

E-Sign and the TCPA

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Why does E-Sign matter?

When a statute or a regulation requires a signature, what makes a click on a website, or the typing of one's name at the end of an email stand for a signature?

- E-Sign allows an electronic signature to satisfy the requirement for a signature.
- TCPA includes signature requirements in (f)(9)—prior express written consent, and (c)(2)(ii).

When a statute or a regulation requires a writing, how does an electronic record—an email or a website—satisfy that requirement?

- E-Sign allows an electronic record to satisfy the requirement for a writing.
- E-Sign requires **special E-Sign consent** before a writing requirement for a consumer can be satisfied with an electronic record.

E-Sign allows the electronic record and electronic signature to qualify--

(a) In general. Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II), 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;

15 USC 7001(a)

Related but separate rules for records and signatures

- E-Sign has –
 - A specific definition for an “electronic signature”
 - A specific definition for an “electronic record”
 - *And* specific rules for electronic records that replace writing requirements to be provided to consumers

What is UETA and is it relevant?

UETA – Uniform Electronic Transaction Act

- Adopted in all US jurisdictions except New York state
- Intended to accomplish the same goals (facilitation of electronic records and electronic signatures) as E-Sign, but applicable to requirements imposed by state law—applying to transactions that are not in interstate commerce.
- UETA is **not relevant** to TCPA requirements, as the TCPA is a federal law only E-Sign applies to it.

Rules for Electronic Signature

What determines whether a click on a website carries the legal significance of a signature?

- E-Sign defines an “electronic signature” and applies several requirements to the electronic action in order for that electronic action to be considered equivalent to a real world signature.
- “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.”

15 USC 7006(5)

Why is all this important?

No valid signature means there is no valid agreement –

The definition of “Electronic Signature” tell us that for an electronic sound, symbol, or process to be considered a signature, it must meet the definition, which includes:

Four separate elements —

1. A sound, symbol or process
2. Attached to or logically associated with a record (the signature must apply to the specific agreement)
3. Executed or adopted by a person (it must have been made by the signer or executed the click, or at least an affirmative adopted by the signer)
4. With the intent to sign the record

All elements must apply for the electronic action to be considered an “electronic signature” that provides the legal equivalency for a signature.

Electronic Signatures: Testing validity

1) Is the signature actually the signature of the person whose name is signed? Did someone else sign for them?

- Cases require an analysis of the security procedures used.
- Who has the burden of proof when forgery alleged?

2) Did the person whose signature appears on the electronic document intend for that sound, symbol or process to be a signature—with all of the import and significance normally attached to a signature?

- Click-through contract – was there *intent* to sign that term in the agreement?
- Was there actually an *action*? *Prefilled in click that requires the consumer to unclick does not count.* The lack of an action is not a signature.

3) Is the signature logically associated with the contract such that the terms of that contract will be applicable to the signature? Is one electronic signature actually attached in multiple places in a contract? If so, who did that – the signer or someone else. Each click by the consumer can be considered a separate signature—but was it the consumer that applied that click to each agreement?

Electronic Signature – Proof of intent to SIGN And Authenticity of the electronic record signed

Look at the element of intent in the process of electronically applying signature:

- Process used must demonstrate the signer's intent to sign.
- Party seeking to enforce contract (which controlled the process) must prove such intent if the signature is challenged. (Common law rules for proof of contract.)
- Accurate records -- tamper-evident audit log – critical – security procedures.
- Failure to have records establishing intent may undermine the ability to enforce a contract.

Alternatively, one may claim that they did not sign this electronic record.

- Someone else hit the “I agree” button.
- Someone else (like a data broker) wrote their name on the website or took their electronic signature applied elsewhere and applied here.
- What is the IP address of the person who hit “I agree”?

Security Procedure? >> Forgery Analysis

- “. . . 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.”
- When a person says their signature was forged and provides some indication of that, then burden shifts to party asserting the validity of the signature to prove signature was valid.

Replacing writings with electronic records

- In *consumer* transactions -- special form of consent from consumers must be obtained before business can provide electronic records in the place of a writing.
- E-Sign's consent requirements applies to ALL writings which are required to be delivered to a consumer under federal statutes and regulations per 15 USC 7001(c)(1).

E-Sign's rules for writings provided in electronic records to consumers

(c) Consumer disclosures

(1) Consent to electronic records. Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if—

15 USC 7001(c)(1)

E-Sign's rules for writings provided in electronic records to consumers –2

If—

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

15 USC 7001(c)(1)(A) and (B)

E-Sign's rules for writings provided in electronic records to consumers –3

(C)the consumer—

- (i)prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and
- (ii)consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and

15 USC 7001(c)(1)(C)

Reasonable Demonstration requirement for consent

➤ Consumers must *demonstrate*, not just affirm, that they have access to the equipment and programs necessary to receive, open, **and retain** the relevant electronic documents. 7001(c)(1)(C)(ii)

➤ The legislative history states:

“It means the consumer, in response to an electronic vendor enquiry, actually opens an attached document sent electronically by the vendor and confirms that ability in an e-mail response. . . . It is not sufficient for the consumer merely to tell the vendor in an e-mail that he or she can access the information in the specified formats.”

Cong. Rec. S5216 (daily ed. June 15, 2000) (comments of Senator Wyden) (“Reasonably demonstrates means just that. It means the consumer can prove his or her ability to access the electronic information that will be provided.”).

Oral Communications NOT Records for *Consumer Transactions*

- E-Sign's consumer consent cannot be obtained through oral record.
- 7001(c)(1)(C)(6) says “An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.”
- This means that a requirement to deliver information in writing to a cannot be satisfied by oral delivery.

Accessibility and Retention Requirements

- E-Sign 7001(e) provides that the validity of an electronic record of a document otherwise required to be in writing may be denied if it is not in a form that is capable of being retained and accurately reproduced by all parties.
- This means that the entire TCPA consent agreement (including all linked callers and/or sellers) must be provided to the consumer in a form capable of being retained and accurately reproduced by the consumer. It is unlikely that most web-generated consents could meet this requirement. In a dispute over the terms of the agreement the burden is on party seeking to enforce the legality of electronic record must show that this requirement was met

Applying to TCPA requirements for telemarketing calls – Prerecorded calls

(9) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. 47 CFR 64.1200(f)(9).

- E-Sign’s electronic records provision—triggering the need for E-Sign consent—applies because the agreement with clear and conspicuous disclosures must be provided in writing.
- E-Sign’s electronic signatures rule applies because the regulation requires the consent agreement must be signed by the consumer.

Applying to TCPA requirements for telemarketing calls -- DNC calls

Calls to DNC lines are illegal unless the “person or entity making telephone solicitations”

ii) . . . has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or . . .

47 CFR 64.1200(c)(2)(ii)

➤ A writing is required to be provided to the consumer, to be signed, by the consumer. E-Sign’s requirements to replace a writing with an electronic record—triggering the E-Sign consent requirement, and relating to an electronic signature apply.

Agencies are constrained in extent to which they can waive E-Sign consent requirements.

7004(d) Authority to exempt from consent provision

(1) In general.

A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and *will not increase the material risk of harm* to consumers.

There *will be* material risk of harm to consumers if E-Sign consent is eliminated.

Criteria that may invalidate E-Sign consent:

- Sending electronic request for E-Sign consent to email address created by merchant.
- Having consumer sign E-Sign consent on seller's hardware.
- Signing on consumer's smart phone when in same physical space with merchant.
- E-Sign disclosures provided in tiny type on smart phone – not clear and conspicuous.
- Sending disclosures to consumer's email, but not showing them to consumer before contract is signed, or giving consumer the chance to open the email.
- Consumer not receiving required E-Sign disclosures until after the signature has been applied (look at time stamps).