ELECTRONIC SIGNATURES:

A Review of the Exceptions to the Electronic Signatures in Global and National Commerce Act

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EXECUTIVE SUMMARY

The United States has rapidly become a society where access to information plays a dominant role in the economic and social progress of daily life. Along with the telephone, the computer and the Internet are the primary tools used to communicate in a fast-paced and quickly changing society. Americans use the Internet for numerous reasons, including to complete business transactions, conduct research, collect health, life and automobile insurance information, and to receive interest rate information and quotes for home mortgages. This report, *Electronic Signatures: A Review of the Exceptions to the Electronic Signatures in Global and National Commerce Act,* contains a detailed review of the nine exceptions to the Electronic Signatures in Global and National Commerce Act (ESIGN or Act), an examination of how the exceptions are handled in electronic commercial and personal transactions, and recommendations regarding whether each exception should remain in the Act for the protection of consumers. The ESIGN Act facilitates the use of electronic records and signatures in interstate and foreign commerce and grants legal validity and enforceability to electronic signatures, contracts, and records. This general rule of validity does not apply, however, to the nine exceptions provided at section 103 of the Act.[1]

The information and data gathered regarding the ESIGN exceptions demonstrate that some industry and consumer interactions using computers and the Internet have become quite routine since the passage of ESIGN. In these areas, procedures designed to protect consumers also have developed in accordance with ESIGN's consumer protection provisions. With regard to areas involving highly personal matters, however, protective mechanisms have not evolved rapidly. As a result, consumers have less confidence in computer technology and continue to rely on written documentation of business and financial transactions. In summary, this evaluation reveals the following:

- Federal and state courts, the insurance and health industries, and the commercial and financial services industries have made significant advancements in developing optional electronic filing and information systems and the respective consumer groups have adapted to electronic filing and purchasing systems.

- Governmental agencies with oversight for recall information and manufacturers have found electronic mail a useful tool in contacting consumers for product recalls.

- ESIGN exceptions involving highly personal or financial interests, such as mortgage foreclosures and domestic law areas, are matters that may be unsuited to electronic information or access systems at this time. Consumer privacy interests and the high risk of loss or damage to personal interests as the result of a failure

[1] The nine exceptions to the ESIGN Act involve contracts and records governed by the following documents: 1) wills, codicils, and testamentary trusts; 2) laws governing domestic law matters; 3) state Uniform Commercial Code, except section 1-107 and 1-206, Articles 2 and 2A; 4) court orders or notices; 5) utility cancellation notices; 6) default, foreclosure, or eviction notices; 7) health or life insurance benefit cancellation notices; 8) product recall notices; and 9) hazardous, toxic, or dangerous materials notices.

to receive required information in a timely manner causes consumers to rely on paper documentation and makes the electronic transfer of information unsuitable in some cases.

- The nature of hazardous waste and dangerous substances management requires that written documentation accompany shipments, even though a portion of the documentation process may be accomplished through electronic means.

- Overall, consumers, government, and industry leaders appear to prefer the option of electronic transactions accompanied by the reliability of paper documentation for some matters.

In *Electronic Signatures: A Review of the Exceptions to the Electronic Signatures in Global and National Commerce Act,* we are pleased to report that there has been significant progress in the use of electronic signatures since Congress passed ESIGN. There are, however, hurdles to overcome related to the lack of consumer confidence in electronic media as the sole method of conducting all business, financial, and personal transactions. This evaluation provides a review of the response to the exceptions to the ESIGN Act by federal and state agencies, private industry, and consumer groups and associations. This evaluation also presents an analysis of whether the exceptions to the Act are necessary to protect consumers in light of the current use of electronic signatures in the United States. In summary, the evaluation recommends that Congress retain the nine exceptions, with modifications to the utility cancellation notices exception to allow utility companies to send electronic cancellation notices to customers voluntarily enrolled in electronic billing services, and to the exception regarding contracts governed by the Uniform Commercial Code, to remove electronic letter of credit transactional records governed by Article 5 and electronic notices governed by Article 6 from the list of exceptions to the Act.

A. BACKGROUND

Congress passed ESIGN in June 2000 to facilitate the use of electronic documents and signatures in domestic interstate and international commercial transactions. The Act was designed to promote the use of electronic signatures in commercial transactions involving both businesses and consumers and to ensure that the electronic documents and signatures resulting from these transactions are given the same legal validity and enforceability as written documents and signatures.[2] Congress included section 101(c) in the ESIGN Act as a consumer protection mechanism. Section 101(c) requires businesses to obtain from consumers electronic consent or confirmation before sending information electronically that a law requires to be in writing. As an additional protection for consumers, Congress included the nine (9) exceptions in section 103 to

[2] Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. §§ 7001-7006 (2000).

remove from the general rule of validity transactions that are not typical commercial transactions, and in which consumers and companies do not engage in direct interaction in commercial settings.

Section 103(c) of ESIGN requires the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, to conduct a three-year evaluation to determine whether the contracts and records that are exempt from section 101 of the Act should continue to be excluded from the application of the statute for the protection of consumers. Section 103 of ESIGN exempts contracts and records governed by laws and regulations regarding: court orders and documents; probate and domestic law matters; commercial law; consumer notices covering utility services, residential defaults and foreclosures, and insurance benefits; product recall notices; and hazardous materials papers. The Act requires the Assistant Secretary to file a report of the findings from the evaluation within three years of ESIGN's enactment, or by June 30, 2003.

The Assistant Secretary for Communications and Information is the head of the National Telecommunications and Information Administration (NTIA), an agency of the U.S. Department of Commerce (Department). NTIA is the principal executive branch agency responsible for telecommunications and information policy issues. The agency advises the President and the Secretary of Commerce on issues that affect the Nation's technological and economic advancement.[3] NTIA conducted this evaluation on behalf of the Secretary of Commerce. In June 2001, NTIA presented two reports to Congress concerning the ESIGN Act. The first report presented the results of an evaluation of the consumer consent provisions in Section 101(c)(1)(C)(ii) of the ESIGN Act.[4] The second report presented an analysis of the effectiveness of electronic versus traditional mail delivery systems under section 105(a) of the ESIGN Act.[5]

In conducting this evaluation to determine whether the exceptions to the ESIGN Act remain necessary to protect consumers, NTIA sought input from the general public, private industry, consumer groups, bar associations, and the federal and state agencies that have regulatory or policymaking authority over the substantive areas related to the exceptions.[6] In a series of nine (9) Federal Register Notices, NTIA requested comment on each exception and the

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[3] Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533 (codified as amended in scattered sections of 47 U.S.C.).

[4] *Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii),* Department of Commerce and Federal Trade Commission, June 2001 (Section 101(c) Report) *available at* http://www.ntia.doc.gov/ntiahome/ntiageneral/esign/105b/esign7.pdf.

[5] *Electronic Signatures in Global and National Commerce Act, Section 105(a),* Department of Commerce, June 2001 (Section 105 Report) *available at* http://www.ntia.doc.gov/ntiahome/ntiageneral/esign/105a/105areport.pdf.

[6] See Appendices B through D.

issues surrounding the impact on consumers if the exception were removed from the Act.[7] Comments were made by various private and governmental institutions, commercial associations and entities, consumer advocacy groups, and financial institutions.[8] NTIA also collected information by: 1) convening meetings with Federal agencies; 2) reviewing websites and electronic transactions policies of government and business entities; 3) conducting conference calls with various industry associations; and 4) researching state electronic transactions laws and industry electronic transactions practices.

The evaluation was affected by three major factors:

- There are few identical or "uniform" state electronic transactions laws despite the sample Uniform Electronic Transactions Act (UETA) provided by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Most state uniform electronic transactions laws contain lists of exceptions that differ from other states, thereby, making an analysis of the impact of removal of the exceptions more complex.

- Each exception is controlled by state law, either in part or entirely, and requires an understanding of the various state substantive laws relating to the exceptions in order to determine the impact on consumers of the elimination of the exception.

- During the initial phases of the evaluation, a common misinterpretation of the term "exceptions" in the context of ESIGN's purpose and the reverse preemption clause caused confusion for some participants regarding the operation of ESIGN and the exceptions.

In this evaluation, NTIA has examined the federal and state laws, and the business practices of the industries in each substantive area that has been excepted from the operation of ESIGN section 101. The following discussion provides: 1) an update of computer and Internet usage in commercial transactions in the United States; 2) an explanation of the operation of the exceptions to ESIGN; 3) a discussion of the relationship and impact of ESIGN on state uniform electronic transactions laws; 4) analyses and findings regarding each of the nine exceptions; and 5) conclusions of NTIA on behalf of the Department of Commerce on whether the exceptions remain necessary for the protection of consumers.

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[7] Appendix B.

[8] Appendix C.

B. THE IMPACT OF FEDERAL ELECTRONIC SIGNATURE LAW: A VIEW OF STATE AND INDUSTRY PRACTICES

1. Overview of Computer and Internet Usage

Recent reports from the Department of Commerce and private research firms show that Americans increasingly rely on the Internet as an important source of information. In February 2002, the Department of Commerce reported in *A Nation Online* that the American population's use of the computer increased from 24.1 percent in 1994 to 56.5 percent in 2001.[9] According to the Commerce Department's study, more than half of U.S. households, or 50.5 percent of American homes, had Internet connections.[10] Other recent studies confirm the Department's finding that the American trend toward computer usage is increasing. The June 2001 ESIGN evaluation of the effectiveness of electronic mail versus traditional mail delivery systems also confirmed America's growing reliance on electronic mail.[11]

An independent study conducted by Dr. Jeffrey I. Cole of the University of California at Los Angeles, Center for Communication Policy, *Surveying the Digital Future - Year Two,* concluded that 72.3 percent of Americans used the Internet for some purpose in the year 2001.[12] According to Dr. Cole's study, the main reasons that Americans use the Internet are to access e-mail and to get information quickly.[13] The report also shows that computer users continue to expand their uses of computers and the Internet. Past studies on Internet usage show that there are common issues that have arisen in the context of electronic commercial transactions: privacy, security, authenticity, and universal access. Although technological advancements have addressed these concerns in part, they remain significant concerns in all contexts regarding access to and transfer of consumer commercial information.[14]

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[9] *See* U.S. Department of Commerce, National Telecommunications and Information Administration and Economic and Statistics Administration, *A Nation Online: How Americans are Expanding Their Use of the Internet*, at 3 (February 2002).

[10] *Id.* The Department of Commerce continuously collects data on the rate of use of computer technologies and expects to complete its survey in October 2003; a report is likely to be issued in February 2004.

[11] U.S. DEP'T OF COMMERCE, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, ESIGN SECTION 105 REPORT, 4-5 (2003).

[12] J. Cole, *The UCLA Internet Report 2001*, *Surveying the Digital Future - Year Two (2001)*, UCLA Center For Communication Policy, *at* http://www.ccp.ucla.edu/pdf/UCLA-Internet-Report2001.pdf (last visited June 3, 2003).

[13] *Id.* at 19.

[14] U.S. GOV. WORKING GROUP ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, LEADERSHIP FOR THE NEW MILLENNIUM: DELIVERING ON DIGITAL PROGRESS AND PROSPERITY, 3rd Ann. Rep., 35 (2000).

Recent data from the Pew Internet & American Life Project shows that on average, approximately 84 percent of all Americans (which includes 97 percent of Internet users and 64 percent of nonusers) have an expectation of finding information online concerning health care, services from government agencies, news, and commerce.[15] Although the Pew Report shows that consumer expectations regarding access to personal information about someone online is much lower (35 percent of Internet users and 25 percent of nonusers), 58 percent of Internet users expect to contact someone using electronic mail.[16]

The importance of the Internet and computers to Americans is also demonstrated by Department of Commerce data reporting electronic commerce sales. In the year 2000, e-commerce sales represented 0.9 percent ($29 billion) of the total retail sales, and 1.1 percent ($34 billion) of total retail sales in the year 2001.[17] By the year 2002, total e-commerce sales were estimated at $45.6 billion, accounting for 1.4 percent of total sales.[18] E-commerce sales in the first quarter of 2003 totaled $11.921 billion of total retail sales equaling $772.2 billion, accounting for 1.5 percent of all sales.[19] The comments submitted in this evaluation regarding whether the exceptions remain necessary to protect consumers have been considered in light of the information regarding consumer and industry Internet usage and the patterns that have developed over the three-year period.

Transactions are conducted over the Internet by the transmission or exchange of documents that include electronic signatures, and which function to provide authentication, or verification of the identity of users of a computer, and security measures for access. Electronic signatures are attached to or incorporated into the records and documents that form the transaction. These signatures take various forms, including the following technologies:

- *password or personal identification number (PIN)* — a set of characters, numbers, or combination thereof, created by the system user and encrypted when transmitted over an open network;
- *smart card* — a plastic card (like an ATM or credit card) containing a microprocessor or "chip" that can generate, store, and process data and that has

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[15] John B. Horrigan & Lee Rainie, *Counting on the Internet*, Pew Internet & American Life Project *at* http://www.pewinternet.org. (last visited June 3, 2003).

[16] *Id.*

[17] *See* E-Stats, CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE (March 18, 2002 and March 19, 2003) *available at* www.census.gov/estats. Estimated U.S. retail and retail e-commerce sales for 2000 are from the U.S. Census Bureau, U.S. Department of Commerce release CB-01-83, May 16, 2001.

[18] Estimated U.S. retail and retail e-commerce sales for 2001and 2002 are from the U.S. Census Bureau, U.S. Department of Commerce release CB-03-37, February 24, 2003.

[19] Estimated U.S. retail and retail e-commerce sales for the first quarter 2003 are from the U.S. Census Bureau, U.S. Department of Commerce release CB-03-81, May 23, 2003.

programming capacity for activation when the user enters another identifier such as a PIN;

- *biometrics* — technological method that measures and analyzes unique human characteristics, such as fingerprints, eye retinas and irises, voice and facial patterns, and hand measurements. The devices consist of a reader or sensor, and software that converts the received information into a digital form, and a database that stores the individual's known biometric data;
- *digitized signature* — a type of biometric, consisting of a graphical image of a handwritten signature, entered using a special digitized pen and pad input device that is automatically compared with a stored copy of the digitized signature of the user and authenticated if the two signatures meet specifications for similarity; and
- *digital signature* — a unique signature produced on a message that uses a key (a large, binary number) known only by the signer, and a signature algorithm (mathematical formula) that is publicly known.[20]

2. The ESIGN Exceptions

ESIGN validates electronic signatures in contracts and electronic documents in commercial transactions and places these documents on legal par with documents written in more traditional forms. The law provides that records and signatures relating to transactions in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because they are in an electronic form or because an electronic signature or electronic record is used in their formation.[21] The documents that are expressly excluded from the requirements of the statute are set out in the nine exceptions.

The excepted requirements are for specific contracts and records that are governed by laws and regulations regarding these following substantive legal areas:

- wills, codicils, and testamentary trusts;
- a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law;
- the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A;
- court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
- notices for cancellation or termination of utility services (including water, heat, and power);
- notices of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary

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[20] *Electronic Signatures: Technology Developments and Legislative Issues,* CRS Report, RS20344 (January 19, 2001).

[21] 15 U.S.C. § 7001 (2000).

residence of an individual;
- notices for the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);
- recall notices of a product, or material failure of a product that risks endangering health or safety; and
- any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic and dangerous materials.[22]

The exceptions operate to remove documents, which are executed under laws and statutes that control the relevant substantive area, from the application of section 101 of the ESIGN Act, including the general rule of validity contained in section 101(a) and the consumer consent provisions contained in section 101(c).[23] In essence, where ESIGN is the only law to be applied in the transaction, electronic documents in the nine areas listed are excepted from the Act and are not required to be given legal validity and effect. Unlike transactions covered by the general rule of validity and the consumer consent provision of section 101(c), the areas removed from the operation of the ESIGN Act do not involve traditional commercial transactions between consumer and merchant.

3. State Electronic Transactions Laws

The application of the requirements of ESIGN's section 101 to transactions and contracts that use electronic signatures or electronic documents depends on whether the state that controls the transaction has adopted an electronic transactions law. Section 102 of ESIGN provides an exemption to ESIGN's general preemption of state law. This section allows states to adopt statutes, regulations, and other rules of law to modify, limit, or supersede the provisions of section 101 with respect to state law.[24] The state's law must be consistent with ESIGN *and* meet one of two conditions. The law must: 1) constitute an enactment or adoption of the Uniform Electronic Transactions Act (UETA) as approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999; or 2) specify alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures, if the alternative requirements are technology neutral and do not accord greater legal status or significance to a

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[22] 15 U.S.C. § 7003 (2000).

[23] It should be noted that ESIGN has an integrated consumer protection mechanism that requires companies to comply with certain procedures designed to protect consumers during electronic transactions. In 2001, approximately one year after ESIGN became law, NTIA conducted a study jointly with the Federal Trade Commission on the consumer consent provisions of section 101(c). That study concluded that the benefits of ESIGN's consumer consent provision outweighed the burdens of implementation on electronic commerce and appeared to be working satisfactorily at that stage of the Act's implementation. *See* Section 101(c) Report, *supra* note 4.

[24] 15 U.S.C. § 7002(a)(2000).

specific technology.[25]

At the date this report, 49 states, the District of Columbia, and the Virgin Islands, have adopted a version of an electronic transactions law.[26] Although some state electronic transactions are modeled closely after ESIGN or UETA, others are incorporated into state commercial and business codes and contain language unique to the state and that refer to the underlying substantive law governing the transactions. Where a state has an electronic transactions law that complies with section 102 of ESIGN, the state law controls whether electronic signatures and documents relating to the nine ESIGN exceptions are to be given the same legal validity and effect as paper documents.

C. ANALYSIS — ARE THE EXCEPTIONS STILL NECESSARY TO PROTECT CONSUMERS?

This section of the report focuses on the nine exceptions to section 101 of ESIGN and provides an analysis of each exception. The exceptions will be discussed specifically with regard to the status of government, industry, and consumer interaction involving each subject matter covered by the exception, the comments provided by participants in the evaluation, and a recommendation as to whether the exception remains necessary to protect consumers. Although each exception was considered independently, the report will also discuss the issues that are common among several exceptions.

1. Wills, Codicils, and Testamentary Trusts[27]

Background

Wills, codicils, and testamentary trusts are donative documents that transfer real and personal property at the death of the owner (donor, testator), and designate persons or entities (beneficiaries) to receive title to that property after the death of the owner.[28] All wills and

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[25] *Id.*

[26] For a list of states that have adopted electronic transactions laws, see Appendix E of this report. Alaska, California, Illinois, New York, South Carolina, Washington, and Wisconsin have electronic signature laws that were enacted prior to the passage of ESIGN. Massachusetts and Vermont have either introduced or passed draft UETA legislation in 2002-2003. *See* NCCUSL, Electronic Transactions Act, *available at* http://www.nccusl.org/nccusl.

[27] NTIA published in the *Federal Register* a notice requesting comment on the issues presented in this evaluation. *See* The Wills, Codicils, and Testamentary Trusts Exception to the Electronic Signatures in Global and National Commerce Act, 67 Fed. Reg. 63379 (Oct. 11, 2002). A list of commenters is provided in Appendix C.

[28] RESTATEMENT (THIRD) OF WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (1999). The term "will" is used throughout this section to refer to wills, codicils, and testamentary trusts.

donative documents must be in writing.[29] The signatures on a testamentary document attest to the fact that the document in question is the final document created by the donor.[30] The signature of the donor provides evidence of finality.[31] The signatures of witnesses authenticate the document as the donor's document, and authenticate the donor's signature.[32] Under section 103(a) of the ESIGN Act, testamentary documents in electronic formats and documents containing electronic signatures of donors or witnesses are not required to be given legal validity or effect.[33]

Authentication or validation of the testator or donor's signature is essential to the probate process. The purpose of the judicial probate process is to determine whether the document presented to the court is actually the will of the deceased person.[34] State legislatures and state courts have primary jurisdiction for establishing the procedures and rules that govern the judicial probate process, and for establishing the signature requirements for wills, codicils, and testamentary trusts. As discussed above in Section B.3., ESIGN section 102(a) provides that the states may adopt electronic transactions statutes that give the state exclusive jurisdiction over electronic transactions occurring within the state.[35] This section allows states to modify, limit, or supersede the application of ESIGN for electronic transactions that occur within the state by adopting either the UETA version that was approved and recommended for enactment by NCCUSL, or an electronic transactions statute that specifies an alternative procedure for the use and acceptance of electronic signatures that complies with the provisions of ESIGN.

The majority of the states that have passed electronic transactions laws have expressly excluded wills, codicils, testamentary trusts from the operation of the state electronic transactions laws.[36] According to the legislative notes of the Drafting Committee for UETA, the exclusion of wills, codicils, and testamentary trusts is largely salutary given the unilateral

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[29] *Id.; see also* UNIF. PROBATE CODE § 2-502 (amended, 1991). It is important to note that handwritten signatures are not required to fully validate a will. Holographic wills are allowed in some states and any mark identifying the will as belonging to a specific person, such as an "X" followed by the title "Father," may be sufficient to constitute a signature under state laws.

[30] PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS, AND ADMINISTRATION 29 (2d ed. 1994).

[31] *Id.*

[32] RESTATEMENT (THIRD) OF WILLS AND OTHER DONATIVE TRANSFERS § 3.1 (1999).

[33] 15 U.S.C. § 7003(a)(2000).

[34] HASKELL at 187.

[35] *See* 15 U.S.C. § 7002(a)(2000).

[36] Of the 42 states, districts, and territories that have passed UETA or ESIGN laws, all 42 expressly exclude wills from the operation of these laws. *See* Appendix E.

context in which the records are created and the unlikely use of such records in a transaction as defined by UETA.[37] Although the legislative history of the ESIGN Act does not indicate the intent of the drafters for including the wills, codicils, and testamentary trusts exception, there are reasons to distinguish these documents from business and commercial contracts and documents. The personal nature of the information and the confidential financial information disclosed in these documents and the relative privacy interests of the donor and beneficiaries may raise issues that do not arise in legal proceedings involving commercial or other civil matters.

In states where the electronic transactions law does not expressly exclude wills, codicils, and testamentary trusts, state substantive law determines whether electronic versions of these documents are valid and enforceable. If the underlying substantive law requires a paper writing or prohibits the use of an electronic signature for the formation of these documents, electronic documents for wills, codicils, and testamentary trusts would not be legally valid. For example, the Maryland Code provides that every will shall be in writing, signed by the testator, attested to and signed by two or more credible witnesses in the presence of the testator.[38] Although the law does not expressly preclude the use of electronic signatures or documents, the Maryland Rules do not consider a photocopy or facsimile copy of a will or codicil as an original document for purposes of filing with the Register of Wills.[39]

Comments

The sole comment on the wills, codicils and testamentary trusts exception recommends that the exception be retained unless ESIGN can require a specific technology for signatures.[40] Dr. Hollar noted that the difference between a unilateral will and bilateral commercial transactions is that parties to the bilateral electronic transactions have agreed to the particular signature system to be used. He stated that there is no such agreement with wills. He also noted that under ESIGN, any number of symbols or methods may constitute an electronic signature or may be accomplished by any one other than the testator. [41] Dr. Hollar opined that the technology necessary to verify a signature may be obsolete and no longer available at the time the signature needs to be verified.[42] Dr. Hollar also pointed out that, at the time the validity of the signature is

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[37] UNIF. ELECTRONIC TRANSACTIONS ACT § 3(B)(1), comt. 4 (1999).

[38] MD. CODE ANN., EST. & TRUSTS, § 4-102 (1957).

[39] MD. R. ANN., EST. Rule 6-108 (b) (Michie).

[40] Dr. Lee Hollar Comments in Response to the Notice and Request for Comments Regarding the Wills, Codicils, and Testamentary Trusts Exception to the ESIGN Act at 2 (Dec. 3, 2002) (Hollar). Dr. Hollar is a Professor of Computer Science in the University of Utah's School of Computing.

[41] *Id.*

[42] *Id.*

questioned, the donor is unavailable. Thus, he asserted that digital signature laws should provide for a continuing infrastructure that supports authentication of a signature even after the signer has died, such as through a public key holder and a certification authority.[43]

Conclusion

Most state electronic transactions laws have an exception for wills, codicils, and testamentary trusts. Moreover, most state probate courts do not recognize electronic versions of these documents or electronic signatures on these documents as original or legal representations of a will. For the states that have not enacted electronic transactions laws, the removal of the ESIGN exception would leave persons in that state free to execute electronic wills, trusts and codicils with software that may not be available at the time the will is probated or its authenticity questioned. Technological and structural systems for preserving software to allow access to the documents for many years or decades in the future have yet to be implemented in state court probate systems. As a result, the removal of the ESIGN exception for wills, codicils, and testamentary trusts could create significant confusion. For these reasons, NTIA recommends the retention of the ESIGN exception for wills, codicils, and trusts.

2. Domestic and Family Law[44]

Background

The States have primary jurisdiction over family law issues, and while state laws require that family law documents be executed in writing, most neither expressly exclude nor accept electronic versions of the same documents.[45] A large percentage of the cases handled in state

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[43] *Id.* at 3.

[44] NTIA published in the Federal Register a notice requesting comments, entitled *The Domestic and Family Law Documents Exception to the Electronic Signatures in Global and National Commerce Act*, 67 Fed. Reg. 61599 (Oct. 1, 2002). No comments were received in response to this notice.

[45] It is likely that the absence of a reference to whether electronic versions are allowed or excluded is due to the fact that state domestic relations laws were promulgated prior to the electronic capabilities now available. In a few cases, states have adopted the Uniform Electronic Transactions Act drafted by the National Conference of Commissioners on State Laws or their own electronic transactions statute that expressly excludes family law documents. These states include: Alabama, Louisiana, Maryland, Mississippi, New Jersey, and New Mexico. *See* National Conference of Commissioners on Uniform State Laws website at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ueta.asp. For example, state and local authorities determine the rules surrounding the issuance of marriage licenses and birth certificates. State courts promulgate court rules and procedure that impact upon family law documents, evidentiary, and service of process requirements. *See e.g.*, New Jersey Supreme Court, "Judiciary Electronic Filing and Imaging System - Pilot Program, March 27, 2000, *published in* New Jersey Law Journal, American Lawyer Newspapers Group, *available at* http://www/judiciary.state.nj.us/jefis/order.htm. (July 17, 2000) (this court project proposes to modify the current rules to allow electronic filing of affidavits and digital signatures when otherwise handwritten signatures were required for court documents).

courts involve an aspect of family law. For example, according to one study, as much as 50 percent of all cases filed in Colorado's state court are related to the family.[46] Not surprisingly, the number and variety of documents associated with a domestic case is also vast. A typical domestic law proceeding, such as a contested divorce case, includes a number of the following documents and filings: a petition, an answer, evidence of service of process, affidavits, motions, orders and decrees, financial schedules, child support and visitation worksheets, agency reports, and medical records.

Moreover, the domestic and family law documents exception covers a wide range of documents, proceedings, and life events that affect families, children, parents, individuals and relationships.[47] For example, in most states a couple must apply for a marriage license in writing and then upon completion of the vows, a marriage certificate must be signed and filed by the person officiating.[48] Another example is the state registrar of vital records' creation of a birth certificate that must be used during the person's lifetime for a variety of reasons.[49] In addition to these administrative functions, courts and government agencies may become involved in various circumstances surrounding the family. This may include the resolution of marital difficulties such as divorce, child custody, visitation, and child or spousal support. During adoption and custody proceedings, state agencies may also be charged with evaluating families and parents, and with producing reports that are used by courts to determine whether individuals should adopt or whether parental rights should be terminated.

In each case, the local and state law procedures determine how documents must be filed, and in some states, also determine whether electronic documents may be submitted to the court.

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[46] *See* Final Report of the Commission on Families in the Colorado Courts at 1 (August 2002), *available at* http://www.courts.state.co.us/supct/committees/commfamilies.htm. This includes both civil and criminal cases.

[47] *See generally,* 15 U.S.C. § 7003(a)(2)(2000).

[48] Almost all states require a marriage license. *See*, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, *available at* http://www.law.cornell.edu/topics/Table_Marriage.htm. *See, e.g.*, D.C. CODE ANN. § 15-717 (1981) (requires a license fee and application for marriage); D.C. CODE ANN. §§ 46-406, 46-412-13 (1981) (requires that documents "solemnizing" the marriage must be filed with clerk of the court). Furthermore, local rules may require different documentation. For example, in one county in Maryland both the bride and groom are required to appear in person and present proper identification and birth certificates, and submit an application. In a neighboring county, only one person is required to appear to complete the application for the marriage license. *See* information at: http://www.courts.state.md.us/clerks/temp/annarundel/marriage.html and http://www.co.pg.md.us/trialbranch/clerk/marriagelicense.asp. Also documents such as prenuptial agreements are required to be in writing and executed with handwritten signatures.

[49] Birth certificates are usually filed and signed by an official at the birth hospital. The signature of the official may be affixed in writing and in some cases electronically, where approved. *See e.g.,* VA. CODE ANN. § 32.1-257 (B) (Michie 2003) (statute specifically allows electronic signatures by the hospital to certify the birth); GA. CODE ANN. § 31-10-9 (2002) (the hospital is required to file the birth certificate with the county; medical information is also required to be provided by birth doctor). All states still require a paper birth certificate to register a child for school.

Typically, state court rules mandate that these documents be executed with handwritten signatures, often notarized, in a certain format, and nearly always on paper. Many states have adopted uniform acts to simplify interstate domestic law practice and procedure. NCCUSL has, in conjunction with family advocacy organizations and bar associations, developed uniform or model laws for adoption by states.[50] Several new uniform family laws are currently being drafted by these same entities.[51]

The handwritten signature and paper requirements also extend to judicial orders and decisions in domestic law cases.[52] Other documents generated by state agencies, such as child welfare and parental fitness reports, are also typically executed in hard form. Generally, state courts will recognize these documents as valid only when they are executed in the required form. However, this validation may not extend to the electronic versions of these documents. Official records, including birth certificates and documents from state judicial proceedings, are often authenticated only with the seal of the court affixed by the clerk or otherwise certified by the judge using a handwritten signature.

The authentication of court documents and papers is also required before courts in other jurisdictions will take official notice of family law documents. The Constitution and federal law are the primary sources of the requirement for full, faith and credit to be accorded to court records and documents from other states.[53] Some interstate uniform family laws require states to give an extra measure of full faith and credit, but electronic documents are rarely mentioned in

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[50] NCCUSL has promulgated the following uniform acts, the current versions of which are available for states to adopt: Child Custody Jurisdiction and Enforcement Act (1997) (enacted by 31 states and introduced in 9 other states); Uniform Guardianship and Protective Proceedings Act (1997) (enacted in Colorado and introduced in Minnesota); Interstate Family Support Act (2001) (enacted in three states and introduced in six others); Model Marital Property Act (1983) (enacted only in Wisconsin); Uniform Parentage Act (2002) (enacted in three states and introduced in two states); Uniform Premarital Agreement Act (1983) (enacted in 26 states and introduced in two states); Uniform Status of Children of Assisted Conception Act (1988) (enacted in two states).

[51] For example, NCCUSL is reviewing proposals for uniform domestic laws in the areas of: post-nuptial agreements, alternative dispute resolution, third party access/visitation of children, domestic partnership/civil union, post-majority educational support, and domestic violence address confidentiality. *See* NCCUSL, Pending Proposals, *available at* http://www.nccusl.org/nccusl/desktopdefault.aspx?tabindex=1&tabid=41.

[52] The courts are allowing the use of electronic decisions and orders, and electronic signatures for cases involving other issues. *See infra* section C.4., Court Documents. In most states, however, policies are still being developed for the treatment of sensitive information included in domestic law filings and orders.

[53] *See, e.g.,* Parental Kidnaping Prevention Act (Parental Kidnaping Act), 28 U.S.C. § 1738A (1980) (discusses where full faith and credit must be given to custody orders that comply with the factors set forth in this federal law); Violence Against Women Act, 18 U.S.C. § 2265 (2000) (requires states to enforce the domestic violence orders of other states). Article IV, section 1 of the United States Constitution grants power to Congress to enact laws that prescribe the manner in which states accord full faith and credit.

these uniform statutes.[54]

Although state legislatures and state courts have primary jurisdiction for establishing and enforcing family law rules and court procedures within the state, federal law preempts inconsistent state law in cases where there is a particular federal interest.[55] Preemption applies, for example, when the United States is a party to an international agreement dealing with an aspect of family law and the law of the state conflicts with the law of the international agreement.[56] In addition, some federal laws were enacted to create uniform treatment among all states in certain circumstances where a specific need has been demonstrated. For example, the Indian Child Welfare Act provides mandatory factors that a state trial court must use to determine whether the tribal or state court has exclusive or concurrent jurisdiction over a child in a custody proceeding.[57] Under this law, electronic service of process, even if it is available

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[54] *See* NCCUSL, Uniform Interstate Enforcement of Domestic Violence Orders Act (Uniform Domestic Violence Act) (2002), *available at* http://www.law.upenn.edu/bll/ulc/uiedvoa/final2002.htm. The Uniform Domestic Violence Act provides that if a protected individual can provide direct proof of a facially valid order from another jurisdiction by presenting a paper copy or through an electronic registry, the court may act to determine whether the order has been violated. Nine states have enacted the Uniform Domestic Violence Act and four states introduced legislation to adopt the Act in 2003.

[55] *See, e.g.*, Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 520 (2003). This federal law requires that certain mandatory statements and attestations be included in writings, such as affidavits, and restricts the state courts' power to render a default judgement if these conditions are not met. This law is used by the state courts when one spouse files for a divorce and alleges that the other spouse's location is unknown. In these cases, the affidavit must include information claiming that the spouse is not on active military duty. The rules governing execution of the affidavit depend upon the individual state law and court rules.

[56] There are several international treaties addressing such issues as jurisdiction and full faith and credit that impact family law matters where the situation crosses international borders. In fact, where the United States has ratified a treaty, it becomes the law of the land and inconsistent state laws are preempted. *See, e.g.,* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention on Protection of Children) , 42 U.S.C. § 14953 (2000), *available at* http://fletcher.tufts.edu/multi/texts/intercounty-adoption.txt (state laws that are inconsistent with the Convention of Interstate Adoption are preempted to the extent they are consistent.). The Convention on Protection of Children, ratified by the United States in 2000, sets forth general principles regarding intercountry adoptions and draws a baseline upon which signatories may build. The treaty is designed to be flexible enough to accept changes in local law that are in accordance with the Convention. *Id. at* § 14901. For example, Article 23 provides that an adoption certified by competent authority of any country that is a party to the Convention shall be recognized as valid in all other Contracting States. Under U.S. law "[d]ocuments originating in any other Convention country and related to a Convention adoption case shall require no authentication in order to be admissible in any Federal, State, or local court in the United States, unless a specific and supported claim is made that the documents are false, have been altered, or are otherwise unreliable." *See* 42 U.S.C. § 14942 (2003).

[57] Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1963 (requires a statement noting whether the Act applies be included in each petition filed where a Native American child is involved).

under state law, would not qualify as proper service of process under federal law.[58] In some cases, the Indian Child Welfare Act can potentially preempt a decision by a state court to seal court records by mandating access to reports and documents in a matter involving an Indian child.[59]

Similarly, the Parental Kidnaping Prevention Act (Parental Kidnaping Act) and the Full Faith and Credit for Child Support Orders Act (Full Faith and Credit Act) mandate uniform state treatment of child custody and child support determinations by preempting inconsistent state law.[60] According to legislative history regarding the Full Faith and Credit Act, inconsistent state law and practice resulted in adverse conditions that affected the welfare of children, and their parents or custodians by allowing non-custodial parents to avoid making court ordered child support payments, and led to conflicting court orders in various jurisdictions.[61] This law establishes uniform rules under which state courts act to affect child custody and support orders from other states, such as the rule requiring parties to file a written consent with the issuing court before another state court may modify an existing child support order.[62] The Uniform Child Custody Jurisdiction and Enforcement Act (Uniform Child Custody Act) is a model law that the states may enact and which provides some guidance for notice requirements.[63] Comments to the Uniform Child Custody Act draft, entitled "Notice to Persons Outside State," provide that notice

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[58] *See id.* at § 1912(a). Thus far at least one state allows limited electronic service of process, Colorado, while Michigan has put forth a proposal to allow electronic service of process. Colorado's law has precautions against conflicts with other state laws to protect consumers, specifically states where electronic service may not be used or where the law requires service via mail. In addition under Colorado's law, a party to a litigation must consent to receiving electronic service. *See* D.C. COLO. L. CIV. R. § 5.2 (2002); COLO. R. CIV. P. 121 § 1-26 (2003). *See also* Center for Democracy & Technology, "A Quiet Revolution in the Courts: Electronic Access to State Court Records," *available at* http://ww.cdt.org/publications/020821courtrecords.shtml.

[59] *See* Indian Child Welfare Act, 25 U.S.C. § 1912(c) (1978) (Parties to a foster care placement or termination of parental rights proceeding involving an Indian child have the right to examine all reports or other documents filed with the court.).

[60] *See also* Parental Kidnaping Act, 28 U.S.C. § 1738A (1980); Full Faith and Credit for Child Support Orders Act (Full Faith and Credit Act), 28 U.S.C. § 1738B (amended 1997). Normally, as in the case above, the federal courts may not assert jurisdiction in child custody or other family law cases. However, federal courts may exercise jurisdiction to enforce compliance of federal law by state courts that assert jurisdiction over another state's child custody case or refuse to enforce another state's decree. *See, e.g., Flood v. Braaten*, 727 F.2d 303 (3rd Cir. 1984).

[61] *See* Full Faith and Credit Act, 28 U.S.C. § 1738B (amended 1997).

[62] This includes a determination that proper notice requirements have been met. The Parental Kidnaping Act and the Full Faith and Credit Act provide that reasonable notice given to the parties involved is one of the factors used in determining whether the court may assert jurisdiction. *See, e.g.,* Parental Kidnaping Act, 28 U.S.C. §§ 1738A(e) (1980); Full Faith and Credit Act, 28 U.S.C. § 1738B(e)(2)(B) (amended 1997).

[63] NCCUSL, Uniform Child Custody Jurisdiction and Enforcement Act § 108 (1997), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/Uniform Child Custody Act97.htm.

and proof of service of process may be made by any method allowed by any state involved in the proceeding, including the use of facsimile.[64]

These examples demonstrate the complicated patchwork of laws governing documents that currently exist in the area of family law. While certain federal laws provide uniform treatment in specific cases, these laws are not comprehensive enough to protect all persons involved in a family law proceeding. As states enact uniform electronic transactions laws, state courts are beginning to deal with the resulting issues of privacy and confidentiality that arise in the context of how these electronic transactions will affect consumers involved in domestic relations cases.

State Electronic Transactions Laws

Section 102 of the ESIGN Act allows each state to consider and enact an electronic transactions law or adopt the UETA law drafted by NCCUSL, which does not contain an explicit exception for domestic relations and family law documents.[65] Thus far, 49 states, the District of Columbia and the Virgin Islands have adopted either UETA or their own electronic transactions law.[66] Several of these jurisdictions have explicitly excepted family law documents.[67] The other states' statutes contain general provisions that make the substantive domestic relations law

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[64] *Id.* at 14.

[65] 15 U.S.C. § 7002 (2000).

[66] *See* Appendix E. Alaska, California, Illinois, New York, South Carolina, Washington, and Wisconsin have electronic signature laws that were enacted prior to the passage of ESIGN. Massachusetts and Vermont have either introduced or passed draft UETA legislation in 2002-2003.

[67] These states are Alabama, Louisiana, Maryland, Mississippi, New Jersey, and New Mexico. *See* Appendix E. Vermont's House of Representatives recently passed a version that also exempts family law documents. It is important to note that New Jersey's court rules allow electronic filing of court documents in all civil cases. In Wisconsin, Assembly Bill 144, introduced in the 2001-2002 Legislature, proposed to enact UETA with only some modifications. Importantly, though, the summary of the bill noted that electronic documents for matters relating to family law, court documents, and other documents normally excluded may be permitted. It explicitly excludes documents related to the execution of wills. *See* Wisconsin Legislature, Summary of Assembly Bill 144, *available at* www.legis.state.wi.us/2001/data/ab-144.pdf at pages 13-14. This bill failed to pass. Subsequent attempts to pass similar UETA provisions have also failed to pass. For example, in the January 2002 Special Session, Assembly Bill 1, these portions were inserted into another appropriations and budget bill. The UETA provisions were stricken from the bill prior to its being passed and signed into law in July 2002.

controlling, requiring a further examination of the specific domestic relations law to determine whether electronic family law documents are legally valid within the state.

The absence of an explicit exception for documents governed by domestic relations and family law in a state's electronic transactions law does not automatically make these documents subject to that law. The applicable writing requirements contained in the substantive family law provisions are controlling. If the underlying substantive law explicitly requires a paper writing and the state electronic transactions law contains an exception for family law documents, then it may be interpreted to prohibit the use of electronic documents and signatures. Alternatively, if the underlying state substantive law does not explicitly preclude electronic documents or signatures, and the state electronic transactions law does not exclude family law documents, then it may be interpreted to permit their use. For example, Maryland adopted the UETA law, which provides: "this title applies to an electronic record or electronic signature otherwise excluded from the application of this title under subsection (b) of this section to the extent it is governed by a law other than those specified in subsection (b) of this section."[68] Subsection (b) provides several exceptions to the general rule of applicability, including an exception for family and domestic law documents.[69] The Maryland law also provides: "[a] transaction subject to this title is also subject to other applicable substantive law."[70] Thus, the Maryland family and domestic relations law would determine whether documents could be electronically filed or contain electronic signatures in cases involving family law.

Most state substantive laws have not explicitly opened the door to electronic documents in the area of family law. For example, Colorado's version of the Uniform Child Custody Act allows "a child-custody determination issued by a court of another State" to be "registered" by sending to the court several documents, some of which must be certified.[71] The Colorado courts,

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[68] *See* MD. CODE ANN., COM. LAW § 21-102(d) (2002).

[69] *See id.* at § 21-102(b). This section states that transactions excluded from the general rule of applicability include the following: wills; documents covered by the Maryland UCC, other than §§ 1-107 and 1-206 and Titles 2 and 2A; the Uniform Computer Information Transactions Act transactions; utility cancellation and termination notices; housing default and foreclosure notices; health and life insurance and benefits termination notices; product recall notices; and domestic and family law matters.

[70] MD. CODE ANN., COM. LAW § 21-102(e) (2002).

[71] Uniform Child Custody Act § 305(a). Specifically such registration requires: "(1) a letter or other document requesting registration; (2) two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and (3) except as otherwise provided in Section 209, the name and address of the person seeking registration and any parent or person acting as a person who has been awarded custody or visitation in the child-custody determination sought to be registered." These documents allow the receiving court to provide a determination of whether the child custody determination is enforceable in the receiving court.

however, accept electronic court filings in other civil matters.[72] Some state law writing requirements for electronic filing of family law documents are permissive, however, and allow the use of electronic documents in certain limited circumstances. As noted above, Virginia law permits hospitals to file birth certificates electronically with the Registrar of Vital Statistics.[73] As another example, in states that have adopted the Uniform Child Custody Act, "[d]ocumentary evidence transmitted from another State to a court of [the] State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission."[74] According to the notes on this section, it was designed to "encourage tribunals and litigants to take advantage of modern methods of communication in interstate support litigation. . . ."[75] Yet even in cases where states may be apt to permit electronic versions of family law documents, state laws and court rules are currently being established to implement policies to seal and protect the confidentiality of information where necessary.[76] The reluctance on behalf of the states is due, in part, to issues surrounding the privacy of the contents of family documents.

Issues Affecting Family Law Documents

Despite the vast number of documents filed in domestic and family law proceedings, the personal and sensitive information included in these documents raises issues of privacy and confidentiality. Although an authentication issue similar to that presented in the evaluation of other ESIGN exceptions is also present in the consideration of electronic family law documents, the privacy and confidentiality issues are paramount in certain domestic relations cases. For example, most states take the view that adoption records, including the names of parties and the original birth certificate, are sealed by the courts precluding public access and publication of the

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[72] COLO. R. CIV. P. 121 §1-26 (2003) Interim Rules For Electronic Filing and Service System, Pilot Project, permits electronic transmission of documents to the clerk of the court.

[73] VA. CODE ANN. § 32.1-257 (Michie 2003). *See supra* n. 49.

[74] Uniform Child Custody Act § 111(c). *See also* VA. CODE ANN. § 20-146.10 (Michie 2003); DEL. CODE ANN. tit. 13 § 1911 (2002). *See also* Uniform Interstate Family Support Act (Uniform Family Support Act) § 316(e) (1996).

[75] NCCUSL commentary to Uniform Family Support Act § 316(e).

[76] *See infra* notes 77 and 87.

documents regardless of their form.[77] This issue coexists with the countervailing interest in providing the public access to court documents and filings.

Traditionally, court documents are open to the public. To the court systems, electronic case management is an attractive tool both for managing cases in an efficient manner and for streamlining document processing systems.[78] Some states are just beginning, however, to grapple with the problems associated with public access to family law documents and have established independent committees to determine the best way in which to provide electronic access while preserving privacy.[79] Various state and federal laws protect specific sensitive information from public access in some circumstances, such as in adoptions.[80] Currently, some state courts are opting to post electronic summary information regarding family law cases, but do not make electronic versions of the documents and pleadings from family law cases available to the public.[81] Elimination of the family law documents ESIGN exception, prior to the establishment of court processes to protect confidential information, may result in the disclosure of otherwise private and sensitive personal information contained in family law documents.

In light of this issue, the National Center for State Courts and the Justice Management Institute have developed guidelines that set forth limits with these concerns in mind so that other court systems may provide access to court records without jeopardizing the privacy of parties in

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[77] *See, e.g.,* Uniform Adoption Act, Art. 6, §§ 3-203, 3-303 (1994) (provides for the confidentiality of all records of adoption proceedings, including the petition, attachments to the petition, medical and social background reports, and pre-placement and post-placement evaluations). *See also* LA. CH. C. ART. 1186-92 (2003); S.C. CODE ANN. § 20-7-1780 (Law.Co-op. 2002); South Carolina Dep't of Soc. Servs. v. John Doe, 527 S.E.2d 771 (S.C. 2000) (construing section 1780 to mean that there must be a compelling reason that outweighs the need for confidentiality in order to determine to disclose personal information in the adoption).

[78] The Center for Democracy & Technology conducted a study which indicated that most states have an online case management system that provides some level of access to state court records. *See* Center for Democracy and Technology, *A Quiet Revolution in the Courts: Electronic Access to Court Records*, *available at* http://www.cdt.org/publications/020821courtrecords.shtml.

[79] *See id.*

[80] For example, the Intercountry Adoption Act provides that accredited private adoption agencies must be capable of "safeguarding sensitive individual information" with respect to "records, reports and information matters." 42 U.S.C. § 14923(6)(1)o(D)(iii). *See* Maryland Judiciary, Committee on Access to Court Records, Final Report at 4 (2002) (Maryland Access Study), *available at* http://www.courts.state.md.us/access/. *See also* Court Documents section, *infra* at 35 and n. 168.

[81] According to National Center for State Courts, at one time the state of Colorado provided online documents, but the link no longer functions. Colorado only provides party name, subject, and attorney information for free, and omits other details. *See* National Center for State Courts website, *available at* http://www.ncsconline.org.

protected situations.[82] The Institute's advisory committee found several categories of documents for which remote public access should be limited. Those specifically mentioning family law documents include the following: (1) family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgements and orders; (2) termination of parental rights proceedings; (3) abuse and neglect proceedings; (4) names of minor children in certain types of actions; and (5) address, phone numbers and other contact information for victims and witness in domestic violence, stalking, and civil protection order proceedings.[83] All publicly accessible information, including many of the above items, would continue to be available at the courthouse through normal means, but without remote access.[84] According to the study, advances in technology may make access to this information feasible in the future.[85]

One study highlighted the inconsistency between state laws and practice regarding the confidentiality of family law documents. According to the Florida Bar Commission on Legal Needs of Children, "records that are kept confidential in . . . dependency proceedings, are open in [Children and Families in Need of Services] cases."[86] The Commission recommended that there be collaboration between state and local agencies sharing information through a case management system. The information that may be shared through this system will be limited to information that is relevant to an individual agency's purposes.[87] The Commission further recommended that Florida statutes pertaining to confidentiality be amended to authorize information sharing among courts handling cases involving custody, delinquency, truancy, child abuse, and neglect.[88]

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[82] Martha Wade Steketee & Alan Carlson, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Records,* National Center for State Courts, Oct. 18, 2002, *available at* http://www.ncsconline.org/wc/publications/res_plipub_guidelinespublicaccesspub.pdf.

[83] *Id.* at 40. Others documents or information to which access should be limited that family law documents may contain include: (1) medical records; (2) social security numbers; (3) financial account numbers; and (4) certain types of photographs.

[84] *Id.* at 39.

[85] The authors proposed an alternative way to determine the sensitivity of information, rather than having the clerk of the court read the information and make the determination. The authors proposed to require that parties complete a form with each document filed indicating whether any information in the submission fits into a sensitive category. They noted that XML tagging and other advances in technology may greatly facilitate the implementation of this rule. *Id.* at 41.

[86] The Florida Bar: Commission on Legal Needs of Children, Final Report, p. 16 (June 2002), *available at* http://www.flabar.org. This study attempts to reconcile the need for privacy versus the state's need for information, especially in cases where the health and welfare of the child are at stake.

[87] *Id.* at 18.

[88] *Id.* at 19.

Despite the conflicts and dilemmas surrounding public access to family law documents, states are finding ways to provide access to the courts through innovative technology programs. State and federal agencies across the country have created websites listing various programs, initiatives, and reports concerning family law. Most state courts now have websites that provide detailed information regarding rules, filing procedures, laws and calendars. For many, this is an incremental step towards implementing a statewide case management system that may in the future accept electronic documents.[89] Most of these court management systems have only been implemented recently and are still in a primary developmental phase. For example, several state court systems are beginning to utilize technology to ease access to family case law information and document preparation, especially designed for *pro se* litigants. Utah, through its unified court system website, provides an index to resources, which includes a FAQ section and "how to" guides for filing divorces, paternity claims, and other proceedings.[90] Additionally, Utah is on the leading edge by enabling litigants to fill out divorce petitions and other documents online by completing a series of questions. Once the party has completed the online process, the litigant must print out the documents, which are ready for signature and filing with the clerk of the court.[91] Other courts provide self-help websites where *pro se* litigants may obtain online forms for family law in both Word and PDF formats, but require that the documents be completed, signed, and filed with the court as paper documents.[92] Other state agencies, such as those charged

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[89] This is the case for Nevada courts, where electronic versions of the documents are accepted. *See* Las Vegas Justice Court, *Justice Court Forms Now Interactive,* News from the Bench (April 2002), *available at* http://www.co.clark.nv.us/justicecourt_lv/welcome.htm. (states that future enhancements being investigated include: automatic calculation on forms with mathematical entry, more detailed forms instructions and examples using 'pop-up' menus, and eventually electronic form submission and filing).

[90] This system can be accessed via kiosks in the courthouses and other public buildings making it easier for those that do not otherwise have access to computers. The site may be accessed at http://www.utcourts.gov. An informational page is available at http://www.utcourts.gov/howto/divorce.

[91] The system, entitled "Online Court Assistance Program," is specifically geared towards those seeking a divorce. In an uncontested divorce case scenario, the online process generates several documents: a cover sheet, a Department of Health certificate, service of process documents, a petition, findings of fact and decree, orders, financial verifications, child support worksheets, and other documents that may be required based on the particular circumstances of the divorce. While anyone may use this online document generation process, it is recommended that if the family income is over $10,000 or involves several children, the litigant should talk to an attorney. This is available online at http://www.utcourts.gov/ocap/div/index.html.

[92] These documents include all of the family law actions such as: divorce, annulment, adoption, and restraining orders. The Word format allows the litigant to fill out the documents on the computer before printing, but both formats require that written signatures be affixed and affidavits be notarized. Colorado's site provides detailed instructions, links to the law, and a list of available documents online. Colorado's website providing family law forms is: http://www.courts.state.co.us/chs/court/forms/selfhelpcenter.htm. Under Colorado's Rules of Civil Procedure, these documents may be filed electronically using signatures if the party filling it out has registered with case management system. COLO. R. CIV. P. 121-126 (amended Apr. 17, 2003). Courts may also make that mandatory according to the rule. *Id.*

with maintaining vital records, are making it easier to order birth, death, and marriage certificates via the Internet as well. Most states now offer this service to some degree.[93]

Even in the more sensitive area of adoption, where for the most part, the information remains confidential, federal agencies and states are using innovative technological solutions to facilitate adoptions and post-adoption services. The U.S. Department of Health and Human Services provides a website for those interested in adoption that contains information on the adopting process, as well as pictures, ages, home state, descriptions of children, and disabilities, if any, of those awaiting adoption nationwide.[94] For yet another example, the State of Maryland's Department of Human Resources has created a Mutual Consent Voluntary Adoption Registry that offers a post-adoption service to adults in Maryland that were adopted as children, and to birth family members who may wish to locate each other.[95]

Conclusion

Family law documents contain extremely sensitive information, often requiring a higher level of protection and confidentiality. Disclosure of this information could negatively impact the families, individuals, relationships, and children involved in family law proceedings. One study indicated that "cases involving families are distinguishable from other civil cases because they invariably involve emotional and psychological dimensions that transcend other civil cases."[96] As so much depends upon the accuracy of family law documents, the individuals, the

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[93] For example, the Utah Department of Health, Office of Vital Records and Statistics, allows Internet users to download applications to receive birth, marriage, divorce, and death certificates. Some certified divorce decrees in Utah are available only through the court, but may be applied for using an online form that must be printed, signed, and returned to the court. The records requested are then sent via mail. For the State of Colorado, Department of Public Health and Environment, one may search online marriage and divorce records. Again however, only the names of the bride and groom, county of the marriage, and marriage date are provided. This index is available at: http://www.sctc.state.co.us/marriages/default.aspx. Private companies also offer online services to order birth, death, marriage and divorce certificates, such as VitalCheck Network, Inc. Interestingly, schools still require a certified copy of the birth certificate. Although the rules in Virginia allow hospitals to file birth certificates electronically, a system has not been developed that allows parents to notify the Department of Vital Records online that they intend to register a child for school and, in turn, direct the department to send an electronic birth certificate to the school.

[94] The website is http://www.adoptuskids.org. This basic information is available without a password. A verified application that shows the individual has been approved to adopt a child is required for the individual to obtain more information from the website. Private agencies may also list children on the website and have access to the information after filing a verified application.

[95] To qualify for this program, the adoptee must be at least 21years of age and not have a minor adopted sibling. The program information notes that court documents for the adoption will be under seal and released at the court's discretion. The website for this program is http://www.dhr.state.md.us/adoptvol/index.htm.

[96] Colorado Commission on Families in the Colorado Courts, Final Report, at p. 5 (August 2002), *available at* http://www.courts.state.co.us/supct/committees/commfamilies.htm.

courts, and the governments must be able to trust, protect, and guarantee the family law documents' authenticity and confidentiality.

In keeping with this higher standard of confidentiality and care, we note that issues of privacy and security of electronic documents in family law proceedings are essential to adequate consumer protection. For the most part, states are just beginning to grapple with the issues surrounding utilizing electronic family law documents including authentication and privacy. Despite expanding use, the concern persists that until authentication methods and technologies demonstrate consistent reliability, especially where so much depends upon the accuracy of the documents, electronic documents should not be used comprehensively for all family law cases.[97] While the benefits of convenience and cost provide incentive to move to electronic case management systems, the issues of public access have slowed progress towards ubiquitous use. Further testing and development of technologies in this environment may in time assuage these concerns. NTIA recommends, therefore, that the ESIGN exception for family law documents should be retained in the statute at this time.

3. Uniform Commercial Code[98]

Background

The ESIGN Act provides that the "provisions of Section 7001 of this title shall not apply to a contract or other record to the extent it is governed by . . . the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A."[99] This provision establishes that transactions, contracts, and records subject to the identified sections may rely upon ESIGN, as applicable, for validity. Those governed by one of the remaining Articles of the UCC -- Article 3 (Negotiable Instruments), Article 4 (Bank Deposits and Collections), Article 4A (Funds Transfers), Article 5 (Letters of Credit), Article 6 (Bulk Sales), Article 7 (Documents of Title), Article 8 (Investment Securities), and Article 9 (Secured

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[97] Authentication technologies currently exist and are widely employed in the marketplace today. According to one commenter responding to the ESIGN request for comments on the court documents exception, complete dependence upon electronic versions of the documents should be avoided because access to computers is still not ubiquitous. *See* National Consumer Law Center, Comments on the Court Documents Exception to the ESIGN Act (NCLC) at 1-2 (Nov. 18, 2002).

[98] NTIA published in the *Federal Register* a notice requesting comment in this evaluation. *See The State Uniform Commercial Code Exception of the Electronic Signatures in Global and National Commerce Act,* 67 Fed. Reg. 78421 (Dec. 24, 2002).

[99] 15 U.S.C. § 7003(a)(2000).

Transactions) -- may not rely on ESIGN for validity, but must instead look to other laws, including the Articles themselves, for validity.[100]

The ESIGN exclusion does not apply, however, to transferable records as defined under Title II of the ESIGN Act.[101] For the purposes of Title II, a "transferable record" is an electronic record that would be a note (not a draft/check) under Article 3 of the Uniform Commercial Code (UCC) if the electronic record were in writing; the issuer of the electronic record expressly has agreed is a transferable record, and the electronic record relates to a loan secured by real property.[102] The provisions of Title II, therefore, allow the use of electronic signatures for transferable records under Article 3 of the UCC, although transferable records is not expressly included as an exception among the exceptions in ESIGN Title I.[103]

General Comments

NTIA received 16 comments in response to the *Federal Register* notice, the majority of which called for retention of the state UCC exception.[104] Generally, the proponents of retaining the UCC exception acknowledged that ESIGN was designed to eliminate barriers to electronic commere by extending legal recognition to signatures, records, and contracts electronic form ("electronic records"). They contended, however, that the UCC exception continues to be necessary in order to support the dual needs of protecting the consumers, depositors, and financial institutions, as well as maintaining certainty in commercial and financial markets.[105] The proponents insisted that this view is borne out in three primary over-arching justifications for retention.

First, the proponents contended that Articles 3 through 9 of the UCC were already "appropriately electronified so that additional coverage of UCC provisions by . . . ESIGN [would be] unnecessary."[106] In these instances, the comments stated that the subject articles already

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[100] The Uniform Commercial Code was drafted in 1978 by the American Law Institute (ALI) and NCCUSL and has been adopted in nearly every state. *See* Permanent Editorial Board for the Uniform Commercial Code (PEB), Comments on the ESIGN Act UCC Exclusion at 1 (Feb. 20, 2003).

[101] 15 U.S.C. § 7021(a)(2000).

[102] *Id.*

[103] *See, e.g.*, 15 U.S.C. § 7003(a)(3)(2000).

[104] A list of commenters is provided in Appendix C.

[105] PEB Comments, *supra* note 100, at 2.

[106] Association of the Bar of the City of New York (NY Bar), Comments on the State Uniform Commercial Code Exception to the ESIGN Act at 2 (Feb. 24, 2003). *See* Business Law Section, Committee on the Uniform Commercial Code, American Bar Association (ABA), Comments on the State Uniform Commercial Code

authorized the use of electronic records for a variety of purposes, or had undergone (or are currently undergoing) revision to consider such authorization.[107] Second, given that several of the articles are based on the concept of negotiability of a signed writing, the proponents asserted that "simply substituting electronic records and authentications for writing and signature requirements . . . would have a significant unintended impact on substantive commercial law rules."[108] "A wholesale 'electronification' of these articles would create new electronic payment products, such as electronic negotiable instruments, including checks, without providing an appropriate framework for handling them."[109] Rules addressing physical possession, endorsement, and physical delivery that affect the right to own and enforce the subject writings "would make no sense, and would be impossible to satisfy, if the writing requirement were replaced with electronic records."[110] Lastly, these comments noted that Article 6 was recommended for repeal and has been abandoned by most states.[111]

The Electronic Check Clearing House Organization (ECCHO) and Boeing Employees' Credit Union (BECU) were the only two commenters who proposed the outright and immediate repeal of the ESIGN exception as it applies to Articles 3 and 4. ECCHO favored a general authorizing law (brought about by the repeal of the exception) that would allow market forces to develop a comprehensive, uniform legal framework applicable to all persons interested in electronic check payment products.[112] BECU posited that the treatment of electronic negotiable

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Exception to the ESIGN Act at 1 (Mar. 19, 2003) ("The Uniform Commercial Code as in effect and as revised accommodates electronic commerce in a carefully considered manner. [E-Sign] is not necessary to facilitate electronic commerce in these transactions, and would be potentially harmful to established and evolving paper-based and electronic commercial transactions which are governed by the Uniform Commercial Code.") *Id.*

[107] Electronic Financial Services Council (EFSC), Comments on the State Uniform Commercial Code Exception to the ESIGN Act at 2 (Feb. 24, 2003). *See also* Federal Reserve Bank of Atlanta (Atlanta Fed.), Comments on the State UCC Exception to the ESIGN Act at 2 (Feb. 24, 2003)("Repeated, careful review by experts in the relevant areas of law, has resulted in the current level of 'electronification' in each of the UCC articles that are the subject of the E-Sign exception.") *Id*.

[108] Federal Reserve Bank of New York (NY Fed.), Comments on the State UCC Exception to the ESIGN Act at 3 (Feb. 24, 2003). *See also* NY Bar Comments *supra* note 106, at 2.

[109] N.Y. Fed. Comments, *supra* note 108, at 3.

[110] EFSC Comments, *supra* note 107, at 2.

[111] *Id.* "In 1989, the UCC's sponsoring organizations determined that changes in business practices had made the regulation of bulk sales unnecessary and recommended its repeal. To date, 42 jurisdictions have done so." PEB Comments, *supra* note 100, at 5.

[112] Electronic Check Clearing House Organization (ECCHO), Comments on the State UCC Exception to the ESIGN Act at 5, 8 (Feb. 24, 2003); *cf.* EFSC Comments, *supra* note 107, at 2, n. 3 ("We note that there have been calls for revision of UCC Article 3 . . . to authorize and establish rules for a true 'electronic check.' EFSC endorses an exploration of the potential advantages of a true electronic check as a new payment method. However, elimination of the ESIGN UCC Exclusion for Article 3 is inappropriate without a thorough review of all the other

instruments "should be created in specific banking laws" and that the ESIGN exception (and any other type of similar electronification exclusion) limits technology growth.[113]

Article-by-Article Analysis and Comment

Article 1 - General

Article 1 sets forth general principles applicable to transactions governed by other UCC articles, as well as definitions and rules of interpretation that inform application of those articles. At one time, sections 1-107 and 1-206 were the only substantive provisions that contemplated a writing. In 2001, the American Law Institute (ALI) and NCCUSL approved a revision of Article 1 "that replaces the writing requirement in former Section 1-107 with a medium-neutral rule and eliminates altogether the rule formerly contained in Section 1-206."[114]

Articles 2 and 2A

Articles 2 and 2A do not fall within the UCC exception. The American Bar Association (ABA) noted that amendments to these articles received final approval by the NCCUSL, and are now pending approval from the ALI at its upcoming annual meeting. "These amendments revise both Articles to fully accommodate a parties' choice to form contracts for the sale and lease of goods through electronic means and with electronic agents."[115]

Article 3 - Negotiable Instruments

Article 3 governs the operation of negotiable instruments, such as checks, and is premised on a "regime" of possession and endorsement of a physical document and the rights and obligations associated with those acts.[116] At its core is a policy of supporting the marketability of that document, which functions as an item of tangible personal property that can

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changes that would need to be made to Article 3, or addressed in an alternative federal statue [sic] or uniform act, as a result.").

[113] Boeing Employees' Credit Union (BECU), Comments on Proposed Changes to the ESIGN Act at 1 (Feb. 20, 2003).

[114] PEB Comments, *supra* note 100, at 3. *See also* ABA Comments, *supra* note 106, at 2. Medium-neutrality as a concept refers to documents that may be accommodated, recognized, or accepted in a paper or electronic format or medium.

[115] ABA Comments, *supra* note 106, at 2, n.4.

[116] *Id*. *See also* Atlanta Fed. Comments, *supra* note 107, at 2 ("Articles 3 and 4, together with existing business systems for processing checks, constitute an elaborate artifice built on the negotiability of a signed, written check that accumulates a written chain of endorsements as the check moves through the process of collection.").

be transferred by delivery of possession.[117] Given this construction, several commenters argued that removing the ESIGN exception would allow for the creation of an electronic negotiable instrument without a functionally equivalent electronic possession and endorsement structure necessary to protect third party rights and lend stability to check-payment systems.[118] One commenter argued that repealing ESIGN's UCC exception and instantly providing that Article 3 governs electronic checks without an appropriate and carefully conceived legal structure is inconsistent with the approach of ESIGN as it relates to transferable records, and would create risks to the check-payment system that cannot be tolerated.[119] NCCUSL concluded that consumers, who depend on the reliability of the check-payment system, would be among those most harmed by such an approach.[120] The proponents of retaining the UCC exception suggested that "a much more carefully crafted legislative initiative is the best way to provide for the 'electronification' of negotiable instruments," preferably in measures similar to the Federal Reserve Board's proposed *Check Clearing in the 21st Century Act*.[121]

While supporting retention of the UCC exception "for the present to see how [the Check Clearing in the 21st Century Act] progresses," three commenters posited that, if the UCC exception were removed and electronic negotiable instruments could be created under Articles 3 and 4, the consumer protections that apply under the UCC for paper checks "would also apply to

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[117] PEB Comments, *supra* note 100, at 3. Article 3 does not prevent parties from using electronic records or payment mechanisms, including funds transfers, debit cards, credit cards, and ACH transactions. The operation of these mechanisms are governed by law other than Article 3. *See* ABA Comments, *supra* note 106, at 2.

[118] *Id.* *See also* Atlanta Fed. Comments, *supra* note 107, at 2. The PEB considers instructive the process undertaken by the drafters of ESIGN with respect to the creation of electronic transferable records.

> Subchapter II of ESIGN . . . authorize[s] transferable electronic records that perform the function of negotiable notes (but not drafts, including checks). The Electronic Funds Transfer Act (15 USC 1693), UCC Article 4A, and other regimes authorize various electronic payment systems. . . . ESIGN create[d] a carefully defined legal structure to support transferable records, including the requirement of a single authoritative copy and the substitution of electronic control for physical possession. The drafters of each act rightly concluded that merely mandating medium neutrality for all notes without the support of legal rules specifying rights and liabilities would not create the level of certainty required when third-party interests are at stake.

PEB Comments, *supra* note 100, at 3-4.

[119] NCCUSL Comments on the UCC Exception to the ESIGN Act at 2 (Feb. 7, 2003).

[120] PEB Comments, *supra* note 100, at 4.

[121] Atlanta Fed. Comments, *supra* note 107, at 3; NY Fed. Comments, *supra* note 108, at 4. *See also* Check Clearing in the 21st Century Act, H.R. 1474, 108th Cong. (2003). On June 5, 2003, the U.S. House of Representatives unanimously approved an amended version of H.R. 1474, the Check Clearing for the 21st Century Act.

these electronic instruments."[122] These commenters stated that consumers would receive sufficient protection under the Electronic Funds Transfer Act and the Federal Reserve Board's Regulation E because they both apply to any transfer of funds that is initiated through an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit a consumer account.[123]

ECCHO's comment, however, suggested that the appropriate legal framework for electronic checks and related payment products should be made solely by the market, comprised of the providers and users of these products.[124] The comment contended that repeal of the UCC exception would provide a functionally equivalent electronic alternative to the paper check collection system "which would better insulate our nation's payment system" from disruption such as occurred during September 2001. ECCHO suggested that the repeal of the exception would have no deleterious consequences on consumers, businesses, or financial institutions, but would, after implementation of advanced security features, better protect these stakeholders from fraudulent or erroneous transactions.[125] The comment stated the consumers and businesses who send and receive electronic checks would enjoy the same protections that currently apply under the UCC to paper checks.[126] Finally, ECCHO asserts that the advanced technology of electronic checks enables certain superior security features (for example, digital certificates and dual key cryptography) that would better protect users of electronic checks from fraudulent or erroneous transactions, as compared to current paper checks or electronic transactions.[127] ECCHO proposed that providing a general authorizing law (resulting from the repeal of the UCC exception), but leaving the development of the technological details of electronic checks to the private sector, would be analogous to the successful development of the modern paper check system. The comment stated "[t]o get electronic checks started, the key step that the private sector needs is an underlying law to authorize [check truncation, check imaging, and electronic

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[122] Credit Union National Association & Affiliates (CUNA), Comments on the UCC Exception to the ESIGN Act at 2-3 (Feb. 24, 2003). *See generally* Ohio Credit Union League (OCUL), Comments on the Applicability of the ESIGN Act to Electronic Checks (Feb. 25, 2003); University of Hawaii Federal Credit Union (Hawaii FCU), ESIGN on E-Checks (Feb. 13, 2003).

[123] Electronic Funds Transfer Act, 15 U.S.C. § 1693 (1978); Federal Reserve Board, Regulation E, 12 C.F.R. § 205.3(b) (1996) (Although the regulation expressly excludes paper checks from coverage under the Electronic Funds Transfer Act and Regulation E, this exclusion does not extend to electronic checks.)

[124] ECCHO Comments, *supra* note 112, at 8.

[125] *Id.* at 5-6. (ECCHO supports CUNA's analysis regarding application of the UCC consumer protections, Electronic Funds Transfer Act and Regulation E to electronic checks.)

[126] *Id.* at 6.

[127] *Id.*

check presentment initiatives], which would result from the repeal of the Article 3 and 4 exception of the E-SIGN Act."[128]

Presently, consumers have confidence in the negotiability of a check, a physical document that functions as an item of tangible personal property that can be transferred by delivery of possession just like any other form of tangible personal property. Article 3 and the check processing systems erected on its foundation constitute "an elaborate artifice built on the negotiability of a signed, written check that accumulates a written chain of endorsements as the check moves through the process of collection. Neither existing law nor the existing backroom systems in banks are [sic] set up to account for electronic counterparts of the original written, signed check"[129] While adoption of new and more efficient technologies in the payments system is a desirable end, an immediate and wholesale repeal of E-SIGN's exception, without informed public discussion among consumer advocates, the banking community, and experts in payments law, would not result in an orderly transition from paper based processes to electronic processes. Rather, the rules and processes for collecting and presenting checks would be disrupted, and important protections for consumers, depositors, and financial institutions created by the existing procedural writing requirements, invalidated.[130]

Articles 4 and 4A - Bank Deposits and Collections/Funds Transfers

Article 4, which governs bank deposits and collections, applies to "items" defined to include Article 3 negotiable instruments if handled by a bank, and promises or orders to pay money that may not satisfy the mandates of Article 3.[131] The rules addressing the rights and obligations of banks and their customers were drafted in a manner that, like Article 3, called for an actual writing to support the requirement of "possession of the item" for deposits and collections. Article 4A governs funds transfers through payment orders that need not be in writing.

PEB stated that "[b]y limiting the application of Article 4 to paper items handled by banks, its rules cannot clash with the different rules applicable to various electronic payment systems. Instead, Article 4 is closely and carefully integrated with Article 3 to facilitate the

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[128] *Id.* at 7.

[129] Atlanta Fed. Comments, *supra* note 107 at 2. "For example, it would not be clear how one would possess or indorse an electronic negotiable instrument. If an electronic check is [sic] is e-mailed to the payor bank has there been effective presentment?" N.Y. Fed. Comments, *supra* note 108, at 3, n.8.

[130] "The primary purpose of Article 3 is to provide for the rights of third parties who take the negotiable instrument. . . . [Eliminating the E-SIGN exception] would sweep away the writing and signature barriers as applied to the creation and enforcement of a negotiable instrument. This change would create havoc as there would be [no] substitute for the possession and indorsement concepts that currently govern the rights and obligations of third parties to a negotiable instrument." ABA Comments, *supra* note 106, at 2-3.

[131] *See generally* PEB Comments, *supra* note 100, and ABA Comments, *supra* note 106.

automated handling of instruments."[132] While Article 4 applies only to paper items, it is medium-neutral because it permits handling, processing, and presentment, as well as settlement, by either paper or electronic means.[133] PEB noted that the provisions of Article 4 may be varied by agreement and by Federal Reserve regulations and operating circulars, clearing-house rules, and the like.[134] PEB recommended that the UCC exception should be retained with respect to Article 4 of the UCC.[135]

Article 5 - Letters of Credit

Article 5 governs letters of credit, which by its terms may be in any form agreed to by the parties, including electronic form. The article prohibits, however, presentation of an electronic document with a letter of credit unless the parties have specifically agreed to use such a document. PEB contended that, because almost all letters of credit are issued by banks to and on behalf of commercial parties, Article 5 has no direct impact on consumers.[136] According to the commenters, Article 5 is also medium neutral, and thus, ESIGN is unnecessary to give validity to the electronic letter of credit transactional records governed by this article.[137]

Article 6 - Bulk Sales of Goods

Article 6 governs bulk sales of goods and requires a purchaser or transferee to provide notice to the transferor's creditors of the bulk transfer, which is the sale of a substantial part of a seller's inventory. In 1989, the UCC's sponsoring organizations determined that changes in business practices had made the regulation of bulk sales unnecessary and recommended its repeal.[138] Forty-two states have done so.[139] The ABA comments provided the most comprehensive explanation of the operation of Article 6 and the reason why electronification of the subject notice is not controversial. The ABA stated that in practice, most transferees will take the least costly and most efficient route of filing the notice with the applicable state office. The determinant as to whether electronic filings are feasible is whether the state office is equipped to handle electronic filings. Thus, authorizing electronic notices for bulk transfers will

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[132] PEB Comments, *supra* note 100, at 4.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 4.

[136] *Id.* at 5.

[137] *See generally* PEB Comments, *supra* note 100, and ABA Comments, *supra* note 106.

[138] PEB Comments, *supra* note 100, at 5.

[139] *Id.;* ABA Comments, *supra* note106, at 3.

have little effect on transactions subject to article 6.[140]

Article 7 - Documents of Title

Article 7 governs documents of title, "primarily warehouse receipts and bills of lading."[141] By their very nature, documents of title "must be in writing, be issued by or to a bailee, and be treated in the course of business and finance as evidence that the person in possession of the document of title has the right to the goods covered by the document."[142] As with negotiable instruments, the rules governing documents of title were based on a paper-based system "where rights of third parties are determined in part by possession and endorsement of the paper document of title."[143] According to the ABA, eliminating the paper requirement without "carefully adapting the rules to the context of the electronic environment would create significant disruption of rights of third parties as to the documents and the goods covered by the document."[144]

The ABA acknowledged, however, that some Article 7 transactions would be protected under ESIGN's consumer consent provisions without the UCC exception. In a section entitled "Consumer Protection," the ABA noted that UCC Article 7, Section 7-210(2)'s requirement that information be made available to consumers in writing would be preserved under the provisions of ESIGN's section 7001. Section 7001(c) provides that if a statute requires information to be provided or made available to a consumer in writing, the information may be provided electronically, subject to certain safeguards.[145] These safeguards include the requirement that if a previously existing law expressly requires a record to be provided by a method that requires verification or acknowledgment of receipt, the record may be made available electronically only if the electronic method provides verification or acknowledgment of receipt. The ABA commented that Article 7, Section 7-210(c) "provides that in foreclosure of a warehouse lien the consumer must get notice either delivered in person or sent by registered or certified letter to the last known address of any person to be notified. If the provisions of Section 7001 applied to this

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[140] ABA Comments, *supra* note106, at 3.

[141] NCCUSL Comments, *supra* note 119, at 2.

[142] ABA Comments, *supra* note 106, at 4.

[143] *Id*.

[144] *Id.*

[145] *See* 15 U.S.C. § 7001(c)(2000).

requirement, the provisions of ESIGN Section 7001 would preserve the ability to give notice in writing."[146]

Article 8 - Investment Securities

Article 8 governs transfers of investment securities. According to PEB, the article was revised in 1994 to allow for both paper and electronic-based transfers "by supporting electronic transactions within the 'indirect' holding system in which an investor's holdings are maintained in a securities account rather than by possession of a physical document."[147] PEB commented that Article 8's structure also facilitates the electronic transfer of rights in securities for which no paper certificate is issued ("uncertificated" securities).[148] PEB stated that the relationship between paper transactions and electronic transactions in Article 8 is complex, and it is important to maintain a clear distinction between certificated and uncertificated securities. The comment asserted that because of the indirect holding system, the "pen-and-ink" rules of Article 8 are more important for the electronic marketplace than they are for the occasional paper transaction. PEB contended that applying ESIGN to the carefully constructed system would have serious and adverse consequences for all participants in the markets, including individual investors.[149]

Article 9 - Secured Transactions

Article 9 governs secured transactions and was significantly revised in order to accommodate electronic security agreements, electronic financing statements, electronic filing, and electronic notices.[150] While noting that Article 9 implements a policy of "medium neutrality by giving electronic records and signatures equal dignity with pen-and-ink requirements," the PEB comment offered an explanation of why one section was specifically not subject to electronification, and why that section should not be subject to the mandates of ESIGN. PEB pointed out that the sole exception to the full effectiveness given to electronic records appears in Section 9-616.[151] That section applies only to a consumer-goods transaction and provides that after disposition of the collateral, the secured party must send the consumer a written explanation of how any surplus or deficiency was created. According to PEB, the drafters concluded that this communication was so critical to the rights of consumer obligors that it should be presented

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[146] ABA Comment, *supra* note 106, at 5.

[147] PEB Comments, *supra* note 100, at 6; *see also,* NCCUSL Comments, *supra* note 119, at 2.

[148] PEB Comments, *supra* note 100, at 6.

[149] *Id.*

[150] ABA Comments, *supra* note 106, at 4.

[151] PEB Comments, *supra* note 100, at 6.

in writing, rather than to risk having it sent to an infrequently monitored email account.[152] PEB concluded that subjecting this rule to ESIGN, and thereby eliminating the writing requirement, would eliminate an important consumer-protection provision.[153]

Both the ABA and PEB noted that, for some types of collateral interests under the UCC (negotiable instruments and documents of title), the ability to perfect and enforce security interests in these items is based in part upon the possession of the tangible items.[154] For other types of collateral (chattel paper and investment securities), parallel systems of rules have been developed for electronic and paper forms. According to these commenters, applying ESIGN to the paper form would "upset the certainty necessary for an efficient system of secured transactions and is not necessary to allow for electronic transactions."[155]

Conclusion

Beginning in the late 1980s, the sponsoring organizations of the Uniform Commercial Code undertook a series of revisions to the UCC that sought to link the law of commercial transactions to the operation of the emerging electronic marketplace. To this end, the various UCC drafting committees crafted tailored electronic record and signature provisions where electronification made commercial sense and was appropriate. With this background, it is not surprising that, in this evaluation, commenters overwhelmingly maintain that deletion of the UCC exception at this time would be an overly simplistic approach to electronification.[156] As discussed above, they contend that such an action is unwarranted and unsupported, given the level of accommodation to electronic commerce already present in the business world. The comments submitted in this evaluation also present information to demonstrate that, without a proper underlying structure to accommodate new forms of payment, elimination of the ESIGN exception for contracts under the UCC would result in disruption and uncertainty in particular transactions. Given the foregoing, the NTIA recommends that the ESIGN exception for the UCC be retained as part of the statute, but modified to exclude electronic letter of credit transactional records governed by Article 5 and electronic notices governed by Article 6.

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[152] *Id.*

[153] *Id.*; ABA Comments, *supra* note 106, at 5.

[154] PEB Comments, *supra* note 100, at 6; ABA Comments, *supra* note 106, at 4.

[155] ABA Comments, *supra* note 106, at 4. *See also* PEB Comments, *supra* note 100, at 7.

[156] *See generally* NCCUSL Comments, *supra* note 119, at 2.

4. Court Documents[157]

Background

The ESIGN exception for court documents removes pleadings, briefs, court orders, and other documents pertaining to the processing of a case before the courts from the operation of section 101 of the statute.[158] Court documents and records traditionally are filed and available for review by the public upon a request made to the court clerk or court secretary's office. The records are physically available for review and copying at a central site located within the courthouse. Since the passage of ESIGN, federal and state courts have made significant progress in establishing electronic filing and access systems for court records and documents. These systems use electronic signatures and documents to provide access to the court documents over the Internet, and to provide an option for litigants to file briefs, pleadings, and other papers in court cases using electronic methods. The process is not complete in the federal or state courts, however, as privacy, security, and technological issues require the establishment of additional court procedure and policy.

The federal courts made significant progress in establishing electronic court systems with the creation of the Case Management/Electronic Case Filing system (CM/ECF).[159] CM/ECF allows attorneys to file court documents from their offices and gives judges, court staff, attorneys, and the public immediate access to most of those documents. There are approximately 40 bankruptcy courts, and 12 district courts that accept electronic filings, and it is projected that CM/ECF will be available in almost all federal courts by mid-2005.[160] As of May 2003, more than 33,000 attorneys and others had filed court documents over the Internet.[161] The federal courts' public access system, Public Access to Court Electronic Records (PACER), initiated more than a decade ago, is a web-based system that offers docket information and case

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[157] NTIA published in the *Federal Register* a notice requesting comment in this evaluation. *See Request for Comment on the Court Documents Exception to the Electronic Signatures in Global and National Commerce Act,* 67 Fed. Reg. 56277 (Sept. 3, 2002). A list of the commenters is provided in Appendix C.

[158] 15 U.S.C. § 7003(b)(1)(2000).

[159] For more information, *see* Federal Judiciary, Case Management and Electronic Case Files (CM/ECF), *available at* http://www.uscourts.gov/cmecf/cmecf-about.html.

[160] *See also* Administrative Office of the United States Courts (AOUSC), Comments on the Court Documents Exception to the ESIGN Act at 2, 5 (Oct. 29, 2002); Executive Office of United States Attorneys, Department of Justice (DOJ), Comments on the Court Documents Exception to the ESIGN Act at 1, 2 (Nov. 18, 2002).

[161] Federal Judiciary, Case Management and Electronic Case Files (CM/ECF), at http://www.uscourts.gov/cmecf_about.html (last visited June 12, 2003). *See also* AOUSC Comments, *supra* note 160, at 2.

documents in those courts that use CM/ECF or that convert documents into electronic form.[162] As a result of the establishment of these electronic case filing and document management systems, the federal courts have over 7 million cases, containing many millions of documents, available to the public over the Internet.[163] In addition, the federal judiciary has authorized service of federal court documents by electronic means upon written consent of the party to be served.[164] Nearly all federal courts have websites with local rules and other court information. Over the next several years, additional courts are expected to place court case and calendar information online, and to develop electronic filing procedures.[165]

The trend established by the federal courts has been followed in the State courts to allow either public access to court documents, online filing and court document management systems, or both. The state courts establish specific writing requirements for filing court documents, and recently, rules allowing electronic filings.[166] For example, the New Jersey Supreme Court promulgated new rules in March 2000 to allow electronic filing of court documents and the use of electronic signatures.[167] Although some states currently have rules that authorize paper filings only, some legislatures have authorized the amendment of court rules to allow electronic filing.[168] The National Center for State Courts (NCSC) compiles information on public access to court records and reports that 30 states employ some type of computer access to court records.[169]

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[162] For more information, see www.pacer.psc.uscourts.gov.

[163] *See* Case Management and Electronic Case Files (CM/ECF), *available at* http://www.uscourts.gov/cmecf/cmecf_faqs.html.

[164] *See* Fed. R. Civ. P. 5(b)(2) and Fed. R. Civ. P. 77; Fed. R. Crim. P. 49(b) and 49(c); Fed. R. Bankr. P. 7005, 9014, and 9022; Fed. R. App. P. 25 and 45. These rules are not applicable to service of process or certain other types of documents used to establish personal jurisdiction or to initiate certain types of cases.

[165] AOUSC Comments, *supra* note 160, at 4-5.

[166] The individual state court districts may promulgate specialized practice rules. *See, e.g.,* Nevada District Court Rule 7.20 (8th Judicial Court), *available at* http://www.co.clark.nv.us/district_court/edcr.htm (last visited June 4, 2003).

[167] *See* N.J. Supreme Court Order of March 27, 2000, *available at* http://www.judiciary.state.nj.us/jefis/order.htm (last visited June 4, 2003). This order lists the New Jersey court rules that were amended to allow judges and court clerks to affix electronic signatures to orders and certifications.

[168] *See, e.g.,* NEV. DIST. CT. R. 12, *available at* http://www.leg.state.nv.us/CourtRules/DCR.html (last visited June 4, 2003) (requires paper pleadings and documents to be filed with district courts). The Nevada statute leaves room for amendment to this rule to allow for electronic filings. *But see* NEV. REV. STAT. 1.117 (1999) (authorizes Nevada Supreme Court to adopt rules for electronic filing, storage, and reproduction of court documents).

[169] For a list of state courts that have electronic case filing and access procedures, *see* "Privacy and Public Access to Court Records," National Conference of State Courts (March 2002), *available at* http://www.ncsconline.org/WC/Publications/Tech_PriPubStatelinksPub.pdf.

The NCSC has also produced model guidelines for state courts to follow as they develop policies for electronic access to court documents.[170] The guidelines are designed to address issues such as privacy and restriction of access to certain confidential information.[171]

Comments

The commenters generally recognized the significant progress that has been made regarding online filing and access to court documents by the federal, state, and bankruptcy courts. The commenters unanimously recommended, however, the retention of the court documents exception to ESIGN for a variety of reasons.

The Administrative Office of the United States Courts (AOUSC), on behalf of the federal judiciary, recommended that Congress should retain the ESIGN court records and documents exception because its removal would create uncertainty and confusion, and because the exception currently functions consistently with the courts' authority to adopt rules and policies governing the federal court system. The AOUSC reported that the courts are in a transitional phase adopting computerized technology as part of their processes, and noted that ESIGN is part of the transition of the entire society to a computerized society.[172] The AOUSC further noted that although ESIGN sets forth a general broad rule about the legal effects of electronic signatures in commercial transactions, the inclusion of the nine exceptions shows a recognition that considerable flexibility is necessary and that a "one-size-fits-all" solution is inappropriate.[173]

The AOUSC stated that the flexibility that courts need to complete the transition to a computerized system is inherent in the federal CM/ECF system. According to the comment, this system allows courts to experiment with different ways of addressing electronic filing issues, and provides the federal judiciary with experience that will be used to make decisions about optimal procedures and processes.[174] The comment further noted the exception is completely consistent with the federal judiciary's status as an independent branch of government, with responsibility for its own procedures and rules, and for ensuring that those procedures and rules protect justice

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[170] *See* "State and Federal Policy on Electronic Access to Court Records," Subcommittee on Access to Court Records, at 2, *available at* http://www.courts.state.md.us/access/finalreport2-05.pdf.

[171] *See* Domestic and Family Law Section, *supra* at 19, for discussion and text on privacy and confidentiality.

[172] AOUSC Comments, *supra* note 160, at 1.

[173] *Id.*

[174] *Id.* at 5.

and fairness in the specific context of court proceedings.[175]

The Department of Justice (DOJ) also recommended the retention of the exception and stated that its elimination would be premature in the absence of court policy that differentiates between the variety of signatures and signing contexts that occur in court filings.[176] DOJ noted the distinct treatment of cases involving significant privacy rights, such as criminal cases and medical or financial cases by courts with electronic filing and access systems. DOJ commented that the Judicial Conference privacy policy in effect in approximately 28 jurisdictions requires counsel to redact certain sensitive information from pleadings filed in court, such as the last four digits of social security numbers, financial account numbers, names of minor children and birthdates.[177] DOJ recommended the retention of the exception because there has not been sufficient analysis of the nature, context and purpose of the different types of signatures that may be involved in any litigation; each having certain requirements in terms of proof, relevance, authenticity, security, and consequences.[178]

The American Bar Association's Science and Technology Law Section (ABA/STL) recommended the retention of the exception to ensure the constitutionality of ESIGN as it applies to federal and state courts.[179] The ABA/STL also recommended that Congress provide additional guidance to infomediaries and administrative courts.[180] The ABA/STL argued that, although Congress could require ESIGN to be applied to state court documents to promote uniformity, the impact of the state courts documents on the national economy and interstate commerce must be "substantial" under the Supreme Court's test in *U.S. v. Lopez*[181] in order for Congress to exercise authority in this area.[182] The comment further stated that parallel provisions of UETA could create a similar exception under state law and there is no reason to assume the accelerated adoption of electronic documents and signatures if the exception is removed.[183] The ABA/STL noted that the goal of establishing a uniform technologically neutral national policy

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[175] *Id.* at 2.

[176] DOJ Comments, *supra* note 160, at 2-3.

[177] *Id.* at 2, n. 1.

[178] *Id.* at 2-3.

[179] Section of Science and Technology Law, American Bar Association (ABA/STL), Comments on Court Documents Exception to the ESIGN Act at 2-5 (Mar. 28, 2003).

[180] *Id.* at 6-7.

[181] 514 U.S. 549 (1995).

[182] ABA/STL Comments, *supra* note 179, at 5.

[183] *Id.* at 6.

for electronic documents could provide a constitutional basis under the Commerce Clause for Congress to remove the court documents exception to ESIGN.[184] The ABA/STL also recommended that Congress amend ESIGN to expand the scope of the present court records exception to include duplicate and original copies of court documents in the hands of infomediaries or filing services, and to include administrative law tribunals of executive branch departments.[185]

A group of consumer associations, represented by the National Consumer Law Center (NCLC), reported that there are still a substantial number of people in the United States without computer access at a time when *pro se* use of the courts is increasing. NCLC recommended that Congress retain the exception because of the large number of *pro se* litigants before the courts and the low numbers of persons that have access to computers.[186] NCLC stated that there has been a dramatic increase in the number of *pro se* filings, reporting that over half of the family court cases in California, and more than 88 percent of the domestic relations cases in Phoenix, Arizona, involve at least one self-represented or unrepresented party.[187] For this reason, NCLC recommended that the court documents exception should remain a part of ESIGN in order to protect the *pro se* users of the courts.[188]

Conclusion

The objective of the evaluation of the court records and documents exception to ESIGN is to assess whether the exception remains necessary for the protection of consumers. The information presented in the comments and the research conducted on the status of state and federal electronic filing systems indicates that, although there have been significant advances made by the federal and state courts to provide electronic access and filing systems for the general public, the court systems in this country are still developing both policy and procedure to handle a completely computerized court system. Once these policies and procedures are established, the impact of the removal of the exception on consumers, as well as on state and federal court systems, will be more apparent. According to the Administrative Office of the United States Courts, the Judicial Conference is currently developing a policy that attempts to balance the historical openness of public records with concerns about personal safety and

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[184] *Id.* at 5.

[185] *Id.* at 7-9.

[186] NCLC Comments on Court Documents Exception at 1-2. NCLC submitted comments on behalf of NCLC, Consumers Union, Consumer Federation of America, and the U.S. Public Interest Research Group.

[187] *Id.* at 2.

[188] *Id.* at 1-2.

security that arise from public access to those records.[189] In cases where security and privacy concerns of parties are paramount, or where personal financial or medical data of litigants should be protected, federal and state courts are still in the process of enacting appropriate rules, policies, and procedure to protect the interests of those appearing before the courts.

Moreover, some federal and state courts have not established electronic filing and access systems. Other courts have established these systems but are still developing policy and procedure for handling sensitive information. These policies are intended to ensure the level of privacy and consumer protection envisioned by ESIGN. In addition, issues regarding the court procedure or requests to seal documents to ensure that the documents are not available at the courthouse or over the Internet have yet to be completed in many state and federal courts.

In addition, the comments suggest that there is a large consumer population that would not be protected without the ESIGN exception for court documents and records because of a lack of equitable access to computerized court systems. According to the comments of NCLC, a significant portion of the American population is still outside the gateway of access to online court filing and access systems due to a lack of access to computers. NCLC cites to an increasing number of *pro se* litigants in the court system that require the continued protection provided by the court records and documents exception to ESIGN.

The federal and state courts have made considerable achievements in the area of electronic transactions and document management systems. Although their advances toward a completed transition to a paperless court process have been significant, there are still important consumer interests that require the protections afforded by ESIGN. For these reasons, the removal of ESIGN section 103(b)(1) exception for court records and documents at this time would be premature. The NTIA recommends its retention as a part of the ESIGN Act.

5. Utility Cancellation Notices[190]

Background

The ESIGN exception for utilities service notices covers cancellation and termination notices for electric, telephone, gas and water services.[191] The rates, terms, and conditions of service provided by electric, gas, telephone, water and sewer companies are governed by federal and state laws and regulations, which prescribe methods and procedures that determine how utility companies make voluntary and involuntary terminations of service to customers, and how

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[189] AOUSC Comments, *supra* note 160, at 4, n. 9.

[190] NTIA published a notice in the *Federal Register* requesting comments on the issues presented in this evaluation. *See The Utility Service Cancellation Notices Exception to the Electronic Signatures in Global and National Commerce Act*, 68 Fed. Reg. 4179 (Jan. 28, 2003).

[191] 15 U.S.C. § 7003(b)(2)(A) (2000).

notices of pending terminations are provided to customers.

On the federal level, the Federal Communications Commission's (FCC) has adopted regulations that instruct telephone companies on the procedure for notifying their customers of pending cancellations of service.[192] The regulations contain several provisions that direct long distance telephone service providers to give their customers written notice upon discontinuance of service. For example, the FCC's rules require that all domestic carriers apply to the FCC for authority to discontinue service, and, as part of that application, to notify all affected customers of a planned discontinuance of service and submit a copy of the application to the public utility commission and to the government of the state in which the discontinuance is proposed, as well as to the Secretary of Defense.[193] Non-dominant international carriers are also required to provide written notice to customers at least 60 days prior to discontinuance of service.[194] Although these rules require written notice, they do not specifically prohibit the use of electronic methods to transmit the notice to customers.

The FCC's rules allow some transactions and communications to be made by electronic means, including electronic posting of the terms and conditions of service that describe the procedure for termination of service. For example, FCC rules allow telephone companies to use electronic methods and signatures for letters of agency, and authorizations or verification of a subscriber's request to change his or her preferred carrier selection.[195] This rule requires that letters of agency submitted with an electronic signature include the consumer disclosures required by section 101(c) of ESIGN.[196] In the Domestic Detariffing Order[197] and the International

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[192] *See generally* 47 C.F.R. § 63.71 (2002).

[193] 47 C.F.R. § 63.71(a).

[194] 47 C.F.R. § 63.19 (2001).

[195] *See* 47 C.F.R. § 64.1130 (2001).

[196] 47 C.F.R. § 64.1130(i).

[197] Second Report and Order, 11 FCC Rcd 20, 730 (1996) (*Domestic Detariffing Order*); *stay granted, MCI Telecommunications Corp. v. FCC,* No. 96-1459 (D.C.Cir. Feb. 13, 1997); Order on Reconsideration, 12 FCC Rcd 15.014 (1997) (Domestic Detariffing Order on Reconsideration); Second Order on Reconsideration and Erratum, 14 FCCR 6004 (1999) (*Domestic Detariffing Second Order on Reconsideration*), *stay lifted and aff'd, MCI WorldCom, Inc. et al. v. FCC,* 209 F.3d 760 (D.C. Cir. April 28, 2000); Memorandum Report and Order, DA 00-2586 (CCB, rel. Nov. 17, 2000) (*Domestic Transition Order*).

Detariffing Order,[198] the FCC also allowed long distance carriers to provide information regarding rates and conditions of service on Internet websites rather than through traditional tariff filings.[199]

As part of the congressional energy conservation policies adopted in the early and mid 1990s, Congress enacted special rules and standard procedures for utility companies to follow during terminations of gas and electric service.[200] These rules refer to procedures that are to be prescribed by state utility and regulatory commissions directing utility service providers to provide reasonable prior notice to consumers of pending termination or discontinuance of service and to allow consumers an opportunity to dispute the reasons for the termination.[201] In general, states and municipal governments have adopted regulations that govern disconnection notice procedures for utility companies. In some cases, these regulations also apply to municipal utilities as well as to privately-owned companies. For example, Nebraska's regulations provide that "[n]o municipal utility owned and operated by a village furnishing water, natural gas or electricity at retail . . . shall discontinue service to any domestic subscriber for nonpayment of any past due account unless such utility first gives written notice by mail to any subscriber at least seven days prior to termination."[202] Under this regulation, notice must be given to the consumer by first-class mail or in person and service must continue for at least seven days after notice has been given.[203] The amount of time for each notice varies among the states; however, most states require written notice of utility service disconnection to be given in advance by mail or in person.[204]

Approximately 49 states and the District of Columbia have adopted state electronic transactions laws or a version of the UETA recommended by the NCCUSL.[205] The utility

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[198] *In the Matter of 2000 Biennial Regulatory review, Policy Concerning the International Interexchange Marketplace*, Report and Order, 16 FCC Rcd 10647 (2001) (International Detariffing Order).

[199] *See* 47 C.F.R. §§ 42.10, 61.72 (2001).

[200] *See* 15 U.S.C. § 3204 (1998); 16 U.S.C. § 2625(g) (2000).

[201] *Id.*

[202] NEB.REV.STAT. § 70-1603 (2002).

[203] Sec. 70-1605.

[204] Compare New Hampshire, N.H.REV. STAT. § 363.B:1 (2002) (10 days) and New York, N.Y.PUB.SERV.LAW § 34(1) (McKinney 2002) (15 days).

[205] A list of those states that have adopted an electronic transactions law or UETA is provided in Appendix E of this report. ESIGN provides that states may modify, limit, or supersede the provisions of ESIGN section 101 by adopting their own electronic transactions law in accordance with section 102(a)(1) of ESIGN. *See* 15 U.S.C. § 7002(a) (2000). Forty-one states, the District of Columbia, and the Virgin Islands have electronic transactions laws that were passed contemporaneously with or subsequent to ESIGN. Alaska, California, Illinois,

cancellation notice exception has not been incorporated into all state uniform electronic transactions laws, and therefore, electronic notice of utility cancellation may be allowed by some states. The absence of an exception in a state electronic transactions law for utility cancellation notices does not automatically mean that the documents may be sent by electronic methods or bear an electronic signature. In most cases, the state or municipal utility laws and regulations control the format and procedure for providing notice to consumers of cancellation of utility services and may authorize formats other than paper writings.[206]

Comments

The Iowa Utilities Board (IUB) was the only state utility commission that submitted comments in response to the request for comment.[207] Current Iowa state regulations require that a written notice be mailed or delivered 12 days before disconnection of energy service and an attempt at contact be made during the final 24 hours.[208] According to the IUB, there have been few complaints regarding this process where a customer claims not to have received the written notice.[209] Rules for local telephone service in Iowa require a five-day written notice of cancellation and there are no rules permitting the use of electronic notices for disconnection.[210] It should be noted that Iowa has passed the Uniform Electronic Transaction Act; however, the law does not include an exception for utility cancellation and termination notices.[211]

The Iowa statutes also allow electronic utility bill information and electronic transactions to be provided to Iowa consumers through utility sponsored e-billing programs. The IUB stated that Iowa's largest energy and telecommunications utilities make customer account information available online and permit customers to submit meter readings, receive monthly billing

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New York, South Carolina, Washington, and Wisconsin have electronic signature laws that were enacted prior to the passage of ESIGN. Massachusetts and Vermont have either introduced or passed draft UETA legislation in 2002-2003.

[206] *See* CAL. PUB. UTIL. CODE § 10010.1(b) (amended 1987) (utility required to make attempt to contact adult person by phone or in person at least 24 hours prior to termination).

[207] *See* Iowa Utilities Board (IUB), Comments of the Iowa Utilities Board on Utility Service Cancellations (March 28, 2003). The IUB regulates retail electric, natural gas, water and telephone utility services. *See also* http://www.state.ia.us/iub.

[208] *Id.* at 1.

[209] *Id.* at 4.

[210] *Id.* at 1-2.

[211] IOWA CODE ANN. § 554D.104 (2000).

statements, render payments, and obtain other information.[212] Moreover, the IUB has adopted rules that allow a customer to negotiate a payment agreement by telephone that includes a written confirmation and electronic transmittal of the terms of the agreement, and where the first payment rendered under the agreement constitutes the customer's acceptance.[213] Current electronic methods provide the customer of record online access to information about an account through the use of a password system.[214]

The IUB recommended the removal of the utility cancellation notice exception from ESIGN stating that removal would make it possible for the IUB to grant waiver requests from utilities or adopt revised rules permitting the use of electronic cancellation notices where appropriate.[215] The IUB explained that this would be done only in cases where the customer has voluntarily signed-up for a utility-sponsored E-billing program. Under the current program, the monthly utility bill is received via e-mail and in some cases, the customers sends in meter readings via e-mail.[216] The IUB concluded that extending the ability to use electronic communications to send out disconnection and termination notices for customers involved in the e-billing program is a logical extension of the program.[217] The IUB acknowledged that with such a provision, however, electronic notices may be ineffective and disconnections may arise in circumstances such as a bill-payer being hospitalized, or where computer malfunctions are undetected or under repair.[218] The IUB contended that elimination of this exception would not require additional changes to Iowa law in order to maintain consumer protection laws, or to maintain current state and federal policies concerning the content and timing of utility cancellation notices.[219]

The IUB also argued that electronic notices increase the privacy of the consumer by removing the notice from the public mail system.[220] Moreover, the electronic notice would be available to the customer within seconds instead of days after it is issued, which could give customers an additional 2-3 days to respond to the situation before termination could actually

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[212] IUB Comments, *supra* note 207, at 2-3.

[213] *Id.* at 3.

[214] *Id.*

[215] *Id.* at 2.

[216] *Id.* at 3.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 2.

[220] *Id.*

occur.[221] According to the IUB, the electronic mail system is not less reliable than the postal system, and for a customer submitting a self-meter read and receiving the corresponding bill by e-mail, an electronic past due notice is a logical extension of the technology.[222] With respect to billing and payments, the IUB reported that vendors in the retail credit card arena have worked out an effective system of using confirmation numbers and that the experience could be adapted to the benefit of utility customers.[223]

Comments were also filed by consumer advocates, submitted on behalf of the low-income clients of the NCLC, Consumers Union, the Consumer Federation of America, and the U.S. Public Interest Research Group. NCLC asserted that it is essential that the utility cancellation notice exception continue to ensure that families poised to lose essential utilities services receive notice of their position and potential legal remedies. The NCLC maintained that nothing has changed since June 2000, when Congress established the exception, to warrant that this exception be dropped.[224]

NCLC stated that cancellation notices provide consumers with essential information that they use to protect basic, vital utility services.[225] The NCLC contended that, with respect to investor-owned facilities, the right to notice of disconnection is so important that it has been extended to protect non-account users in landlord-tenant situation, and, in cases of the elderly or disabled, third parties are allowed to receive notices of disconnection.[226] The NCLC pointed out that in many states, the disconnection of utility service by the landlord is considered constructive eviction.[227] Although municipal utilities are often exempt from state regulation, municipal utility terminations must comport with constitutional due process requirements.[228] Thus, the NCLC argued that allowing utilities to avoid paper notice by electronic means contradicts state legislative and court intent to require meaningful and adequate notice.[229]

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[221] *Id.* at 2-3.

[222] *Id.* at 3.

[223] *Id.* at 4.

[224] NCLC Comments on Utility Cancellation Notices Exception at 2 (Mar. 31, 2003).

[225] *Id.*

[226] *Id.* at 3.

[227] *Id.* at 5. *Citing* Florida's Landlord and Tenant Act, FLA. STAT. ch. 83 (2002).

[228] *See* Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978) (receipt of utility service held to be a constitutionally protected property interest).

[229] NCLC Comments, *supra* note 224, at 4.

NCLC argued that Internet access is not universal, and there is no guarantee that households with access will be accessible at a particular email address. Moreover, NCLC warned that, in the case of telephone or electric service, if termination is not adequate to apprize the customer of the threatened termination, the disconnected consumer would lose the ability to receive further electronic communication from the utility.[230] NCLC provided a number of reasons as to why notification by mail is preferable to electronic notification: (1) a computer is required to access or read an electronic record whereas paper can be read without any special equipment; (2) the U.S. Postal service provides universal free delivery, whereas electronic mail does not have the same mandate; (3) an electronic record can only be assessed through a computer connected to a third party for whom payment is generally required, typically an Internet service provider (ISP); (4) ISPs frequently go out of business with virtually no warning to subscribers; (5) spam has become a tremendous problem for electronic mail such that filters or other mechanisms to withstand the assault often wrongly delete important email messages.[231]

NCLC also recognized that certain populations, the elderly, the disabled and poor families, are at greater risk from the loss of utility services and could face dire circumstances as a result, such as hypothermia, property damage, and illness or injury caused by the use of dangerous sources of heat.[232] NCLC cited to articles demonstrating a link between homelessness and utility disconnections, as well as connections between costly utility service and the disruptions of families and children's education.[233] NCLC noted that, while electronic notices of disconnections may endanger the health, safety, and welfare of all residential customers, the most vulnerable customers are those not likely to have Internet access at home.[234] NCLC provided the results of the U.S. Department of Energy's Energy Information Agency's 1997 Residential Energy Consumption Survey that revealed that households below 150 percent of the federal poverty level experienced electricity shut offs at a rate over 3 times that for households with incomes above 150 percent of the federal poverty level. NCLC also referenced a 2001 Commerce Department survey on Internet use that found that 46 percent of the U.S. population does not use the Internet.[235] Moreover, the percentage of that population is markedly higher for low-income households; 75 percent of people in households where income is less than

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[230] *Id.*

[231] *Id.* at 11-13.

[232] *Id.* at 5-6.

[233] *Id.* at 6, n. 21 (citing Lisa Perry, *Agencies Battle More and More Heatless Homes*, DAYTON NEWS, Jan. 30, 2000 (Red Cross spokesperson notes that there is a bigger demand for emergency housing for families in the winter) and *Maybe Seniors Can Burn Tax-Cut Dollars for Warmth*, Editorial, PEORIA STAR, April 23, 2001.

[234] NCLC Comments on Utility Cancellation Notices Exception, *supra* note 224, at 8.

[235] *See* National Telecommunications and Information Administration and Economic and Statistics Administration, U.S. Department of Commerce, *A Nation Online: How Americans are Expanding Their Use of the Internet*, February 2002, Figure 4-4.

$15,000 and 66.6 percent of households with incomes between $15,000 and $35,000 do not use the Internet.[236]

NCLC also referenced the Supreme Court's decision in *Memphis Light, Gas and Water Division v. Craft*, where the Court discussed the common law inadequacies of equitable remedies where there is the threat of essential services.[237] NCLC concluded that the exceptions were necessary when ESIGN was enacted and continue to be necessary today.[238] Moreover, the NCLC stated that, while more Americans are connected to the Internet, more than half of the nation is not connected at home. Furthermore, NCLC cautioned that there is a danger in relying on constant access to the Internet because Americans may have access one day and not the next. This is particularly the case for lower income households, which experience higher drop off rates.[239]

Conclusion

The objective of the evaluation of the utility cancellation notices exception to ESIGN is to assess whether the exception remains necessary to protect consumers. The information provided in the comments, particularly those submitted by the NCLC, indicate that consumers still need the protection provided by this exception.

There was no data that suggests that widespread or global changes have occurred in the methods required by state and federal law to provide notice of utility cancellations since the enactment of ESIGN sufficient to warrant elimination of this exception. The comments submitted by the IUB presented data regarding the experience of only one of fifty states. This information, while helpful, is not sufficient to warrant eliminating the exception. The IUB provided information that shows technological advancements have been made by utility companies that offer electronic programs for consumers. The IUB also pointed out that vendors in the credit card industry have developed an effective billing and payment system that could be adapted to benefit utility customers. Despite these advancements in technology, there is insufficient information to conclude that they have been widely adopted and applied by the utilities industry or required by state and federal regulators as a form of consumer protection related to termination or cancellation notices. The data presented by NCLC suggests that there are still a large number of consumers that do not have access to online technology in their homes. NCLC's comments also highlighted the fact that significant numbers of consumers who

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[236] NCLC Comments, *supra* note 224, at 8.

[237] *Id.* at 8 (citing *Memphis Light*, 436 U.S. at 19-22).

[238] *Id.* at 10.

[239] *Id.* at 11.

have Internet access in one year drop off the system in subsequent years.[240] Moreover, the data shows that lower income consumers are more likely than not to have access to the Internet in their homes. To the extent that a consumer does not receive a cancellation or termination utility notice and is subject to disconnection of a vital service -- heat, electricity, water, telephone service -- the exception remains necessary.

The IUB made a compelling point that consumers electing to receive their bills electronically through a utility established e-billing program should be able to accept electronic cancellation and termination notices. This practice is consistent with one of the goals of ESIGN, that is to allow parties to agree to engage in electronic contracts. Based on the foregoing discussion of voluntary electronic billing services, NTIA recommends a modification of the ESIGN Act to allow utility companies to send electronic cancellation notices to consumers under limited circumstances. Where a state's substantive law allows a utility company to contract with customers for electronic billing services, the utility company should have the option of providing notice of cancellation of utility services via the Internet or other electronic means. As noted by the IUB, electronic notices of utility service cancellation may be appropriate for customers who voluntarily sign up for utility-sponsored electronic billing programs and who make utility payments electronically.[241]

The modification to allow electronic notice for utility service cancellations will affect consumers in the states where the ESIGN statute is effective. Because several states have not enacted electronic transactions laws under ESIGN section 102, the ESIGN exception for utility cancellation notices still applies to electronic notices sent by utilities in those states.[242] The modification, therefore, will validate electronic cancellation notices sent by utility companies to their electronic billing customers in these states. States with electronic transactions laws or UETA laws that include an exception for utility cancellation notices will not be affected by the modification. The modification also will not affect states that have an electronic transactions or UETA law that does not include an exception for utility cancellation notices if the state's underlying substantive law requires utilities to send cancellation notices through the mail or paper documents.[243] Utility customers that do not have access to the Internet and those that do not sign up for voluntary billing services will not be affected by the modification. In all cases, the utility company will still be held to the requirements of state law for notice, including

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[240] *Id.*

[241] IUB Comments, *supra* note 207, at 2.

[242] 15 U.S.C. § 7002(a),(b) (2000).

[243] Alaska, California, Illinois, New York, South Carolina, Washington and Wisconsin have electronic transactions laws that predate the ESIGN Act. Massachusetts has not passed an electronic transactions law. Vermont recently enacted a uniform electronic transactions act that will be effective in January 2004.

requirements that written cancellations be sent by mail.[244] The modification would not apply to notification requirements under federal or state law and regulations in cases in which a utility company ceases operations in an area.[245]

Based on the information presented in response to the request for comment in this evaluation, NTIA recommends that the ESIGN exception for utility cancellation notices be retained as part of the statute, and modified to allow companies to send electronic notice of utility service cancellations in cases where consumers voluntarily receive electronic billing services under state law.

6. Housing Default and Foreclosure Notices[246]

Background

Federal and state regulations governing foreclosures and evictions require that the creditors and landlords give consumer mortgagors and tenants written notice of default, foreclosure, and eviction and that the notice be sent by certified or registered mail prior to action by the mortgagee or landlord to recover possession of the property.

The Department of Agriculture (USDA), the Federal Reserve Board (Federal Reserve), the Department of Housing and Urban Development (HUD), the Department of the Treasury (Treasury), and the Department of Veteran's Affairs (VA) have federal regulatory oversight over the housing and mortgage industry and, more specifically, over single family mortgage loans and programs that guarantee or secure funding for housing. These regulations and laws govern the type and the manner of service that mortgage companies, banks, and other lenders are required to provide consumers prior to taking action to foreclose on residential properties or to evict tenants. States have concurrent jurisdiction in these areas and, therefore, also have laws that govern residential foreclosure proceedings and tenant eviction processes. Section 104 of ESIGN allows federal and state regulatory agencies that are responsible for rulemaking under any other statute

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[244] 15 U.S.C. § 7001(b) (2002).

[245] *See, e.g.,* 47 C.F.R. § 63.60 (definition of discontinuance of service under FCC regulations); 47 C.F.R. § 63.19 (procedures for discontinuance of international services); 47 C.F.R. § 63.61(applicability of discontinuance procedures); and 47 C.F.R. § 63.71 (procedures for discontinuance of service by domestic carriers).

[246] NTIA published in the *Federal Register* a notice requesting comments, entitled *The Housing Foreclosure, Repossession, and Default Notices Exception to the Electronic Signatures in Global and National Commerce Act,* 67 Fed. Reg. 69201 (Nov. 15, 2002). (A correction was published at 67 Fed. Reg. 70302 (Nov. 21, 2002) to specify a due date of January 14, 2003 for submission of comments. No other changes were made to the notice.) NTIA received several comments which are outlined within this section. A list of commenters is provided in Appendix D.

to interpret the consumer provisions of ESIGN through interpretive rules, orders, and regulations.[247]

Since the enactment of ESIGN, several federal agencies have amended their regulations to adapt the administrative and regulatory environment to electronic commerce transactions. The Farm Credit Administration (FCA) has created new rules and amended others to remove regulatory barriers to electronic commerce for Farm Credit System institutions and their customers.[248] The FCA recognized the ESIGN exception for residential default, foreclosure, and eviction notices and concluded that some of its system institutions cannot use electronic notification to deliver some of the notices required under part 614 of its rules.[249] These rules provide that a lender "shall provide written notice to the borrower that the loan may be suitable for restructuring" not later than 45 days before the lender begins foreclosure proceedings.[250]

Similarly, the notice rules of the Office of Thrift Supervision within Treasury require that a creditor provide written notice by registered or certified mail with return receipt no later than 30 days before the creditor acts to foreclose or accelerate payments on a federally-related loan or mortgage.[251] The foreclosure rules of the Department of Veteran's Affairs require the Department to provide borrowers with certain written information regarding alternatives to foreclosure after receiving notice of default from the holder of a note on a loan guaranteed by the Department.[252]

The Federal Reserve Board and the Treasury Department have revised their regulations to authorize the electronic delivery of disclosures regarding certain home mortgages consistent with the ESIGN Act. In March 2001, the Federal Reserve Board amended Regulation Z in response to the ESIGN Act.[253] Regulation Z implements the Truth-in-Lending Act and requires that creditors make certain written disclosures to consumers about the terms and cost of credit before the transaction is consummated.[254] The Federal Reserve Board interpreted ESIGN as containing special rules for use of electronic disclosures that may be provided only if the

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[247] 15 U.S.C. § 7004 (b)(1) (2000).

[248] 12 C.F.R. § 609.620 (2003).

[249] 12 C.F.R. § 609.910 (2003).

[250] 12 C.F.R. §§ 614.4516, 614.4519 (2003).

[251] 12 C.F.R. § 590.4 (h) (2003).

[252] 38 U.S.C. § 3732 (2002).

[253] 12 C.F.R. § 226 (2003).

[254] *See* 15 U.S.C. §§ 1601-1604 (2003).

consumer affirmatively consents after receiving certain information.[255] The amendment to Regulation Z allows depository institutions, creditors, lessors, and others to provide information to consumers regarding financial transactions if the disclosures are clear and conspicuous and the creditor complies with the consumer consent provisions in section 101(c) of ESIGN.[256] Specifically, regarding notices relating to the primary residence of an individual, the Federal Reserve Board amended its rules to permit a creditor to provide a single rescission notice by electronic communication to each consumer with an ownership interest in a dwelling who has affirmatively assented to electronic delivery of the notice.[257]

The Federal Reserve Board also amended Regulation B to allow for electronic disclosure of information required by the Equal Credit Opportunity Act (ECOA).[258] ECOA prohibits discrimination by a creditor in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age, receipt of public assistance, or good faith reliance on provisions of the Consumer Credit Protection Act.[259] Regulation B provides guidance on the timing and delivery of written disclosures required by ECOA. The Federal Reserve Board's amendment of Regulation B requires that creditors comply with the consumer consent provisions of section 101(c) of ESIGN when making disclosures electronically by e-mail or through website postings.[260] In May 2002, the Department of the Treasury's Office of Comptroller of the Currency (OCC) also amended its regulations, adding Subpart E, to facilitate the ability of national banks to conduct business using electronic technologies.[261]

The regulations of the Department of Housing and Urban Development (HUD) contain several requirements for residential default, foreclosure, and eviction notices to be provided to consumers of multifamily and single family housing. Similar to the Federal Reserve Board's and the Farm Credit Administration's regulations, HUD may also issue regulations and rulings to interpret the application of ESIGN's provisions on its purview. One of HUD's responsibilities is to insure mortgages secured by multifamily housing projects under the National Housing Act. Mortgagees are required to notify HUD of a default on a HUD-insured loan within 30 days of the date of the initial event of default.[262] The procedures for non-judicial foreclosure of multifamily

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[255] 66 Fed. Reg. 17329, 17330 (Mar. 30, 2001).

[256] 66 Fed. Reg. at 17334.

[257] 66 Fed. Reg. at 17332-33.

[258] 15 U.S.C. § 1691-93 (2003)*; see* 66 Fed. Reg. 17785 (Apr. 4, 2001).

[259] 12 C.F.R. § 202 (2003).

[260] 12 C.F.R. § 202.17(b).

[261] 12 C.F.R. §§ 7.5000-7.5010 (2003).

[262] HUD Handbook 4350.4, Table 2, Default Dates for Deadlines.

properties are outlined in the Multifamily Mortgage Foreclosure Act of 1981.[263] For these mortgages, HUD's foreclosure commissioner must serve notice of default and foreclosure by certified or registered mail, postage prepaid and return receipt requested to the owners, mortgagors, dwelling units, and other lien-holders not less than 21 days prior to the foreclosure sale, and the notices must be served by mail, publication, or posting on the secured property. Moreover, these notices are deemed duly given upon mailing, regardless of whether the addressee actually receives the letter.[264]

HUD's regulations do allow, under certain circumstances, the electronic transmission of information for some mortgage defaults and foreclosures. For example, the lenders or mortgagees that hold multifamily housing mortgages insured or co-insured by HUD are allowed to fulfill reporting requirements for mortgage defaults and delinquencies by electronically submitting the information directly to HUD.[265]

HUD's Office of the Assistant Secretary for Housing also oversees the requirements for and the manner of eviction notices given to tenants of subsidized housing and HUD-owned projects. The regulations provide that a landlord's determination to terminate tenancy must be in writing and served on the tenant by first-class mail or hand-delivery to an adult person at the residence no earlier than 30 days prior to the termination of the tenancy.[266]

HUD also provides rental assistance for low-income families under the public housing program, various Section 8 project-based assistance programs, and the Section 8 tenant-based voucher program. Federal statutes and regulations set tenancy requirements. However, the tenancies are governed by State laws and procedures in all other respects. In all of the programs, tenants may be evicted for violations of the lease or other good causes. Under HUD's regulations, the landlord, owner, or public hosing agency must give written notice of the grounds for eviction, and this notice may be combined with a notice to vacate issued under State law.[267]

The Single Family Mortgage Foreclosure Act of 1994 requires several written notices and communications for single family mortgages during the pre-foreclosure, foreclosure sale, and mortgage collection processes.[268] The regulations require that the mortgages or lenders give the mortgagors in default on loans insured by HUD a written notice of delinquency.[269] In

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[263] 12 U.S.C. §§ 3701-3717 (2003).

[264] 12 U.S.C. § 3708 (2003); *see also* 24 C.F.R. § 27.15(a) (2002).

[265] 24 C.F.R. § 200.120 (2002).

[266] *See* HUD Handbook 4350.3, Chapter 4, No. 4-21; 24 C.F.R. § 247.4 (2002).

[267] 24 C.F.R. §§ 880.607(c), 882.511(d), 966.4(l)(3), 982.310(e) (2002).

[268] 12 U.S.C. §§ 3757-3758 (2003).

[269] 24 C.F.R. § 203.602 (2003).

addition, the regulations require that the foreclosure commissioner must serve notice of default and foreclosure sale by certified or registered mail, postage prepaid and return receipt required on the current owner, occupants, mortgagors, and lienholders not less than 21 days before the foreclosure sale.[270] For notices of default and acceleration, the lender or mortgagee must provide the borrower with written notice by certified mail that the loan is in default.[271] The lender or mortgagee is required to notify the mortgagor, or borrower, and each head of household who is actually occupying a unit of the property of its potential acquisition by HUD at least 60 days prior to the date on which the mortgagee reasonably expects to acquire title to the property.[272]

It is important to note that states also have jurisdiction over the residential default, foreclosure, and processes as applied to the real estate located within state borders. In addition, the laws regarding default and eviction notices for most rental property are within the primary jurisdiction of the states. For example, Colorado provides that, with respect to a default on any consumer loans secured by a deed of trust or mortgage recorded after January 1, 2002, which encumbers a dwelling, the owner of the evidence of indebtedness shall, not more than 45 days after initial default and not at least 20 days prior to the recording of a notice of election and demand, or the initiation of a suit for foreclosure, provide written notice of such default and the opportunity to cure to all persons liable on the debt at the address of the residence of each such person.[273] Similarly, Georgia's rules regarding foreclosure provide that notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 15 days before the date of the proposed foreclosure.[274] Georgia's rules require that the notice shall be in writing and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor, and shall be deemed given on the official postmark day of the day on which it is received for delivery by a commercial delivery firm.[275]

The states' electronic transaction laws vary just as the manner in which notice is provided to homeowners and occupants regarding default varies among the states. As of the end of 2002, there were 51 different versions of state electronic transactions laws.[276] It should be noted, however, that several of the states that have enacted electronic transactions laws have retained an

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[270] *See* 12 U.S.C. § 3758 (2003); *see also* 24 C.F.R. §§ 27.103, 27.105 (2002).

[271] 24 C.F.R. § 201.50(b) (2002).

[272] 24 C.F.R. § 203.675 (2002).

[273] COLO. REV. STAT. § 38-38-102.5(c)(2) (2001).

[274] GA. CODE ANN. § 44-14-162.2(a) (2001).

[275] Sec. 44-14-162.2(a).

[276] This number includes 49 states, the District of Columbia, and the Virgin Islands.

exception for housing foreclosures and rental default notices.[277] For those states that have not adopted an electronic transactions law, the ESIGN Act continues to apply. In this regard, housing foreclosure and rental default notices that are transmitted or executed in an electronic format or using an electronic signature are *not* legally valid in those states without an electronic transactions law. The various state and federal laws that require written notice control the manner in which housing consumers receive notice of the delinquencies that threaten ownership and tenancy rights. The removal of the foreclosure and rental and default notices exception to the ESIGN Act would give mortgagees and landlords an additional method of communicating this information to consumers via any electronic format available to them, including but not limited to facsimile, electronic mail, and digital or wireless devices.

Comments

Many of the commenters encouraged the use of the electronic commerce, but believe that at this time there are too many variables associated with the delivery of electronic eviction notices to occupants. In this regard, the commenters agreed that the ESIGN exception for such notices should remain in order to continue to provide occupants with the necessary protections and safeguards they expect to be afforded in default or foreclosure circumstances. However, some of the commenters stated the belief that, as technology becomes more advanced and allows a sender to determine whether a recipient has received an e-mail, it may be necessary in the future to reassess the exception and possibly remove it. The following comments provide a summary of the comments received by NTIA in response to its *Federal Register* notice on this issue.

NCLC submitted comments on behalf of itself and a number of other consumer groups in support of keeping the housing and foreclosure notice exception because it ensures that families in a position to lose their homes actually receive notice of impending foreclosure proceedings.[278] NCLC made the point that the notices provide crucial information to the family about their legal status, and legal rights to pursue to avoid loss of the home. According to NCLC, the high stakes involved make it better to require the safest method of delivery and allow the additional delivery method via the Internet.[279] The NCLC stated that the exceptions are needed to protect consumers and that the current economic climate dictates increased protections. According to NCLC, the rate of foreclosures on homes has skyrocketed in the past few years – to the highest rate of

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[277] *See, e.g.,* ALA. CODE § 8-1A-3(c)(2)(b) (2001); 5 ILL. COMP. STAT. 175/5-115 (2003).

[278] NCLC Comments on Housing Default and Foreclosure Notices Exceptions (Feb. 24, 2003). NCLC submitted comments also on behalf of the Consumers Union, the Consumer Federation of America and the U.S. Public Interest Research Group.

[279] *Id.* at 2.

foreclosures since they have been monitored.[280]

NCLC asserted that the electronic transmission of documents is not as reliable as those that are sent through the postal service, and thus, the exception should not be removed.[281] Moreover, NCLC cited the Department of Commerce's *A Nation Online* study to make the point that millions of Americans may have access to e-mail one day and not the next because of the statistics outlined in the report that show households – primarily lower-income households – discontinue e-mail for a number of reasons.[282] NCLC states it is very important that access to essential information not be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service, NCLC argued that the law should treat electronic delivery and physical world delivery of records differently.[283] NCLC took the position that "these exceptions currently govern all federally required notices relating to the loss of one's home, they also govern those required by state law in every state except Arkansas."[284] NCLC supports maintaining the exception.

The Electronic Financial Services Council (EFSC) supported expanding the use of the electronic records and signatures in transactions among consumers and businesses, but expressed the belief that the current housing foreclosure, eviction, repossession, acceleration of payment and default notices exception is justified and should remain in the statute. The EFSC based its decision on the fact that the deleterious consequences and immediacy of these types of notices warrant the continued delivery on paper.[285] Along that same line, EFSC stated that NTIA and Congress should reconsider the need to remove this exception once e-mail delivery becomes an "integral part of our lives, like the telephone and the U.S. Postal Service."[286]

The Mortgage Bankers Association of America (MBA) also stated that the ESIGN

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[280] *Id.* at 7 (citing Peter Kilborn, *Easy Credit and Hard Times Bring Foreclosures*, N.Y. TIMES, Nov. 24, 2002, at A30.

[281] *Id.* at 7-8.

[282] *Id.* at 8.

[283] *Id.*

[284] *Id.* at 16-19. NCLC indicates that in Arkansas the ESIGN exception may not apply because the uniform UETA was enacted with the intent to displace ESIGN.

[285] EFCS Comments on Housing Default and Foreclosure Notices Exception at 1 (Jan. 14, 2003).

[286] *Id.*

housing default and foreclosure notice exception should be retained, not eliminated or altered.[287] In fact, MBA stated that the current exception ensures that borrowers receive important notices of possible foreclosure and rights to cure without hampering lenders' abilities to execute electronic notes and to communicate electronically with borrowers on other origination and servicing matters.[288] In this regard, MBA maintained that requiring written notices of default, acceleration, foreclosure, eviction and redemption are appropriate and provide borrowers with the necessary safeguards for their protection.[289]

A number of credit unions also submitted comments in response to the NTIA's inquiry. The Credit Union National Association (CUNA) and Affiliates supported keeping the ESIGN foreclosure and default notice exception and stated it should only be removed if adequate consumer protections are maintained.[290] CUNA stated that traditional e-mail cannot provide the same assurances of delivery of foreclosure and default notices that is now provided by certified or registered mail. The negative consequences of not receiving a residential default or foreclosure notice, which would be the potential loss of the home, is potentially greater to a consumer than the consequence of not receiving other types of disclosures.[291] CUNA recognized that proof of delivery may be available through other electronic mail delivery systems, however, the organization stated that without sufficient proof of delivery, the use of e-mail at this time reduces consumer protection and is therefore inadequate.[292] CUNA finally pointed out that the current exception has not hampered credit unions' abilities to provide mortgages electronically.[293]

The Navy Federal Credit Union's (NFCU) submitted comments similar to those of CUNA in its support of the current ESIGN default and foreclosure exception, but stated that over time there may be a need for the exception's removal. NFCU indicated that it has developed a system to identify when an e-mail message has been delivered and opened by one of its members. Under the system, NFCU provides its members with access to a personal electronic mailbox within the organization's website where electronic notices and messages are delivered

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[287] Mortgage Bankers Association of America (MBA), Comments on Housing Default and Foreclosure Notices Excpetion at 2 (Jan. 14, 2003).

[288] *Id*.

[289] *Id*.

[290] CUNA Comments on Housing Default and Foreclosure Notices Exception at 2 (Jan. 31, 2003). According to CUNA, it represents 90 percent of the 10,000 federal and state credit unions in the United States. *Id.* at 1.

[291] *Id.* at 2.

[292] *Id*.

[293] *Id*.

and monitored for verification that documents sent to the mailbox have been opened. NFCU stated that this form of verification is similar to certified or registered mail.[294] NFCU indicated that it would continue to send default and foreclosure notices by certified or registered mail if the housing foreclosure notice exception is removed. However, if the credit union opted to provide default and foreclosure notices electronically, it would obtain consent from the member and the member would have to demonstrate his or her ability to receive electronic messages through the NFCU's designated website.[295]

The Ohio Credit Union League (OCUL) expressed the belief that the ESIGN housing foreclosure and default exception is necessary to protect consumers and to prevent confusion, even though Ohio has enacted its own electronic transactions law that addresses consumer safeguards.[296] The OCUL comments supported the consumer protection-based exceptions and stated that this issue is best left to the respective states to determine the scope and applicability of the consumer laws that should fall within the scope of the ESIGN Act or the respective state's electronic transactions law or UETA. OCUL expressed concern that removal of the ESIGN exceptions could very easily result in confusion and conflict with numerous state laws.[297]

According to information submitted by the Credit Union Affiliates of New Jersey (CUANJ), state law already includes a provision for electronic notice for real estate foreclosures. Under New Jersey law, a consumer may affirmatively consent to receive notices electronically.[298] New Jersey law also provides that consumers may revoke that consent.[299]

The American Land Title Association (ALTA) urged NTIA to retain the current exception because removing it would be premature.[300] Compliance with foreclosure regulations (*e.g.,* consumer notification) is a significant issue for ALTA because its members assume the risk of titles to property and foreclosures that are subsequently found to be invalid – meaning it pays

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[294] Navy Federal Credit Union (NFCU), Comments on Housing Default and Foreclosure Notices Exception at 1-2 (Jan. 8, 2003).

[295] *Id.* at 2.

[296] The Ohio Credit Union League (OCUL) is a trade association that represents approximately 500 credit unions in Ohio that are federal and state charted.

[297] OCUL Comments on the Housing Default and Foreclosure Notices Exception at 2 (Jan. 13, 2003).

[298] CUANJ is a statewide trade association representing approximately 225 credit unions with over one million members in New Jersey. N.J. STAT. § 12A:12-21 (2001).

[299] N.J. STAT. § 12A:12-21 (2001).

[300] American Land Title Association (ALTA), Comments on Housing Default and Foreclosure Notices Exception at 1 (Mar. 31, 2003). ALTA's membership is composed of 2400 title insurance companies, their agent, independent abstracters and attorneys who search, examine, and insure land titles to protect owners and mortgage lenders against losses from defects in titles. *Id.*

the claim for the insured.[301] ALTA also noted that if a foreclosure sale was not insured by a title insurer, and was set aside, the purchaser of the foreclosed property would be displaced and the purchasers' ownership interest would be invalid. Consequently, the consumer could be adversely affected financially and personally.[302] Because of these circumstances, ALTA stated that member companies would have to carefully consider the risk of underwriting properties where electronic foreclosures have been performed, especially if the current ESIGN exception were removed and given the inconsistency in state electronic transactions laws.[303]

Conclusion

The policies and procedures for residential foreclosures, defaults, repossessions, or evictions vary from state to state. One requirement is consistent among the states – occupants must be given advanced written notice, either through registered or certified mail, before any process can begin. Sending eviction and foreclosure notices through electronic means may prove efficient in delivery speed and administrative costs, but current state and federal laws prohibit electronic transmissions of these notices as the only means of communicating with the party involved. There is widespread consensus among consumer groups and the financial services industry that removing the exception would increase the likelihood that occupants or homeowners may be adversely affected financially and physically because there is no guarantee that they will receive an electronic eviction, foreclosure, or right to cure notice. Even though electronic verification systems are being used by the Navy Federal Credit Union as part of electronic notification procedures, the use of these systems is not widespread in the mortgage industry.

In regard to this information, the NTIA recommends that Congress retain the ESIGN Section 103(b)(2)(B) exception. This recommendation is based on state and federal laws that require written notice in order to provide consumers the proper safeguards; the lack of widespread, adequate receipt verification technologies; and on the comments received. This information supports continuation of the current procedures and law and indicates the removal of the exception at this time would be premature.

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[301] *Id.* at 2.

[302] *Id.* at 1.

[303] *Id.* at 2.

7. Health and Life Insurance Cancellation Notices[304]

Background

The ESIGN Act exception for life and health insurance cancellation notices excludes from operation of the statute such communications sent to consumers by electronic means. The regulations governing termination and cancellation notices for life and health insurance benefits are in part federal law, but primarily state law. While states generally require some form of written notification of life and health insurance cancellations, ESIGN does not preempt states' ability to validate electronic substitutes, including those contemplated under the electronic contracting provisions of the Uniform Electronics Transactions Act (UETA).

The Department of Labor, Employee Benefits Security Administration (EBSA), formerly the Pension and Welfare Benefits Administration (PWBA), and the Department of Health and Human Services, Centers for Medicaid and Medicare Services (CMS), have federal regulatory authority for the distribution of information regarding life and health insurance to employees in private sector employee benefit plans and to Medicare and Medicaid recipients. As early as 1997, before the passage of ESIGN, these agencies proposed rules to allow the release of information regarding health and life insurance benefits in electronic format.[305] Since that time, both agencies have conducted rulemaking proceedings to incorporate standards for the electronic transmission of certain health insurance information. The CMS adopted standards for electronic transactions regarding health plans, health care clearinghouses, and certain health care providers in August 2000.[306] During May 2002, CMS proposed an amendment to its rules to improve Medicare and Medicaid programs, and the efficiency and effectiveness of the health care system in general by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health insurance information.[307] The CMS's regulations require health providers and organizations to provide: written notice to Medicare enrollees of the termination of a risk contract; notice by mail to Medicare enrollees of a health maintenance organization (HMO) or covered medical provider's

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[304] NTIA published in the *Federal Register* a notice requesting comments, entitled *Health and Life Insurance Cancellation Notices Exception of the Electronic Signatures in Global and National Commerce Act*, 67 Fed. Reg. 75849 (Dec. 10, 2002). No comments were received in response to this notice.

[305] *See, e.g.,* 62 Fed. Reg. 16979 (Apr. 8, 1997)(codified at 29 C.F.R. Part 2520).

[306] *See* 65 Fed. Reg. 50312 (Aug. 17, 2000)(to be codified at 45 C.F.R. §§ 160, 162).

[307] *See* 67 Fed. Reg. 38050 (May 31, 2002) (to be codified at 45 C.F.R. § 162). CMS recently released its final rule in which it responded to public comments and finalized provisions applicable to electronic data transaction standards published in the May 31, 2002 proposed rules. *See also* 68 Fed. Reg. 8381 (Feb. 20, 2003) (to be codified at 45 C.F.R. § 162).

(CMP) intention not to renew a contract; and 60 days' notice of a contract termination initiated by the HMO or CMP.[308]

The Labor Department's EBSA also recently issued regulations governing the disclosure of pension, health, and other welfare benefit plan information through electronic media.[309] Under rules that became effective on October 9, 2002, the administrator of a group health plan may furnish certain documents (including reports, statements, notices and other documents) to plan enrollees, beneficiaries, and other persons entitled to the information using electronic media.[310] The Labor Department has incorporated ESIGN consumer consent provisions in its regulations, including a requirement for affirmative consent to receive documents in electronic form, an enumeration of the types of documents to which the consent applies, and a requirement that affirmative consent again be provided in the event of changes in hardware and software requirements necessary to access and retain the documents.[311]

Generally, states require health and life insurance companies to provide some form of written notice to policyholders before the effective date of a policy cancellation or nonrenewal. For those states that have not enacted an electronic transactions act or UETA, the legal effect of electronic delivery of these notices would appear to be relatively certain.[312] For example, the insurance law of the State of Georgia requires the following:

> (b) Written notice stating the time when the cancellation will be effective, which shall not be less than 30 days from the date of mailing or delivery in person of such notice of cancellation . . . shall be delivered in person or by depositing the notice in the United States mails to be dispatched by at least first-class mail to the last address of record of the insured and of any lien holder, where applicable, and receiving the receipt provided by the United States Postal Service or such other evidence of mailing as prescribed or accepted by the United States Postal Service.[313]

In this case, the use of electronic means to transmit health and life insurance cancellation notices,

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[308] 42 C.F.R. §§ 417.488(a), 417.492(a)(ii), and 417.494(c)(2) (2002).

[309] 67 Fed. Reg. 17264 (Apr. 9, 2002).

[310] 29 C.F.R. § 2520.104b-1(c).

[311] *Id.*

[312] The following states have recently introduced legislation to enact UETA laws in 2003: Alaska, Massachusetts, Missouri, and Vermont. Georgia, New York, Washington, and Wisconsin have electronic transactions laws that were passed prior to ESIGN.

[313] GA. CODE ANN. § 33-24-44(6) (2002).

therefore, would represent a departure from state law requiring companies to transmit information in writing through postal or personal delivery.[314]

As noted earlier, 49 states, the District of Columbia and the Virgin Islands have enacted a version of an electronic transaction law; however, consensus regarding delivery of the subject notices does not exist.[315] Thirteen states have expressly excluded health and life insurance cancellation notices from the operation of the state's electronic transactions law.[316] For example, the State of North Carolina's electronic transaction law provides that the law does not apply to "any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits, excluding annuities."[317] Of the remaining states that have not incorporated the exclusion for these cancellation notices, the majority would more than likely consider electronic delivery valid if the insured has agreed in his/her underlying contract to conduct transactions by electronic means. For instance, the State of North Dakota mandates in its insurance regulations that "[an] insurer may cancel the [health insurance] policy at any time by written notice delivered to the insured, or mailed to the insured's last address as shown by the records of the insurer, stating when, not less than five days thereafter, the cancellation is effective."[318] Unlike those states that specifically designate use of the postal service to transmit cancellation notices, the language of the North Dakota insurance statute does not specify the form of delivery.[319]

The various laws states enacted to address the delivery of health and life insurance notices and information have engendered discussion among those stakeholders who are directly

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[314] *See also* ALASKA STAT. § 21.36.260 (Michie 2002) (an insurer must mail the insurance cancellation notices by first class mail to the last known address of the insured, and obtain a certificate of mailing from the U.S. Postal Service); S.C. CODE. ANN. § 38-39-90 (Law.Co-op. 2002) ("[i]t is sufficient to give notice either by delivering it to the person or by depositing it in the United States mail, postage prepaid, addressed to the last address of the person"); WASH. REV. CODE ANN. § 48.18.290(2) (West 2003) (written notice of cancellation must be mailed "by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office.").

[315] *See* Appendix E.

[316] The following states have enacted electronic transactions laws that include an exception for health and life insurance cancellation notices: Alabama, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, and North Carolina. *See, e.g.,* MD. CODE ANN., COM. LAW § 21-102(B)(4)(III) (2003); N.C. GEN. STAT. § 66-313(E)(3) (2001). On May 29, 2003, the Vermont General Assembly passed an electronic transactions law that includes an exception for health and life insurance cancellation notices identical to the ESIGN exception. *See* H.B. 148, 67th Gen. Ass., Biennial Sess. (Vt. 2003) .

[317] N.C. GEN. STAT. § 66-313(e)(3)(2000).

[318] N.D. CENT. CODE, § 26.1-36-04 (2002).

[319] N.D. CENT. CODE, § 9-16-04 (2002). *See also* CONN. GEN. STAT. § 38a-456 (2003); IOWA CODE § 515.80 (2003) (life insurance cancellation notification shall be mailed or delivered to the named insured).

affected by the operation of these laws. Insurance vendors seek to realize the business promise of electronic commerce through online contracting. They strongly favor UETA-based statutes with their specific provisions offering consumers the freedom to choose the medium for transactions, including electronic document delivery.[320] Consumer advocates also support online contracting in principle, but desire to ensure that in the course of agreeing to conduct online business transactions, consumers can be made aware of the difficulties in and fallibility of electronic communication.[321]

Conclusion

The non-uniform series of state enactments of electronic transactions laws and the underlying uncertainty regarding the application of the electronic contracting provisions to insurance law cancellations are current concerns for the public and the insurance industry. Removal of the insurance cancellation exception from ESIGN, at this time, could leave both stakeholders in uncertain positions regarding transmittal of health and life insurance cancellation notices. The exception is a key component of ESIGN's consumer protection mechanism with respect to this issue. NTIA, therefore, recommends that Congress retain ESIGN's exception for cancellation notices for health and life insurance benefits.

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[320] The National Association of Independent Insurers (NAII) has expressed support for UETA laws, and provides the following statement on its website:

> *Document Delivery*. Many states currently have laws and regulations regarding document delivery that pose significant e-commerce barriers. Some states require insurers to deliver paper versions of documents, including policies, billing notices and cancellation notices. Electronic document delivery should be permitted if agreed upon by the insurer and the policyholder.
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> NAII believes that both business and the public would be best served if states adopt the UETA model law, which offers the most efficient blend of consumer protection and flexibility for conducting business on the Internet.

NAII, "Industry Issues: E-Commerce Talking Points," *available at* http://www.naii.org/sitehome.nsf (last visited on May 8, 2003).

[321] *See* NCLC Comments on Court Documents Exception, *supra* note 186, at 3.

8. Product Recall Notices[322]

Background

Section 101 of the ESIGN Act requires that electronic signatures, contracts, and records be given legal effect, validity, and enforceability. However, section 103(b)(2)(D) provides that the requirements of section 101 shall not apply to contracts and records governed by statutes and regulations regarding product recall notices.[323] State laws and regulations may, however, preempt ESIGN's product recall exception provided states pass an UETA or electronic transactions law, or enact alternative procedures that are technologically neutral and that do not afford greater legal effect to generating or receiving electronic recalls.[324]

A recall is a voluntary or compulsory removal of a product, including food, from the stream of commerce because the product violates state or federal regulations regarding the product, or because the use of the product poses a risk to health or safety.[325] Recall notices are typically issued by government agencies, and by manufacturers, retailers, and distributors of products and foods using a variety of media under the guidance, direction, or at the request of federal and state regulatory and consumer protection agencies. The Department of Agriculture (USDA), Environmental Protection Agency (EPA), Food and Drug Administration (FDA), National Highway Safety Transportation Administration (NHTSA), and U.S. Consumer Product Safety Commission (CPSC) have regulations, guidelines, or policies that relate to recalls of various manufactured products, medical devices, foods, drugs, and cosmetics.[326] Numerous recall notices are issued by manufacturers each year under the order, guidance, instruction, or at

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[322] NTIA published in the *Federal Register* a notice requesting comments, entitled *Product Recall Exception to the Electronic Signatures in Global and National Commerce Act*, 67 Fed. Reg. 59828-59830 (Sept. 24, 2002). NTIA received one comment through the notice process. Comments received in this evaluation are listed in Appendix D.

[323] 15 U.S.C. §§ 7001-7003 (2000).

[324] *See* 15 U.S.C. 7002(a)(1),(2)(2000).

[325] Food Safety Inspection Service (FSIS) Directive 8080.1, Rev. 3, section V, *available at* http://www.fsis.usda.gov/FOIA/dir/8080.htm. (USDA recall guidelines).

[326] *See, e.g.,* 9 C.F.R. § 417.3 (2002) and Food Safety Inspection Service (FSIS) Directive 8080.1, Rev. 3, *available at* http://www.fsis.usda.gov/FOIA/dir/8080.htm (USDA recall guidelines); 42 U.S.C. § 7541(c)(1) (2003), and 40 C.F.R. §§ 85.1802-85.1805, 92.703, 92.404, 94.404 and 94.703 (2002) (EPA recall authority and procedures); 16 C.F.R. §§ 1115.2(c), 1115.20 (2003), and CPSC Recall Guidelines, *available at* http://www.cpsc.gov/businfo/8002 (CPSC recall authority and recall guidelines); 21 C.F.R. Part 7; and 49 U.S.C. § 30119 (2003), 49 C.F.R. §§ 573.6, 577.5, 577.6, 579 (2002), NHTSA Motor Vehicle Defects and Recall Campaigns, available at http://www.nhtsa.dot.gov/hotline/recallprocess.html and NHTSA Safety Recall Compendium, Third Release, June 2001, *available at* http://www.nhtsa.got.gov/cars/problems/recalls/recall_links.cfm (NHTSA recall authority and guidelines).

the request of federal and state agencies.

Current federal regulations and policies generally allow companies to use a variety of methods to transmit recall notices. Companies, manufacturers, distributors, retailers or recall firms may disseminate recall information to the consumer by, among other things, letters, signs and posters at points-of-purchase, press releases and public announcements, including video news releases and website notices.[327] The methods used to notify consumers and the extent of a recall varies in each case depending on a variety of factors, including the severity of the risk to health, life, and safety associated with the use of the product and the level of product distribution. For example, FDA assigns a numerical recall classification, (*i.e.*, I, II, III,) to each particular product recall to indicate the relative degree of health hazard presented by the product being recalled.[328] Under the USDA scheme, a manufacturer of a widely-distributed product that has been classified as a Class I recall may be required to issue direct notice in the form of written letters, press releases, and point of purchase posters in order to contact consumers, retail and wholesale distributors, and users of the product.[329] In practice, most Class I recalls are determined to warrant a public warning in the form of written letters, press releases, and/or point of purchase posters in order to contract consumers, retail and wholesale distributors, and users of the product.

For a product that presents a less serious risk of injury, for example, a product where the risk of serious injury or illness is not likely, but is possible, a lesser degree of notice may be warranted. For instance, an agency may request a manufacturer of such a product to join in a press release, provide point-of-purchase posters, post information on a company website, and issue a notice to distributors, dealers and sellers of the product.[330] In cases involving foods or products that pose extreme health or safety risks to the public, federal and state agencies, as well as companies, issue press releases to inform the public of the dangers associated with the use of

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[327] *See, e.g.,* CPSC Recall Handbook at 15-18 (May 1999) (CPSC Fax-on-Demand Document #8002).

[328] The FDA has three classifications for recall notices: Class I recalls are situations in which there is a reasonable probability that the use of, or exposure to, a volatile product will cause serious adverse serious health consequences or death; Class II recalls are situations in which use of, or exposure to, a volatile product may cause temporary or medically irreversible adverse health consequences or where the probability of serious adverse health consequences are remote; Class III recalls are situations in which use of, or exposure to, a volatile product is not likely to cause adverse health consequences. The CPSC's Class A recall classification is similar to FDA's Class I recall classification. CPSC Class A recalls require a more extensive notice process. *See* FDA Recall Guidelines, *available at* http://www.fda.gov/oc/po/firmrecalls/recall_defin.html; *cf.* CPSC Recall Handbook and CPSC Fax-on-Demand Document # 8002 at 12. *See also* FSIS Directive 8080.1, Rev. 3*, available at* http://www.fsis.usda.gov/FOIA/dir/8080.htm.

[329] *See* USDA, FSIS Directive 8080.1, Rev. 3, sections VI(D) and VI(E); CPSC Recall Handbook and CPSC Fax-on-Demand Document No. 8002, at 11-12, 15.

[330] CPSC Recall Handbook and CPSC Fax-on-Demand Document No. 8002, at 11-12, 15; U.S. Department of Transportation, NHTSA Safety Recall Compendium, at 10, 12.

the food or product that is the subject of the recall.[331] More recently, some federal agencies have instituted procedures that provide for recalling companies and firms to send electronic mail notices to consumers and postings on the company's website announcing the recall of a product.[332]

In many states, the Department of Health, the Attorney General's office, or a consumer affairs division is responsible for receiving complaints about particular products or foods that may require a recall action and for making sure the rules and procedure for federal and state recall notices are met. The ESIGN recall exception applies to all states unless a state has passed an electronic transactions act law that allows for recall notices to be sent electronically. Of the states that have passed separate UETA laws, a large number of them have not retained the exception for product recalls.[333] Notwithstanding, many states have consumer safety laws that are distinct from state and federal guidelines regarding product recalls. State electronic transactions laws also vary as to whether product recall notices are exceptions to the Act. These state laws focus on intrastate product recalls and matters that occur within the exclusive jurisdiction of the state. The ESIGN exception for product recalls provides an exception for recalls governed by federal law and relating to products and matters in interstate commerce.

Comment

James T. O'Reilly submitted comments recommending the repeal of the product recall exception to ESIGN. Mr. O'Reilly stated the public interest is served by the fastest, most efficient downstream notification of product risks, and that Federal safety agencies' interests are best served by expediting delivery of recall information to dealers, retailers, pharmacies, and consumers.[334] According to the comments, ESIGN's section 101 requirements help speed the message to consumers, but the effect of precluding the application of section 101 means that no recall communication in electronic form would be deemed an adequate notice. He contended that the public is harmed because of the disincentive to use electronic messages. Mr. O'Reilly

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[331] USDA, FSIS Directive 8080.1, Rev. 3, section IX, "Publication Notification" at 3.

[332] CPSC Recall Handbook at 15.

[333] Forty-one states, the District of Columbia, and the Virgin Islands currently have electronic transactions laws that were passed after ESIGN was enacted. Alaska, California, Illinois, New York, South Carolina, Washington, and Wisconsin have electronic signatures and transactions laws that were passed prior to the passage of ESIGN. Five states have electronic transactions laws containing an exception for product recalls. The electronic transactions laws in Alabama, Colorado, Connecticut, North Carolina, and West Virginia have exceptions for product recalls. *See* Appendix E.

[334] James T. O'Reilly, Comments on Section 103 Exceptions to the ESIGN Act at 2 (Apr. 22, 2002). James O'Reilly is a member of the ABA Administrative Law Section and a professor at the University of Cincinnati. The comments were submitted on his own behalf and not as a representative of the ABA or the University.

concluded his comments on product recalls by stating the exclusion from section 101 forces manufacturers to use "snail mail," which has real negative consequence for consumers, especially those that use warranty cards for purchased products. He stated that there is no reason NHTSA, CPSC, or FDA required communications should not be entitled to equal force and effect when sent to dealers, physicians, retail chains, or ultimate users via the fastest possible means.[335]

Conclusion

Removing the product recall exception from the ESIGN Act will mean that, where ESIGN is effective, product recall notices sent to consumers or retailers electronically are to be given the same legality and effectiveness of written notice. There may be benefits to sending product recall notices electronically. Provided a consumer database is maintained, manufacturers, and product distributors can reach a large number of consumers within a matter of minutes of a recall notice being sent. Consumers will likely receive an electronic mail notice of a recall or discontinuance of a product more quickly than a notice sent through the more traditional means of communication. The comment NTIA received urged removing the recall exception because it is counterproductive to the speed and urgency necessary in delivering the recall message to consumers through the fastest means possible.[336] Oversight agencies recognize the importance and need for speed in recall notice delivery and are encouraging companies to use their websites to supplement the companies' or distributors' product recall efforts.[337] In addition, there may be administrative and cost efficiencies for product manufacturers and distributors if the product recall exception is removed.

Eliminating the exception may create new issues for consumers. One concern is that companies may use the removal of the exception as justification or basis for sending recall notices either through electronic mail or by posting them on the company website without giving consideration to the method most likely to effectuate actual notice. Some companies may be more responsible in fulfilling their notice obligations by using a number of notice methods. Yet other companies may be less responsible and may undertake only minimal efforts of communicating recalls. In addition, the third party outreach firms would have the incentive to adopt notice methods that are easier and less costly and may disregard the consumer protection requirements of state and federal law.

The difference in type of product also presents an area of concern if removal of the ESIGN exception allows manufacturers or distributors to send product recall notices by electronic mail alone. Because of their composition and method of purchase, some products

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[335] *Id*.

[336] *Id*. at 2-3.

[337] Some agencies allow e-mail messages and website postings but require follow-up through hard copies of the notice. *See supra* note 329.

make electronic notice more acceptable. For instance, when consumers purchase household appliances, automobiles, and even some children's items, warranty cards are completed by the consumer and mailed to the manufacturer. Nearly all warranty forms ask for a consumer's electronic mail address so information about rebates, new product models, and possible recall information can be sent directly to the consumer by traditional or electronic mail. A large number of products, however, are not sold with warranty cards to be completed by consumers. If manufacturers and distributors are allowed to effect product recalls solely by electronic methods, a separate regulation would be required for perishable items and other non-warranty related products, such as food, cosmetics, drugs, household products and clothing -- products that are sold without cards requesting information or warranties. A manufacturer would have difficulty in contacting families directly who buy these types of products since electronic mail address information is not provided by the customer at the point-of-purchase. Currently, in recall situations involving these type of items, manufacturers and retailers are required to issue recalls in various written forms such as posters at retail establishments or news media bulletins.

In addition to the manufacturer's problem making direct contact with the consumer in the situation described above, electronic mail and web-site postings would not be effective in reaching consumers without access to the Internet. Thus, the removal of the ESIGN exception for product recalls could create situations in which consumers do not receive timely notice of a product defect if manufacturers attempt to meet recall obligations exclusively through electronic mail or website postings without alternative measures such as traditional mail, or posters.

Finally, although ESIGN and state UETA laws require verification or acknowledgment of receipt of the recall notice communication, using electronic mail notices are difficult for manufacturers and producers to monitor because consumers tend to change electronic mail addresses and in most cases they do not provide the new information to the manufacturers and distributors until that information is requested. Moreover, unfortunately, much of the e-mail received by consumers is SPAM, unsolicited messages that offer a variety of products and services or that serve as vehicles for fraudulent schemes, computer viruses and unsavory promotions. There is a high risk that consumers may erroneously treat electronic recall notices as SPAM and delete or ignore the notice. Thus, the intent and urgency of the recall notification would be lost. The overriding goal of a product recall is to protect consumers from harmful products, and to do this, manufacturers and distributors need access to all available methods of communicating that information to the general public. Removing the exception will allow manufacturers and distributors to deliver recall notices in any manner they may choose unless additional rules and regulations stipulate that sending electronic mail recall notices can be used to supplement, but not supplant, other forms of notice. Moreover, as has been noted herein, there are still a number of concerns associated with removing the ESIGN product recall exception. For these reasons, NTIA recommends that Congress retain the ESIGN product recall exception at this time.

9. Hazardous Materials[338]

Background

The exception for hazardous materials excepts all documents required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic and dangerous materials from the application of section 101 of the ESIGN Act.[339] Under this exception, electronic documents and documents containing electronic signatures are not required to be given the same legal validity and effect as paper versions of these documents. This provision affects shipping papers, labels, and placards for a broad range of materials that are considered to be hazardous, including explosive, radioactive materials, etiological agents, flammable or combustible liquids or solids, poisons, oxidizing or corrosive materials, and compressed gas.[340]

The Department of Transportation's (DOT) Research and Special Programs Administration (RSPA) has authority under federal hazardous materials transportation law, to regulate the transportation of hazardous materials in commerce.[341] RSPA has developed a comprehensive set of regulations that govern the safe transportation of hazardous materials.[342] The Hazardous Materials Regulations (HMR) incorporate a comprehensive approach to hazardous materials transportation, including: documentation that must accompany shipments (shipping papers and emergency response information); other hazardous communication requirements, such as hazard warning labels and placards; packaging marking; and packaging manufacture and use requirements. In addition, the Resource Conservation and Recovery Act (RCRA) authorizes the Environmental Protection Agency (EPA) to regulate the transportation of hazardous wastes that also are regulated by DOT as hazardous materials.[343]

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[338] NTIA published a notice in the *Federal Register* requesting public comment on the issues presented in this evaluation. *See Request for Comments on the Hazardous Materials and Dangerous Goods Shipping Papers Exception to the Electronic Signatures in Global and National Commerce Act,* 67 Fed. Reg. 56279 (Sept. 3, 2002). A list of the commenters is provided in Appendix C.

[339] 15 U.S.C. § 7003(b)(3)(2000).

[340] 49 U.S.C. § 5103(a) (2003). *See* 49 C.F.R. § 171.8 (2002) for definition of hazardous materials and 49 C.F.R. § 172.101 (2002) for a table listing of hazardous materials.

[341] 49 U.S.C. § 112(d)(1) (2003).

[342] 49 C.F.R. Parts 171-180 (2002); 49 U.S.C. §§ 5101-5127 (2003).

[343] 42 U.S.C. § 6912 (2003).

A physical, hard copy shipping paper and emergency response information is required to accompany shipments of hazardous materials.[344] The shipping paper must remain on the transport vehicle or with the shipment while in transit to serve as part of the hazard communication system.[345] In addition to providing information to the transporter, the shipping paper and other aspects of the hazard communication system allows emergency responders (*e.g.*, firefighters and police officers) to quickly and safely identify the hazardous materials being transported in case of an emergency. The shipping paper allows emergency responders to make critical decisions concerning evacuation radii, personal protection equipment, fire dispersants, and response strategy. The central purpose of the uniform hazardous waste manifest (UHWM) system is to provide documentation showing chain of custody of the hazardous waste at all times, where the waste is destined for disposition, and when the waste arrives at the disposal facility. The UHWM system allows generators, shippers, and waste handlers to use a single form to satisfy both EPA's manifest requirements and DOT's shipping paper requirements.[346] Thus, the UHWM can also serve as a DOT-required shipping paper conveying essential emergency information during transportation, such as the proper shipping name and hazard class of a material, and the telephone number where more information about the material can be obtained.

Since the enactment of the ESIGN Act in 2000, both DOT and EPA have initiated rulemaking proceedings to revise their regulations to allow specific hazardous waste information to be transmitted electronically between generators, treatment and disposal facilities, and state governments. On May 22, 2001, EPA published a Proposed Rule in the *Federal Register* requesting comment on its proposal.[347] The Notice proposed to change EPA's hazardous waste regulations to establish an electronic UHWM system to track shipments of hazardous waste from a generator's site to the site where the hazardous waste is to be managed.[348] EPA's proposed rule modifies the UHWM regulations to allow waste handlers (generators, transporters, and treatment, storage or disposal facilities) the option of preparing, transmitting, signing, and storing their manifests electronically.[349] This proposal includes a standard for signing the manifest with electronic signatures, electronic data interchange (EDI) and Internet file standards, and computer security standards. The EPA proposal, however, also contains a requirement that a paper copy of the electronic manifest accompany the shipment in order to satisfy the HMR

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[344] 49 U.S.C. § 5110(a) (2003).

[345] 49 U.S.C. § 5110(c) (2003).

[346] 49 Fed. Reg. 10490 (Mar. 20, 1984) (codified at 40 C.F.R. §§ 260, 262, 271).

[347] 66 Fed. Reg. 28240 (May 22, 2001) (codified at 40 C.F.R. §§ 260-265, 271).

[348] 40 C.F.R. §§ 262-265 (2002); 45 Fed. Reg. 12722, 12724 (Feb. 26, 1980).

[349] 66 Fed. Reg. 28240, 28266 (May 22, 2001) (to be codified at 40 C.F.R. § 262).

requirement that a shipping paper accompany each hazardous materials shipment for emergency response purposes.[350]

In connection with EPA's notice, RSPA issued a notice of proposed rulemaking proposing to revise its regulations on the use of the UHWM for hazardous waste shipments. RSPA's proposed regulatory changes parallel EPA's proposal.[351] Specifically, RSPA proposed to modify its regulations to require that a printout of the electronic manifest or a separate shipping paper must accompany the shipment of hazardous waste when an electronic manifest is used.[352] EPA's proposed rule is pending final resolution.

In 2002, RSPA published a final rule requiring shippers and carriers of hazardous materials to retain a copy of each hazardous material shipping paper or an electronic image thereof, for a period of 375 days after the date the hazardous material is accepted by a carrier.[353] This rule is consistent with section 5110(e) of the FHTML, which requires that a copy of each shipping paper be retained for a period of one year after shipment of the hazardous materials ends and authorizes the retention of electronic images of shipping papers.[354] An electronic image includes an image transmitted by facsimile, an image on the screen of a computer, or an image generated by an optical imaging machine.

Every state has adopted, and currently enforces, regulations that are consistent with the federal HMR for the transportation of hazardous materials. These requirements, including those addressing hazard communication, are generally consistent with the international recommendations and requirements for the shipment of hazardous materials issued by the United Nations Committee on the Transport of Dangerous Goods, the International Maritime Organization, and the International Civil Aviation Organization.[355] For example, Maryland's code of regulations governing transportation of hazardous materials incorporates by reference DOT

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[350] *Id*. at 28268.

[351] 66 Fed. Reg. 41490 (Aug. 8, 2001) (to be codified at 49 C.F.R. § 172).

[352] 66 Fed. Reg. at 41491. *See e.g.,* 49 C.F.R. §§ 172.200-172.202 (2002).

[353] *See* 67 Fed. Reg. 46123 (July 12, 2002) (to be codified at 49 C.F.R. §§ 172, 174-177); 49 C.F.R. § 172.201(e) (2002).

[354] 49 U.S.C. § 5110(e) (2003).

[355] Federal hazardous materials transportation law preempts any State, local, or Indian tribe requirement on the preparation, execution, and use of shipping documents related to hazardous materials that is not substantively the same as the final rule issued by RSPA. *See* 49 C.F.R. § 5125(b)(1)(C) (2003) .

and the U.S. Nuclear Regulatory Commission's regulations, and any additional federal regulations affecting the transportation of hazardous materials by motor carriers on Maryland's highways.[356]

EPA and DOT's proposed and current regulations, and the state regulations regarding hazardous materials will be impacted by elimination of the ESIGN Act's hazardous and dangerous materials documents exception. Thus, this evaluation has implications for companies that engage in the manufacture, sale, transportation, and disposal of hazardous materials. It also has implications for emergency responders who rely on the immediate availability of critical information in the event of an accidental release of hazardous materials during transport.[357]

Comments

The commenters on this exception are divided regarding whether the hazardous materials and dangerous substances documents exception to ESIGN should be retained. Most of the comments recognized that DOT's regulations require a shipping paper to accompany the shipment of hazardous and dangerous substances and recommend the retention of the exception.[358] The Institute of Makers of Explosives (IME) posited that the shipping paper communicates important information to emergency responders that may not have the resources to access electronic documents regarding the shipment of hazardous materials and dangerous substances.[359]

Several commenters recommended the retention of the exception for hazardous waste documents to preserve or coordinate the law with regulations under federal, international and state laws, and federal laws regarding pesticide labeling. The Dangerous Goods Advisory Council (DGAC) noted that the DOT's requirement that paper copies of shipping papers and emergency response information accompany shipments of hazardous materials is also an international requirement for shipments by air and water, under the ICAO Technical Instructions

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[356] *See* MD. REGS. CODE tit. 11, § 7.01.02(A) (2003).

[357] Several federal agencies have various responsibilities concerning hazardous materials and dangerous substances. There are also numerous state agencies and organizations that act to protect the public from misuse, mishandling, or errors in labeling of hazardous materials. EPA and DOT have proposed regulations implicating the transmission of electronic documents that provide notice regarding hazardous materials. Reference to these agencies is not intended to exclude other agencies that play a valuable role in protecting consumers.

[358] Dangerous Goods Advisory Council (DGAC), Comments on the Hazardous Materials and Dangerous Goods Shipping Papers Exception at 1 (Oct. 28, 2002); California Department of Toxic Substances Control (DTSC), Comments on the Hazardous Materials and Dangerous Goods Shipping Papers Exception at 2, 3 (Nov. 1, 2002); Institute of Makers of Explosives Comments (IME), Comments on the Hazardous Materials and Dangerous Goods Shipping Papers Exception at 2, 3 (Sept. 17, 2002).

[359] IME Comments, *supra* note 358, at 3.

and the IMO IMDG Code.[360] The California Department of Toxic Substances Control Comments (DTSC) commented that the State of California's definition of hazardous wastes is broader than EPA's, and the state regulates materials that are not subject to regulation under federal law. DTSC stated that, if the exception is modified, the States must be allowed to require the use of the uniform hazardous waste manifest when a material is defined as a hazardous waste under state, not federal, law.[361] The Institute of Makers of Explosives (IME) stated that the elimination of the ESIGN exception for hazardous materials documents would have the effect of overriding the preemptive effect of the Federal Hazardous Materials Transportation Law (FHMTL), which "preempt[s] any non-federal requirement pertaining to the 'preparation, execution, and use of shipping documents related to hazardous materials.'"[362] IME noted that the FHMTL declares that the preemptive effect is void if a non-federal requirement is authorized by another law of the United States, which ESIGN would constitute if the exception is removed.[363]

One commenter noted the effect on international policy of removing the exception for hazardous materials documents from ESIGN. EPA noted its intention to make the U.S. export notification program compatible with the United Nations' voluntary international Prior Informed Consent procedure (PIC), which requires importing countries to receive shipments of restricted pesticides only after providing their informed consent of the potential risks of chemicals. EPA also noted that there is no mechanism currently in place to ensure that foreign governments will accept electronic notifications from the United States.[364]

EPA's Office of Prevention, Pesticides, and Toxic Substances (EPA/OPPTS) reported that the revocation of the exception would adversely impact its regulations and impair its ability to execute statutory responsibilities as required by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).[365] EPA/OPPTS also stated that the revocation of the exception could increase risks to human health and the environment by adding distance between the important

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[360] DGAC Comments, *supra* note 358, at 1.

[361] DTSC Comments, *supra* note 358, at 1.

[362] IME Comments, *supra* note 358, at 2.

[363] *Id.*

[364] U.S. Environmental Protection Agency, Office of Prevention, Pesticides and Toxic Substances Comments (EPA/OPPTS), Comments of EPA/OPPTS at 5 (Nov. 4, 2002). EPA noted its intention to coordinate with the PIC procedure even though the United States has not ratified the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade. *Id.*

[365] *Id.* at 1. *See* FIFRA, 7 U.S.C. §§ 136-136y (2003); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (2003).

health, safety and use information and persons who need immediate access to the information.[366] EPA/OPPTS also urged the retention of the exception because of the federal pesticide and labeling requirements of FIFRA and the notification of lead hazards requirements of the Toxic Substances Control Act (TSCA).[367] The comment stated that FIFRA requires pesticides to be labeled with information for purchasers regarding proper use and critical health and safety information that should be read and understood prior to use of the product. According to EPA/OPPTS, labels and labeling refer to the written, printed, or graphic matter on, or attached to, the pesticide device, or any of its containers or wrappers, and any written or printed information that accompanies pesticide products.[368] EPA/OPPTS stated that these documents must accompany domestic and international shipments of pesticides in a non-electronic format to ensure that end users -- residential occupants, commercial pesticide applicators, gardeners, farmers, field workers, and others -- can readily access important caution and warning information.[369] EPA/OPPTS cautioned that, without such information in a printed, attached form, for example, agricultural field workers may use the wrong product, use an incorrect amount of the product, or fail to wear the proper personal protective equipment for that product. The improper application, according to EPA/OPPTS, would pose health risks not only to the worker, but also to the general population and could also could subject retailers and end-users to legal jeopardy under FIFRA section 12(a)(2).[370]

EPA/OPPTS further noted that a revocation of the hazardous materials documents exception would create a loophole in the disclosure provisions of the TSCA. According to the comment, a provision of TSCA requires persons who perform renovations of target housing to provide a lead hazard information pamphlet to the owner and occupant of the housing prior to commencing renovations. EPA/OPPTS stated that because low income families represent a substantial number of persons living in target housing, they are unlikely to have Internet access to be able to receive an electronic transmission of the lead hazard information.[371]

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[366] EPA/OPPTS Comments, *supra* note 364, at 1.

[367] *Id.* at 1, 6*; see also* FIFRA Regulations, 40 C.F.R. § 156.10 (2002); TSCA, 15 U.S.C. §§ 2601-2629 (2003).

[368] EPA/OPPTS Comments, *supra* note 364, at 1.

[369] *Id.* at 2.

[370] *Id.* at 2-3.

[371] *Id.* at 7.

However, some comments stated that the elimination of the exception is necessary to bring transporters and waste handlers up to the current automated record keeping methods.[372] One comment suggested that the mission of the RCRA waste manifest system is compatible with electronic signatures and transmission because waste management handlers would be able to retain and transmit copies more efficiently.[373] The comment also stated that EPA/OPPTS and the states would retain their enforcement ability since the waste generator would still receive and file a record of waste receipts in its database.[374]

Conclusion

Given the significant experience that EPA and the RSPA have in this area, the information presented by these agencies provides compelling evidence that the removal of the ESIGN exception for hazardous and dangerous materials documents would create the potential for dangerous conditions to exist in the hazardous materials transport industry. The risk of information presented in this evaluation indicates that the removal of the exception would pose a significant risk of injury to health and public safety.

RSPA, in its expert opinion, has determined that a hard copy of the shipping paper is necessary to supply critical information to emergency responders in the event of an accidental release or spill of hazardous materials or toxic substances. The paramount interest protected by this policy is public health and safety. Even though the removal or elimination of the ESIGN exception would not directly impact RSPA's regulations because the shipping paper requirement would continue, the elimination of the exception may create confusion in the industry and may cause hazardous waste shippers and transporters to omit the hard copy of the shipping papers and ship dangerous materials in areas where emergency responders do not have the technical capability to access electronic documents. Regardless of any resulting increase in efficiency or reduction of paperwork, the risk of serious harm to the general public that may result from an accidental release of toxic and hazardous substances is extremely high if an emergency responder lacks access to electronic shipping papers.

EPA/OPPTS presented a second compelling reason to retain the exception. According to EPA/OPPTS, printed and written labeling for pesticides are critical to public safety and health. The proper use of these substances affect the food supply and the health of the general public.

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[372] Air Transport Association of America (ATAA), Comments on the Hazardous Materials and Dangerous Goods Shipping Paper Exception to the ESIGN Act at 1 (Nov. 4, 2000); O'Reilly Comments, *supra*, note 334, at 3.

[373] O'Reilly Comments, *supra* note 334, at 3.

[374] *Id.*

The requirement that use and emergency information for pesticides should be affixed to the substance serves an important function to preserve public safety and health. Accordingly, NTIA recommends the retention of the ESIGN exception for documents required to accompany the transportation or handling of hazardous or dangerous materials.

D. Conclusion and Recommendations

There have been significant advances in electronic commerce and business transactions using electronic signatures during the three-year period following the passage of the ESIGN Act. The goal of the Act, to facilitate the use of electronic records and signatures in interstate or foreign commerce, has been substantially realized. In addition to the overall success of the Act in furthering the use of electronic signatures and documents in commercial transactions, the nine exceptions have worked well, along with section 101(c) of ESIGN, as a mechanism for protecting consumers.

The data and information provided by the comments and independent research discussed in *Electronic Signatures: A Review of the Exceptions to the Electronic Signatures in Global and National Commerce Act* present a snapshot of how electronic records and signatures have been received by businesses and consumers over the past three years. The information presented in this evaluation demonstrates that electronic or "e-commerce" is not only "alive and well", but is thriving and quickly becoming a well-established method of transacting business in America. This evaluation also discusses information to show that Americans with computer and Internet access are increasingly receptive to electronic commercial transactions. Finally, and most importantly, the information discussed above presents a realistic picture of the progress of the policies, mechanisms, and practices that are necessary to guarantee continued protection in the areas of confidentiality, privacy, and security for American consumers engaged in electronic transactions.

After three years, there has been remarkable progress in some of the areas covered by the exceptions in terms of the use of electronic signatures and records, in particular, the courts, product recalls, and UCC transactions. The institutions responsible for these areas have been successful at adopting consumer protection policies, although they are not fully developed and integrated. Due to the high confidentiality and privacy interests inherent in transactions involving other exceptions (such as wills, family law, foreclosure and defaults, utility cancellations), there are few, if any, solutions other than ESIGN that institutions and the marketplace can provide at this time. Some of these issues may be resolved over time as technology progresses to provide more secure authentication, privacy, and security solutions.

Thus, the overall progress in the nine areas covered by the exceptions is noteworthy. However, policies and practices for consumer protection in each area are still being established and incorporated into e-commerce and market systems. The process for development of these policies and practices, though gradual, is occurring at an effective pace. The acceptance of electronic signatures and electronic documents as a part of commercial transactions has developed to the extent, however, that Congress may effectively work with the agencies and

entities directly involved with each exception area to develop adequate consumer protection mechanisms in order to eventually remove the exceptions. NTIA recommends, therefore, that the Congress of the United States retain each of the nine exceptions to the ESIGN Act to allow the further development of the electronic marketplace in this country and the establishment of additional consumer protections in electronic transactions systems. NTIA further recommends that Congress amend the ESIGN Act to allow utility companies to send electronic cancellation notices to consumers that participate in voluntary electronic billing programs, and to remove electronic letter of credit transactional records governed by Article 5 and electronic notices governed by Article 6 from the list of exceptions to the Act.