” means an electronic record that:

- Would be a note under Article 3 of Chapter 25 (Negotiable Instruments) of the North Carolina General Statutes or a document under Article 7 of Chapter 25 (Documents of Title) of the North Carolina General Statutes if the electronic record were in writing; **and**
- The issuer of the electronic record expressly has agreed is a transferable record.

NC UETA: Transferable Records

- A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes the transferee.
- To satisfy such control requirements, certain strict statutory requirements must be met.
- Notably, the comparable provision for transferable records under the E-SIGN Act applies only to electronic records that relate to loans secured by real property.



NC UETA: Admissibility in Court

- “In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”
- Rules of Evidence, such as establishing the necessary foundation for the admission of an electronic record, still apply.



A close-up photograph of a person's hand holding a white stylus and writing on a tablet. The background is blurred, showing what appears to be a meeting or office setting. The text 'Best Practices' is overlaid in white on the right side of the image.

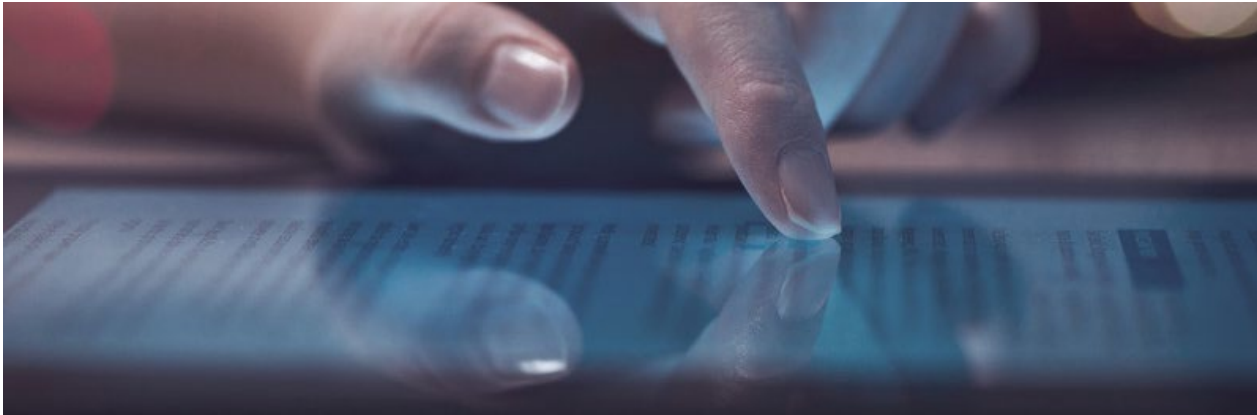
Best Practices

Best Practices: Express Written Agreement

- The NC UETA only applies if the parties have agreed to conduct transactions by electronic means. To avoid any ambiguity, it is recommended to expressly authorize electronic transactions and electronic signatures by written agreement.
- Except as expressly stated in the NC UETA, parties may vary the NC UETA by agreement.

Best Practices: Express Written Agreement

Sample short-form clause: “This [Agreement] may be executed and delivered, including by way of electronic signature (PDF formats included) in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.”



Best Practices: Express Written Agreement

- **Sample long-form clause:**

The words “delivery,” “execute,” “execution,” “signed,” “signature,” and words of like import in any Credit Document or any other document executed in connection herewith shall be deemed to include electronic signatures, the electronic matching of assignment terms and contract formations on electronic platforms approved by the Administrative Agent, or the keeping of records in electronic form, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature, physical delivery thereof or the use of a paper-based recordkeeping system,

Continued sample text

as the case may be, to the extent and as provided for in any applicable Law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act; provided that notwithstanding anything contained herein to the contrary neither the Administrative Agent, the L/C Issuer nor any Lender is under any obligation to agree to accept electronic signatures in any form or in any format unless expressly agreed to by the Administrative Agent, the L/C Issuer or such Lender pursuant to procedures approved by it and provided further without limiting the foregoing, upon the request of any party, any electronic signature shall be promptly followed by such manually executed counterpart.



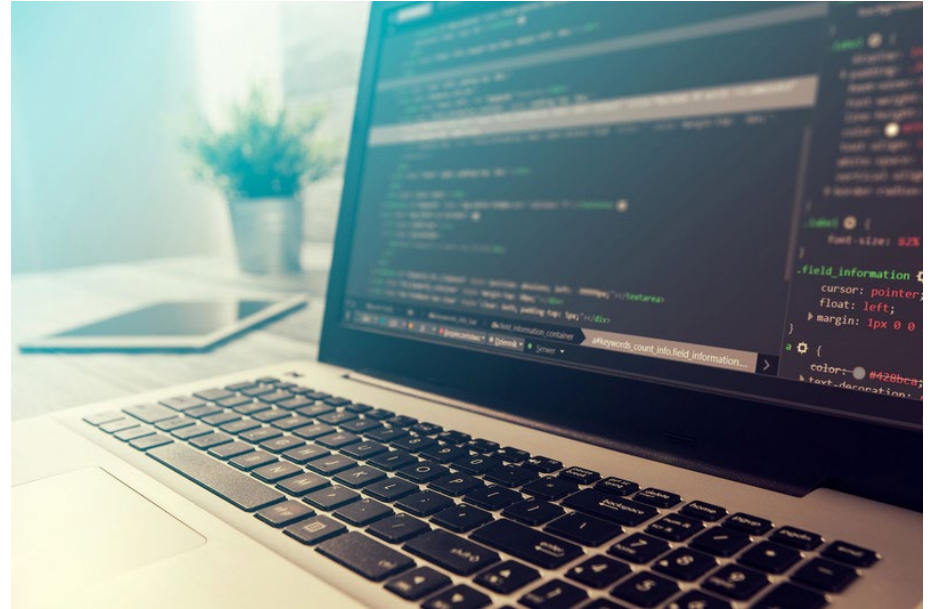
Best Practices: Ensure Proper Document Retention

- Generally, documents executed electronically must be retained for the same length of time as if they were signed in wet ink.
- Records should be accessible in a form that can be reproduced easily.
- Records required to be maintained by law must satisfy the statutory requirements previously outlined.



Best Practices: Implement Proper Security and Authentication Requirements

- For purposes of attribution, a technological security procedure may be the best way to convince a court that the electronic record was signed by a particular person.
- For example, services like DocuSign can provide an audit trail.



Best Practices: Adopt Electronic Signature Policy; Implement Employee Training

- Establish guidelines for employees on when and how electronic signatures may be used.
- Specify the procedures for determining and obtaining proper authorizations before committing the company to binding obligations.
- Train employees to promote compliance with the Electronic Signature Policy.

Best Practices: Avoid Common Pitfalls

- Prevent unauthorized employees from entering into electronic agreements.
- Cross-border transactions – recognize that electronic signatures may not be enforceable under local law, or may have additional requirements.
- Ensure there is sufficient storage on servers to house documents securely.



Signno

Frequently Asked Questions



Question 1:

Our Purchase Agreement doesn't say anything about whether electronic signatures are acceptable or not. Can we sign by DocuSign?



Answer 1:

- **Possibly, under ESIGN and the UETA, electronic signatures are treated as valid and, therefore, are permitted when a Purchase Agreement is silent on the issue.**
- **However, if the Purchase Agreement is silent and one party objects to e-signatures, hard copy signatures are possibly required, unless a course of conduct can be established between the parties that would validate the use of an e-signature.**



Question 2:

Our Loan Agreement says electronic signatures are valid. Can we sign the Note by electronic signature?



Answer 2:

- **Yes, under ESIGN and the UETA electronic signatures are treated as valid and Notes are no exception.**
- **Importantly, if the Notes are negotiable (e.g., payable to "bearer" or "to the order of") then the Notes can still be executed by electronic means, but additional requirements may apply to be considered a “transferable record”.**
- **Notably, any substantive requirements under the UCC (e.g., control; method and manner of perfection) still apply. Therefore, in many instances, it is still advisable for a lender to require an original promissory note.**

Question 3:

Our Loan Agreement says electronic signatures are valid, but the bank is telling me they need originals on the Incumbency Certificate and the Loan Agreement, what should I do?

Answer 3:

- **Despite their new electronic signature boilerplate, many banks still want to see that the signature on the Loan Agreement matches the signature on the Incumbency Certificate. While you may have a valid legal basis for objecting, we advise doing as the bank asks so they loan you their money without delay.**

Question 4:

Our Purchase Agreement requires originals or PDFs of handwritten signatures, can we DocuSign anyhow?

Answer 4:

- **No. Nothing prohibits contracting parties from overriding the electronic signature legislation. If the document has specific agreed requirements, those will prevail.**

Questions?



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Partner

T: +1 336.574.8069

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Associate

T: +1 336.721.3505

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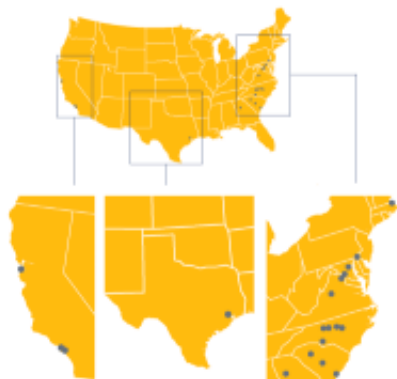
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