# ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

# (E-SIGN ACT)

# OVERVIEW

## Overview

The E-Sign Act encourages the use of electronic signatures, electronic contracts and electronic records by establishing requirements and standards that when followed give legal validity to these electronic instruments. The E-sign Act provides that: 1) a signature, contract, or other record relating to a transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and 2) a contract may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

The E-Sign Act neither requires private parties to use or accept electronic records or electronic signatures, nor does it mandate or recommend any specific technological standard. It permits the use of electronic records to provide required disclosures in electronic format rather than written format. In short, it allows the issuance of electronic records to satisfy any statute or regulation that requires written records, provided the consumer/member has previously agreed to accept the records electronically.

The E-Sign Act also permits credit unions to satisfy statutory and regulatory retention of records requirements electronically, as long as the electronic form is accurate and capable of being reproduced for later reference.

## Associated Risks

Compliance risk can occur when the credit union fails to implement the necessary controls to comply with the E-Sign Act.

## Additional Information

Additional information can be obtained from the National Credit Union Administration on-line at http://www.ncua.gov/reg_alerts/Prior2003/01-RA-03.pdf .

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# OPERATIONAL REQUIREMENTS

## Disclosures / Notices

Consent To Electronic Records [§101(C)(1)]

If a credit union is required to provide, or make available, a written record of a transaction, the credit union may use an electronic record to provide, or make available this record, if—

(a) The member has affirmatively consented to the electronic format, and has not withdrawn this consent;

(b) The member is provided, before consenting, with a clear and conspicuous statement—

- (i) informing the member that he/she has the right to receive the record(s) in paper form and may withdraw consent, and inform the member of any consequences of withdrawing consent (fees or termination of account, for example);
- (ii) informing the member whether the consent is for a single transaction, or categories of records to be provided or made available in an ongoing relationship;
- (iii) describing the procedures the member must use to withdraw consent, and to update information needed to contact the member electronically; and
- (iv) informing the member of the method to request and obtain a paper copy of an electronic record after consent and any associated fees;

(c) The member—

- (i) is provided with a statement of hardware and software requirements for access to and retention of electronic records and
- (ii) consents, or confirms his/her consent electronically in a manner demonstrating the member can access the information in the electronic form the credit union will use; and

(d) after receiving member consent, if the hardware and software requirements for accessing or retaining electronic records change, creating a material risk that the member may not be able to access or retain subsequent electronic records, the credit union—

- (i) provides the member with a notice of the changes, and the right to withdraw the consent without charging a fee for the withdrawal, and without imposing any condition or consequence not previously disclosed.; and
- (ii) again complies with subparagraph (c).

Accuracy and Accessibility [§101(D)]
Legally imposed records retention requirements are met by retaining an electronic record of the required information. The electronic record must:—

(a) accurately reflect the information set forth in the contract or other record to be retained; and
(b) remain accessible to all persons who are entitled to access it for as long as legally required in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

Prior Consent [§101(c)(5)]
The consumer disclosures subsection of the E-sign Act does not apply to any records that are provided or made available to a member who has consented prior to the effective date of Subchapter I of the E-sign Act to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

Oral Communications [§101(c)(6)]
An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of the consumer disclosures subsection of the E-sign Act except as otherwise provided under applicable law.

## Recordkeeping

Record Retention
As noted in the accuracy and accessibility section above, the E-Sign Act permits credit unions to comply with legally imposed records retention requirements by retaining electronic records

## Enforcement / Liability

Penalties

The E-Sign Act does not specify civil liability provisions for violations of that act. Nothing in the E-Sign Act provides an exemption from penalties for failure to deliver disclosures required by regulation.