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Technology Law Alert

Electronic Transaction Laws: Is Your Transaction Enforceable if Conducted Electronically?

Nearly all companies conduct some form of business over the Internet. It is estimated that by 2004, online sales in the United States will reach \$3.2 trillion. It is now commonplace for companies to use email, voicemail, and facsimile correspondence in negotiating business transactions. Many businesses also use automated digital voice systems that enable callers to conduct transactions by making selections on their telephone's keypad.

Forty states have passed a version of the Uniform Electronic Transactions Act (**UETA**), which, along with the federal Electronic Signatures in Global and National Commerce Act (**E-Sign**), may govern the enforceability of the electronic transactions described above.

READ THIS ADVISORY IF:

- You conduct any business over the Internet;
- You use email, voicemail, or facsimile in conducting your business;
- You use an automated voice system in your business;
- You fear that you could be inadvertently forming an enforceable contract that you did not want to enter into; or
- You fear that the contract you had thought was enforceable fails to comply with the requirements of UETA and E-Sign.

ENFORCEABILITY OF ELECTRONIC TRANSACTIONS

Electronic transactions are transactions that are conducted through an electronic medium, such as the Internet. They may involve an act of an individual or an automated action by a computer. Records of such transactions are usually stored on a computer-based medium and may never be converted to paper form.

To be enforceable, some laws require that a transaction be documented in "writing" and be "signed" by the parties to the transaction. For example, in jurisdictions that have adopted the Statute of Frauds, contracts for the sale of goods for \$500 or more, contracts for the sale of any interest in real property, and contracts that will not to be performed within a year, must be in writing and signed by the party against whom enforcement is sought. Federal and state laws governing electronic transactions address concerns of whether a record provided in electronic form constitutes a "writing" and whether a party to a transaction using a signature that is generated electronically has "signed" the agreement.

E-Sign, the Federal law, and UETA, which has been adopted by forty states as of August this year, provide that electronic records and electronic signatures will be enforceable. Both laws, however, impose certain requirements for the use of electronic records and signatures.

ENFORCEABILITY REQUIREMENTS

The main requirements for enforceability of electronic transactions under UETA and E-Sign are:

- An eligible transaction
- Consent of the parties to do business electronically
- Valid electronic signature
- Ability to access and retain records

Eligible transaction defined

The parties to an electronic transaction may consent to do so in an express or implied manner. Certain types of transactions, such as those relating to wills, trusts, some commercial transactions, and notices of foreclosure and eviction, are excepted from both laws. Under E-Sign, a “transaction” is an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons. UETA’s definition of transaction also includes governmental affairs, and its comments indicate that unilateral or non-transactional actions are not covered by UETA. Finally, where E-Sign applies only to transactions in or affecting interstate or foreign commerce, UETA applies also to purely intrastate transactions. To the extent that there is doubt as to whether a state’s UETA law or E-Sign applies, the best course of action is to comply with both.

Consent of the parties to do business electronically

The question as to whether the parties have consented is determined from the context and surrounding circumstances, including the parties’ conduct. For example, if a party sets up a website in which another party enters and initiates a transaction, such as a purchase of products from the website, both parties have impliedly agreed to conduct the transaction in electronic form.

E-Sign imposes additional consent requirements on consumer transactions. These requirements only apply, however, where the consumer is entitled by law to receive information in writing (such as consumer disclosures required for electronic funds transfers, credit transactions, and insurance sales) and where that information is

sought to be provided in electronic form only.

Under E-Sign, the consumer must:

- *affirmatively* consent to receive an electronic record in lieu of a paper record; and
- provide the consent electronically in a manner that reasonably demonstrates that he or she can access the electronic information in the electronic format that was provided (*e.g.* if a document will be provided to a consumer in Adobe Acrobat format, the consent process must demonstrate that the consumer can access the information provided in that format) (the “Electronic Handshake”).

The Electronic Handshake is a burdensome requirement that requires some creativity on the part of business. Some ways that this requirement may be met include:

- self-validation: technology that senses whether the consumer has been able to access the consent, which should be provided in the same format as the electronic record, and
- consumer testing: providing the consumer with an opportunity to test a format through a series of web-based interfaces during the consent process that ends with the consumer clicking to confirm that he successfully accessed the test information.

E-Sign also requires that the consumer be provided, prior to consenting, with a clear and conspicuous notice that:

- informs the consumer of the right to revoke consent, and the procedures, conditions, consequences, and fees associated with revoking consent;
- informs the consumer of the right to request a paper record, and any fees associated with obtaining a paper record;
- informs the consumer as to whether the consent to receive information in electronic form applies only to records related to a particular transaction or to other identified categories of information;
- informs the consumer of how to update information needed to contact the consumer electronically; and

- informs the consumer of the hardware and software requirements for access and retention of the electronic records, and any changes in such requirements that pose a material risk that the consumer will no longer be able to access such records, as well as the consumer's right to withdraw consent under these circumstances, without the imposition of any fees.

Signature requirements

Under both E-Sign and UETA, an electronic signature is: 1) an electronic sound, symbol or process; 2) attached to or logically associated with an electronic record; 3) made or adopted by a person with the intent to sign the record.

Common examples of electronic signatures that qualify under E-Sign and UETA include:

- a secret code or password used to identify a party (such as those used in connection with debit or credit cards)
- clicking on an "I agree" or "I accept" button
- pressing a numeric key on a telephone receiver
- typing a name at the end of an email message
- a digital image of a handwritten signature
- a fingerprint, voice print, or retinal scan
- a digital signature that is created through cryptography or a public key

Record accessibility and retention requirements

Under E-Sign, certain kinds of oral communications and recordings of oral communications do not qualify as electronic records. For example, a tape recording of a telephone conversation cannot be a substitute for the written notice required by law to be provided to consumers. The legislative history underlying E-Sign makes clear however, that oral communications created or stored in a *digital* format, such as those captured through an automated voicemail system, are acceptable.

Under E-Sign, an electronic record may be denied legal effect if it is not in a form that is capable of being retained and accurately reproduced for later reference. Similarly, UETA provides that an electronic record is not enforceable against the recipient if the sender

inhibits the ability of the recipient to store or print the record.

OTHER ISSUES AFFECTING ELECTRONIC TRANSACTIONS UNDER UETA

UETA also contains provisions that specify the point at which an electronic record or signature is deemed to have been sent or received. These provisions are important for a number of reasons, including: 1) determining when a contract has been created, and 2) determining whether certain contractual or regulatory deadlines have been met.

In addition, UETA contains specific provisions governing the effect of errors or changes in electronic communications.

Finally, there is the question of how to establish the identity of the person. Whether a signature is the act of the person that purported to sign it can be established by any relevant evidence, including the use of security technology or a password.

The risks and what you can do about them

If you are conducting business via the Internet, whether with consumers or businesses, or if you are using email, facsimile or voicemail in your business, you may have questions regarding whether E-Sign or UETA applies to you.

Holland & Hart LLP routinely advises its clients on how to eliminate legal liability associated with electronic commerce. To this end, we encourage you to contact a member of our Technology Practice Group to assist you in ensuring that you are entering into legally enforceable electronic transactions under UETA and E-Sign or to advise you as to how to avoid doing so inadvertently.

If you have any questions regarding this Technology Law Alert or the other services that Holland & Hart LLP provides, please contact us immediately. We are here to help.

State Variations in the Adoption of UETA

As of August of this year, UETA has been adopted in forty states. While some states have adopted the uniform version of the law in its entirety, others have enacted the law with significant variations. Because Holland & Hart LLP has offices in Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming, major variations from the uniform law in these states are outlined below:

Colorado	<ul style="list-style-type: none">• Excludes from its definition of "transaction" any ballot cast in any election or any petition related to any government instrumentality.• Excludes from its scope court orders and court documents, notices concerning the cancellation of utility services, health insurance and notices concerning product recalls, as well as documents required to accompany the transportation or handling of hazardous materials.• Incorporates by reference the consumer disclosures required under E-Sign.• Provisions concerning the acceptance and distribution of electronic records by governmental agencies and provisions concerning the interoperability UETA with other laws vary significantly from the uniform version.
Montana	<ul style="list-style-type: none">• Adds provisions to determine when an electronic record or electronic signature is attributable to a person.
Wyoming	<ul style="list-style-type: none">• No major variations.
Utah	<ul style="list-style-type: none">• Provides specific procedures to be followed for notarization, acknowledgement or verification using an electronic signature or record.• Provides for specific procedures under which a state agency may regulate the conduct of electronic transactions with that agency.
New Mexico	<ul style="list-style-type: none">• No major variations.
Idaho	<ul style="list-style-type: none">• Excludes the "electronic transfer of funds to or from the state" from the definition of "information." This is significant to the extent that UETA provides that if a law requires provision of "information" in writing, this requirement is satisfied if provided in an electronic record, so long as it is capable of retention by the recipient at the time of receipt.• Excludes from its scope any statute, regulation or other rule of law governing family law matters.

For More Information About This Technology Law Alert, Contact:



Wendy Rossiter
303-295-8440
wrossiter@hollandhart.com

Ms. Rossiter's technology transfer practice focuses on e-commerce and the representation of high technology companies. She joined Holland & Hart's Technology Practice Group in 2001 after completing a judicial clerkship with Justice Nancy Rice on the Colorado Supreme Court.

During law school, Ms. Rossiter served as an Articles Editor on the Oregon Law Review and as a full-time judicial extern for Judge Ann Aiken of the United States District Court for the District of Oregon. Ms. Rossiter graduated Order of the Coif from the University of Oregon School of Law in 2000.

During the five years prior to law school, Ms. Rossiter was a project manager for J.P. Morgan. There, she gained significant experience evaluating emerging technologies and performing financial and logistical analyses in connection with the company's process reengineering efforts.

Ms. Rossiter is verbally fluent in two dialects of Chinese.



Lise Carney
303-295-8377
Denver
lcarney@hollandhart.com

Ms. Carney's technology transfer practice centers around the representation of high technology businesses, including broadband companies, in negotiating and drafting agreements for software development and licensing, hardware and equipment development, maintenance and support agreements, source code and manufacturing information escrows, and electronic billing and payment agreements. Ms. Carney's experience has included negotiating and drafting agreements for the development and procurement of consumer grade digital set-top equipment and software; consulting services agreements; electronic bill presentment and payment agreements; online commercial banking agreements; and, agreements for cable Internet and telephone services.

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Looking Out for Our Clients

The Technology Practice Group's Quarterly Technology Law Alert

Our technology lawyers are leading practitioners in the areas of equipment and software development, procurement, licensing, Internet, and e-commerce.

The Rocky Mountain region has become one of the leading centers for computer, software, Internet, cable television, satellite telecommunications, telephony, and other advanced technology businesses.

Holland & Hart LLP has participated in every step of this evolution in the region's economic base and its communications and technology lawyers are recognized nationwide for having the experience and expertise necessary to provide premium legal services to sophisticated, cutting-edge companies.

HOLLAND & HART^{LLP}

*The Law Out West*SM

www.hollandhart.com

Attorneys at Law
Technology Practice Group
Suite 3200
555 Seventeenth Street
Denver, Colorado 80202-3979

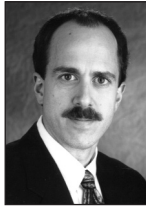
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Dan Glivar
303-295-8322
Denver
dglivar@hollandhart.com



Kevin Crandell
303-295-8052
Denver
kcrandell@hollandhart.com



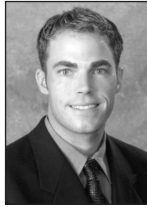
Steve Villano
303-295-8075
Denver
svillano@hollandhart.com



Inga Regenass
801-595-7834
Salt Lake City
iregenass@hollandhart.com



Wendy Pifher
719-475-6465
Colorado Springs
wpifher@hollandhart.com



Matt Abell
719-475-6496
Colorado Springs
mabell@hollandhart.com



Kristine Miller
303-473-2726
Boulder
kmiller@hollandhart.com



Brad Wiskirchen
208-383-3914
Boise
bwiskirchen@hollandhart.com