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AN OVERVIEW OF SOME RULES AND PRINCIPLES FOR DELIVERING CONSUMER DISCLOSURES ELECTRONICALLY

R. DAVID WHITAKER

I. INTRODUCTION

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Electronic Transactions Act (UETA).[1] The UETA establishes a set of uniform rules for electronic equivalents of writings and signatures available for adoption by the states. To date, the UETA has been adopted in some form in forty states and the District of Columbia. In July of 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (ESIGN), which became effective, for most purposes, on October 1, 2000.[2] In essence, it adopts most of the significant rules of the UETA, many of them verbatim, and uses those rules to create a federal "baseline" for acceptance of electronic records and signatures under both federal and state law. Both statutes are "overlays" that automatically amend laws and regulations to the extent they govern covered transactions, unless the law or regulation is excluded from coverage.[3]

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1. UNIFORM ELECTRONIC TRANSACTIONS ACT (1999) (UETA) *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta.htm (storing drafts and the final version of UETA) (last visited Feb. 15, 2003). For an extensive review of the development of the UETA, see Carol A. Kunze's, *ETA Forum*, *at* http://www.webcom.com/legaled/ETAForum/index.html (last visited Feb. 15, 2003) (moving to http://www.uetaonline.com/).

2. Electronic Signatures in Global and National Commerce Act (ESIGN), Pub. L. No. 106-229, 114 Stat. 464 (2000), (codified at 15 U.S.C. §§ 7001-7006, 7021, 7031 (2002)).

3. The interaction of ESIGN and the UETA and the effect of federal preemption is beyond the scope of this Article. For purposes of this Article, the author has attempted to amalgamate and summarize the rules under ESIGN and the UETA so as to comply with whichever statute adopts a more stringent rule.

One of the core purposes of ESIGN and the UETA is to permit the use of electronic records in place of paper records. New laws were necessary to accomplish this because existing law *required* the use of paper documents for many business and consumer transactions. The mandatory use of paper was predicated on this simple premise – that a written record of the communication can be easily and reliably reviewed later. If a dispute arises concerning the content and purpose of a particular communication, the existence of a written record simplifies the task of courts and juries trying to resolve the dispute. This is not true with human memory, which is both unverifiable and demonstrably unreliable. So, the rule emerged that many types of important communications concerning a transaction must be on paper to be enforceable, in order to encourage the use of paper and simplify the task of courts and juries.

Over time, this general rule developed a variety of subsidiary principles. One of the most important of these is that a communication, to be enforceable, must usually be presented in such a way that it is reasonable to believe there was an opportunity to review and understand it. The mere placing of words on paper is often not enough – the paper must be effectively displayed or delivered to the target audience. Depending on the circumstances and the type of transaction, the rules for delivery and display range from very general to very specific. Particularly in consumer transactions, the display and delivery requirements can involve specific language, placement, timing and formatting. If the required communications do not occur or are not given in the prescribed manner, the transaction may not be enforceable – that is, the person who provides value first may not be able to force the other party to complete the transaction, or may have to give back the value received (or sometimes, even more). Almost all of the legal rules for language, placement, format and timing assume that the information is being communicated on paper.

In an electronic environment there are both old and new issues to address when satisfying these requirements for display and delivery. Electronic records offer opportunities to enhance information delivery. Information can be displayed in new ways, using dynamic relationships to bring different informational

elements together, or to separate and order them in new, more flexible ways than are possible in a static, two-dimensional paper document. However, used improperly, an electronic environment can also obscure information or make it easy to overlook. In addition, existing paper display requirements may not translate well into electronic form. Substituting scroll boxes, pop-up notices, and web browser frames for paper documents requires careful design and implementation if the information is to be effectively delivered.

This Article will examine some of the basic rules in ESIGN and the UETA that apply to the delivery of required notices and disclosures. This Article will also review some of the regulatory requirements for electronic notices and disclosures issued to date by the Federal Reserve Board and the Federal Trade Commission. Finally, this Article will offer some general principles for effective online notices and disclosures.

II. ESIGN AND THE UETA

As written, the UETA applies to the use of electronic records and signatures in connection with a "transaction," which is defined as "any action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."[4] The term "commercial" is meant in its broadest sense, encompassing virtually any transaction that is related to or connected with trade and traffic or commerce in general. As such, both business-to-business and consumer transactions are covered.[5] ESIGN has an equivalent definition covering business, commercial and consumer affairs.[6] Note that a transaction requires an interaction between at least two parties – a unilateral act, such as the creation of a "living will," is not included in the definition. Consumer protection laws requiring the delivery of notices and disclosures "in writing" are among the types of laws

4. UETA §§ 3(a), 2(16).

5. *See* UETA § 3(b); Author's Notes, UETA Drafting Committee Meeting of July 22, 1999, Denver, Colo. (on file with the author).

6. *See* ESIGN § 106(13).

and regulations covered by ESIGN and the UETA. There are a few specific exceptions, which include:

- Under ESIGN (but not UETA) recordings of oral communications are excluded from the definition of electronic record for purposes of consumer notices and disclosures;[7]
- Under ESIGN (but not UETA), notices of utility termination, default or foreclosure under a mortgage or lease, termination of health or life insurance, and product recalls and safety notices;[8]
- Under ESIGN and UETA, any notices or disclosures required to be provided in writing under the Uniform Commercial Code, other than notices and disclosures under Article 2 (Sales) and 2A (Leases).[9]

A transaction is covered by ESIGN or the UETA only if the parties have agreed, expressly or as determined by the context and surrounding circumstances, to conduct the transaction through electronic means.[10] The consent requirement only applies to electronic records or signatures that replace legally required writings or traditional signatures. If a writing or signature is not required for the particular agreement, notice, disclosure or other document to be effective under existing law, there is no requirement under the UETA that consent be obtained before providing the document electronically or using an electronic signature.

A. Consumer Consent

Consumers (i.e., individuals who obtain, through a transaction, products or services which are used for personal, family, and household purposes) receive special protection under

7. *See id.* § 101(c)(6).
8. *See id.* § 103(b).
9. *See* UETA § 3(b)(2); ESIGN § 101(b)(2).
10. *See* UETA § 5(b).

the ESIGN Act and under the UETA as enacted in some states.[11] Electronic records may be used to satisfy any law that requires that records be provided to consumers "in writing" only if the consumer has affirmatively consented to the use of the electronic records and has not withdrawn such consent.[12]

Prior to obtaining consent, the electronic record provider must deliver a clear and conspicuous statement informing the consumer:

- of any right or option of the consumer to have the record provided or made available in paper form;
- of the right of the consumer to withdraw consent and any conditions or consequences (which may include termination of the parties' relationship) of such a withdrawal;
- of whether the consent applies (i) only to the particular transactions which gave rise to the obligation to provide the record, or (ii) to all identified categories of records that may be provided during the course of the parties' relationship;
- of the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer;
- of how the consumer may, after consenting, upon request, obtain a paper copy of the electronic record and whether any fee will be charged for such a copy; and
- of the hardware and software requirements for access to and retention of the electronic records.

Furthermore, the consumer must consent electronically, or confirm his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information

11. *See* ESIGN § 106(1).
12. *See id.* § 101(c)(1).

in the electronic form that will be used to provide the information that is the subject of the consent.[13]

Additionally, after the consumer has consented, if there is a change in the hardware and/or software requirements needed to access or retain the electronic records that creates a material risk that the consumer will not be able to access or retain subsequent electronic records, the consumer must be provided with a statement of the revised hardware and/or software requirements that includes another opportunity to withdraw consent.[14] Moreover, the provider of the electronic records must again comply with the access verification provisions.

B. The Three Pillars

For the vast array of laws and transactions within the scope of the UETA and ESIGN, the following three rules are the pillars on which the two statutes are built: (1) "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form;" (2) "if a law requires a record to be in writing, an electronic record satisfies the law;" and (3) "if a law requires a signature, an electronic signature satisfies the law."[15] The three pillars, in turn, are built upon three defined terms: *record*, *electronic record*, and *electronic signature*.

A record is "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."[16] This encompasses not only traditional writings, but also anything that is stored on magnetic or optical media (such as a computer hard drive or CD-ROM).

A tape recording would constitute a record, as would storage of information in any more esoteric medium that may be used in the future. Essentially, all that is required is that the information not be oral or otherwise ephemeral; it must be

13. *See id.* §§ 101(c)(1)(B), 101(c)(1)(C).
14. *See id.* § 101(c)(1)(D)(i).
15. UETA § 7; ESIGN § 101(a).
16. UETA § 2(13); ESIGN § 106(9).

capable, for some period of time, of being retrieved for review in a form comprehensible by a human being.

It is important not to read too much into the retrievability requirement. The time period for which the record must be stored is not fixed. Minimum storage times required to qualify as a record probably depend, at least in part, on the context and may be as little as a few seconds (although proving the existence of such a record later might be difficult). The key concept to remember is that once it is no longer retrievable, it is no longer a record. Also, it is important to note that ESIGN and the UETA establish no requirement as to where record storage must physically occur. For example, if an individual reviews information via the Internet that is stored on a server belonging to someone else and that is two thousand miles away, that information is still a record for purposes of the two statutes.

The requirement that the record be "retrievable in perceivable form" is an objective, not a subjective, requirement. To qualify as a record, it is not necessary that a specific recipient be able to comprehend the information contained in the record, only that *someone* could comprehend it. For example, a data file stored on a hard drive that displays information in Spanish is a record for purposes of ESIGN and the UETA, even if the person reviewing the record does not know Spanish. Also, it is not required that the record be retrievable by everyone who might conceivably have a connection to the transaction. It is only required, for purposes of the definition, that it be retrievable by *someone.*

An *electronic record* is a record "created, generated, sent, communicated, received, or stored by electronic means."[17] Essentially, the term is intended to cover any type of record that is generated or stored electronically. As such, it would cover records created on a computer and stored on any type of media.

An *electronic signature* is "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the

17. *See* UETA § 2(7); ESIGN § 106(4).

record."[18] Included within this definition would be typed names, a click-through on a software program's dialog box combined with some other identification process, biometric measurements (such as a retinal scan or thumbprint), a digitized picture of a handwritten signature, or a complex, encrypted authentication system. As with traditional ink signatures, the legal consequences of the signature, and the question of whether it may properly be attributed to a particular person, is left to other law and the surrounding factual circumstances.[19]

C. *Special Rules for Electronic Records*

While ESIGN and the UETA set up no special standards for the use of electronic signatures, they do have a number of special rules for electronic records that are intended to substitute for certain types of writings. One such special rule is that if a person is required by law to provide or deliver information in writing to another person, an electronic record only satisfies that requirement if the recipient may keep a copy of the record for later reference and review. If the sender deliberately inhibits the recipient's ability to print or store the record, then the record does not satisfy the legal requirement. Also, if a law or regulation requires that a record be retained, an electronic record satisfies that requirement only if it is accurate and remains accessible for later reference.

The UETA does not say for how long it must be retained or to whom it must remain accessible. ESIGN provides that the record must be accessible to all people entitled by law to access for the retention period prescribed by law. Neither statute requires that the electronic record necessarily be accessible in a particular place – the parties entitled to access can, by agreement, establish a storage location.

Another special rule is that if a particular writing is required by law to be displayed in a particular format, the UETA does not change that requirement. For example, if a law requires a

18. *See* UETA § 2(8); ESIGN § 106(5).
19. *See* UETA § 5(e), 9(b).

notice to be printed in at least 12-point type and a boldface font, that requirement remains in place under the UETA. If the law requires two elements of a document to be placed in a particular physical relationship to each other or some other part of the document, that requirement is not changed by the UETA. For example, if the law requires a disclosure to be displayed just above a contracting party's signature, that rule must be observed within the electronic record. Finally, if a law expressly requires a writing to be delivered by U.S. mail or by hand delivery, the UETA does not change those delivery rules.[20]

Generally speaking, these rules are not variable by agreement under either ESIGN or the UETA; however, under UETA if the underlying statutory requirement that information be delivered in writing, or by a particular delivery method, may be varied by agreement, then the requirement that an equivalent electronic record be capable of storage, or be delivered by the same method as a writing, may also be waived.[21]

Permitting electronic records to substitute for writings serves little purpose if the records are not admissible in evidence in the event of a dispute. The rule is simple: "A record or signature may not be excluded from evidence solely because it is in electronic form."[22] An electronic record also qualifies as an original document (even if that record is not the original form of the document) and satisfies statutory audit and record retention requirements.[23] Beyond that, the ordinary rules of evidence will apply.

A wide variety of statutes and regulations, and many private agreements, provide that certain types of documents are effective at the time sent, or at the time received. The UETA (but not ESIGN) provides default rules for determining when an electronic record has been sent from one party to another, and when it has been received. The default rules only address the

20. *See id* §§ 8, 12(a); ESIGN §§ 101(d), (e).

21. *See* UETA § 8(d).

22. *See id.* § 13; ESIGN §101(a). There is a special provision in ESIGN that would permit use of electronic delivery in lieu of mail delivery if certain conditions are met. *See* ESIGN § 101(c)(2)(B).

23. *See* UETA § 12(d); ESIGN § 101(d)(3).

functional requirements for sending or receiving the record; they do not presume that the record is intelligible or effective at the time it is transmitted.[24] The effect of a garbled or incomplete transmission is left to other provisions of the UETA and to other law.

An electronic record is considered "sent" when certain criteria are met. The record must be addressed or directed to an information processing system that is specified or used by the recipient for receiving records of the general type being transmitted, and from which the recipient is able retrieve the record. The information must be in a form that the recipient's system is capable of processing. Also, the information must leave an information system under the sender's control, or, if the sender and the recipient are using the same system, must enter a part of the system under the recipient's control.[25]

There are several features of the default rule worth noting. First, the record must be directed to the recipient; messages sent randomly or sent to a system or network, rather than to the recipient, do not trigger the default rule. Second, the system to which the record is sent either must actually be used by the recipient to receive the type of record involved, or must be specified by the recipient for receipt of that type of record. Generally, this rule leaves the recipient in control of the place of receipt. However, what constitutes a "type" of record, or how broadly or narrowly the phrase "type of record" should be interpreted, is not clear. As a practical matter, a sender relying on the "actual use" rule could be incurring a significant risk if receipt is disputed. In general, it is advisable to send electronic records to an agreed destination, and to be clear about the kinds of records that will be transmitted. Third, the default rule requires satisfaction of conditions that may be outside the sender's control.

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24. *See* UETA § 15 cmt. 1.

25. *See id.* § 15(a). The second alternative accommodates the situation where the sender and recipient are using the same system, and the sender controls that system. Common circumstances could include an email from an Internet service provider to one of its customers, or from an employer to an employee via an internal email system. In such circumstances, the record would not be considered sent until it is reflected in the recipient's "in basket" as an incoming email. *See id.*

For the record to be "sent," the recipient must be able to retrieve it, and it must be in a form the recipient's system can process.[26] It is not clear, from the language of the UETA, whether the retrieval requirement is meant to be an objective or subjective standard. Is it sufficient that the recipient *could* retrieve the record, if the recipient's system were working properly, or does the recipient *actually* have to be able to retrieve it?

The structure of the sending rule suggests that the requirement is objective, rather than subjective. Otherwise, why require that the record must enter a system, or portion of a system, under the recipient's control? If the record is only "sent" when the recipient can actually retrieve it, why does it matter whether the recipient has control over the system?

As a practical matter, parties to an agreement may wish to expressly address whether an extended failure of the recipient's system impairs the sending of a record or not. In addition, the sender may not be able to objectively confirm that the recipient's system is capable of processing the record. It may be advisable for senders to obtain a representation and warranty that the recipient's system is capable of processing specified document formats.

The UETA's receipt rule is essentially a subset of the sending rule. To be received, it does not matter how the record was addressed, so long as (1) it actually arrives at a system to which the recipient has access for retrieving the record; (2) the system has been designated or actually used by the recipient for receipt of the type of record in question; (3) and the system is capable of processing the record. It is not necessary for the

26. According to Official Comment 1 to UETA § 15, satisfaction of this element of the rule is not affected by errors in transmission that might garble an otherwise readable record if the record is not so badly damaged that it cannot be processed. In other words, if Harry sends a word processing file to Mike, and Mike receives a damaged, but accessible file, the file would be considered sent. If, on the other hand, the damage is so severe that the file cannot be opened and inspected, even to determine whether it has been garbled, then presumably it has not been sent, since it is not in a form the recipient's system is capable of processing. As a technical matter, it may also make a difference when the fatal damage occurs. If the record is damaged after it leaves the system, or the part of a system under the sender's control, then presumably it has been sent for purposes of UETA § 15, since, at the moment it left the sender's control, it was capable of being processed by the recipient's system.

recipient to actually access the electronic record in order for it to be considered received.[27] The UETA also provides default rules for the location at which a record is sent and received. In general, records are deemed sent from the sender's place of business, and received at the recipient's place of business. If the party in question has more than one place of business, the record is treated as sent from, or received at, the place of business with the closest relationship to the underlying transaction. If a party does not have a place of business, then the record is deemed sent or received from the party's residence.[28] The physical location of the record is not, in and of itself, relevant. [29] This rule reflects the fact that many companies now store records with third-party data processors or at locations remote from their operational offices.

The default rules for what constitutes "sending" or "receiving" an electronic record may be varied by agreement. The place of sending and receipt may be varied by agreement or specified in the electronic record itself. The force and effect of variations from the default rule is left to other law.

The UETA does contain one rule concerning sending and receipt that cannot be modified by agreement. If one of the parties to a transmission is aware that a record was not actually sent or actually received, even though it was purportedly sent or received under the terms of the UETA's default rules, then the effect of the electronic record and its transmission is determined by other law. This is intended to prevent a party from varying the rules so that a record is regarded as sent or received, for legal purposes, even when one of the parties knows that this was not actually the case.

The UETA and ESIGN also contemplate the creation of hybrid agreements, portions of which are memorialized in writing and other portions of which are electronic. For example, the

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27. *See id.* § 15(e).

28. While the UETA does not expressly say so, whether or not a party to the transmission has a "place of business" should be answered in the context of the transaction. Strictly speaking, many consumers have a place of business, but in most cases it is not relevant to their consumer transactions. Absent special circumstances or other applicable law, the UETA's default rules treat transmissions sent or received by a consumer as occurring at the consumer's residence.

29. *See* UETA §§ 15(c), (d).

UETA provides that "[a] contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."[30] ESIGN states, "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."[31] This choice of language recognizes that contracts are often formed from the interaction of multiple documents,[32] and validates the creation of the contract even though one or more of those documents is an electronic record.

III. EXAMPLES OF FEDERAL REGULATIONS AND GUIDANCE ON ELECTRONIC DISCLOSURES AND NOTICES

A. Interim Regulation Z

The Federal Reserve Board issued interim rules (the "Interim Rules") interpreting the provisions of ESIGN concerning the use of electronic communications to provide required notices under five consumer protection regulations: B (Equal Credit Opportunity), E (Electronic Fund Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings). The Interim Rules were effective as of March 30, 2001, and may be relied upon by the financial services industry, but are not currently mandatory. Among the Interim Rules is Interim Regulation Z, which addresses the application of ESIGN to Truth-in-Lending disclosures.[33]

Interim Regulation Z sets out a number of basic rules for the use of electronic records to deliver truth-in-lending disclosures.

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30. *See id.* § 7(b).

31. ESIGN § 101(a)(2).

32. *See* RESTATEMENT (SECOND) OF CONTRACTS §132 (1981). One common example of the use of multiple documents to create a contract is the use of a purchase order and acceptance to create a contract for the sale of goods. The procedure for resolving conflicts between the two documents used to form the contract is set out in Section 2-207 of the UCC.

33. *See* 12 C.F.R. § 226 (2002); *see also* Truth in Lending, 66 Fed. Reg. 17,329, 17,330 (Mar. 30, 2001) (discussing Regulation Z and other regulations that apply to Truth-in-Lending).

There is no "three day delay" rule – disclosures delivered electronically, even over the Internet, are not subject to the rule permitting certain disclosures to be mailed within three days after an application is submitted via the telephone. The disclosures must be delivered at the time otherwise mandated by Regulation Z. Also, review of the ESIGN consumer consent disclosures is not required before certain "shopping" disclosures are delivered to the consumer. These disclosures include Home Equity Line of Credit ("HELOC") and Adjustable Rate Mortgage ("ARM") loan application disclosures (sections 226.5b and 226.19(b)), and disclosures under sections 226.17(g)(1)-(5). However, the ESIGN consumer consent disclosures must be available for voluntary review at the time the shopping disclosures are made, and review of the ESIGN consumer consent disclosures must be "forced" before final submission of the loan application.[34] Also, disclosures (other than the shopping disclosures) must be available for review for ninety days from the date of delivery, and an email must be sent advising where the disclosure may be viewed, even if the disclosure is being displayed to the consumer on a real-time basis. Finally, delivery of a disclosure occurs either at the time the disclosure is displayed to the consumer, or at the time an email is sent to the consumer with the disclosure attached or with a hypertext link to the disclosure or otherwise advising of the disclosure's location.

B. FTC Guidance On Conspicuous Disclosures

The Federal Trade Commission ("FTC") has provided some useful guidance on the electronic delivery of conspicuous disclosures, both in its regulations on Privacy of Consumer Information and in a special publication.[35] As a general rule, the FTC expects conspicuous online notices and disclosures to be reasonably understandable and designed to call attention to the information that must be disclosed. Generally speaking, a

34. Note that in some states, required state disclosures associated with the loan may require earlier, forced delivery of ESIGN consent disclosures.

35. *See* 16 C.F.R. §313; *Dot Com Disclosures*, http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html (last visited Feb. 15, 2003).

disclosure will be "reasonably understandable" if: (1) the information is laid out in clear, concise sentences and sections; (2) the disclosure or notice uses short explanatory sentences or bullet lists; (3) the language of the disclosure or notice uses concrete words and the active voice; and (4) the disclosure or notice avoids multiple negatives, technical jargon, and ambiguous language. Generally speaking, a disclosure or notice is "designed to call attention to itself" if: (1) the information is placed on a screen that the consumer must access or is likely to frequently access; (2) the information is available behind a hyperlink on an introductory screen labeled to convey the importance of the information behind the link; and (3) the online system design uses text or visual cues to encourage scrolling, if necessary.

The information should always be presented with a clear, visible heading that calls attention to the notice and an easy-to-read typeface. Wide margins, ample line spacing, and boldface or italics for key words are also useful. The use of graphic devices, such as shading and sidebars, to offset the important information is also encouraged.

Hyperlinks should clearly describe the information that will be found by clicking on the link. The link should take the consumer directly to the required information. Consumers should not be required to search through multiple "nested links" in order to get to the required information. Where a claim or statement is made that is supposed to be accompanied by a corresponding disclosure, the disclosure should either appear on the same screen or be associated with a clearly labeled hyperlink that appears on the same screen. If the disclosure is below the visible area of the screen, it should be flagged by a prompt that visibly advises the consumer to scroll down to see the disclosure.

IV. GENERAL PRINCIPLES FOR ELECTRONIC DISCLOSURE

Based on the provisions of ESIGN and the UETA, the general FTC guidance for online disclosures, and the examples provided through regulations like Interim Regulation Z and the FTC privacy rules, certain principles can be derived for providing effective online disclosures and notices.

Most consumer disclosures and notices can be provided electronically, whether or not the statutes or regulations requiring the information delivery have been specifically revised to address electronic delivery. The UETA and ESIGN are "overlay" statutes that automatically amend existing consumer protection rules. As such, while specific regulatory guidance is helpful, it is not necessary as a precondition to electronic delivery. Exceptions are situations where the notice or disclosure falls into a category that has been expressly excluded by the statute, such as a foreclosure notice, or information that must be delivered by a specified method, such as first class mail (assuming that ESIGN's special exception for electronic delivery with acknowledgement is not available or practicable).

Because of the ESIGN consumer consent rule, and its adoption by a number of states as part of their UETA enactment, anyone wishing to make mandatory disclosures subject to a "writing" requirement to a consumer electronically should plan on taking the consumer through the ESIGN consumer consent process. It should be possible to make disclosures online that take advantage of the special tools available in an online environment, such as hyperlinks, scroll boxes, dialog boxes, borders, shading and other attention-getting devices. The basic principle that applies to the use of such devices is that they should be deployed in such a way as to enhance, rather than obscure, the effective delivery of the required information.

Online disclosures should always either be provided in a form that the consumer can keep, either as a printout or as a saved electronic file, or held available online for the consumer's review for (i) the time period for which the disclosure is effective, (ii) the life of the transaction, or (iii) as required by any specific rule, such as Interim Regulation Z's ninety-day rule. When innovative methods are used for electronic display of the disclosure that do not translate well into a paper record or saved file, the provider may want to consider offering the disclosure or notice for printout or downloading in a more traditional format. In order to avoid questions about effective delivery in the event the consumer has difficulty with printing out an electronic record or saving it to local storage, it is probably prudent to offer the consumer the option of

calling a consumer service telephone number or writing to an email address in order to obtain a hard copy of the record via mail or facsimile.

A disclosure may be effectively delivered (once the ESIGN consumer consent process has been completed) by displaying it as part of an interactive session, by delivering it in the body of an email or as an email attachment, or by delivering an email or other electronic notice that has a URL embedded in it that the consumer may activate to review the information. It is not, generally speaking, necessary for the provider to assure or determine that the disclosure or notice is, in fact, reviewed, just as the provider is not required to determine whether the consumer actually reads a paper document that is presented or delivered. It will be advisable, when using email for this purpose, to have the consumer expressly agree to the delivery of the contemplated notices and disclosures to the email address. It will also be advisable to monitor emails sent to consumers for return notices indicating that the email was undeliverable, in which case the provider may want to design the delivery system to generate a paper copy for mailing.