

Michigan Credit Union League & Affiliates



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ESIGN and Online Account Opening



Agenda

- ESIGN vs. UETA
- Bylaws and Requirements
- Internal Controls
- Record Retention



ESIGN vs. UETA

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- Two key statutes:
 - Electronic Signatures in Global and National Commerce (ESIGN) (Federal)
 - Uniform Electronic Transactions Act (UETA) (State)



ESIGN

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ESIGN - 15 USC 7001 et.seq.

- Provides authority for electronic records (notices, disclosures, etc.) and;
- Electronic signatures
- Basic Premise:
 1. A signature, contract, or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form; and
 2. 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.



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- The Act defines “electronic record” as a contract or other record created, generated, sent, communicated, received, or stored by electronic means.
- “Electronic signature” is defined as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.



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Important facets of ESIGN

- The person seeking to rely on the electronic signature has the burden of proving it is the member’s electronic signature.
- Multiple protections are built into the law to ensure the member has the necessary technical expertise and equipment for electronic processes.
- A “consent handshake” is required when delivering electronic records to a member.



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Protections under “Consent Handshake”

- 5 requirements:
 - ✓ Consent must be informed
 - ✓ Member must have the technological ability to accept the electronic records
 - ✓ The member must agree
 - ✓ Changes in technology may warrant additional procedures
 - ✓ Member must have the right to withdraw consent



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10 Requirements for Disclosure

- Must be clear and conspicuous
- Must be provided before the member agrees to accept electronic records
- Must explain what rights the member has to obtain the records in paper form
- Must explain the member’s right to withdraw consent for electronic records and the consequences and conditions of the withdrawal of consent
- Must explain the extent of the consent granted



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- Must delineate the procedures to be followed in the event the member chooses to withdraw consent
- Must tell the member the process which should be followed to update his/her contact information
- Must divulge whether the consumer may obtain a paper copy of the electronic record
- Must tell whether a fee will be assessed for obtaining a paper copy of the record and whether the relationship will be terminated upon withdrawal of consent
- Must describe the hardware and software requirement necessary for the member to both access and retain the electronic record.



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Establishing Consent

- Consent must be affirmatively granted
- Consent must be given or confirmed electronically
- In order to establish consent – member must reasonably demonstrate the ability to access electronic information that is in the form in which you intend to provide the record
- Determine how you will provide the record
- Devise a “test” to ensure the member can access the electronic record in the format in which you are providing it



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Subsequent Disclosures

- Outlines the revised hardware and/or software requirements;
- Provides another opportunity for the consumer to withdraw consent; and
- Requires the consent handshake to be redone.



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Excludes certain documents such as:

- Wills and Trusts
- Domestic relations
- UCC court orders
- Notices of utility turnoff
- Foreclosures, evictions
- Cancellation of health insurance
- Serious product recalls or failures



UETA Basics

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- A record or signature may not be denied legal effect or enforceability solely because it is in electronic form
- A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation
- If a law requires a record to be in writing, an electronic record satisfies the law
- If a law requires a signature, an electronic signature satisfies the law
- MCL 450.831- 450.849 et. seq.



UETA

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- Applies to any electronic record or electronic signature created, generated, sent, received, or stored on or after a particular date designated in the state statute
- Is permissive – not mandatory
- Applies only to transactions between parties who have agreed to conduct a transaction by electronic means



UETA

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- Provides that a party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means
- Effect of any of its provisions may be varied by agreement
- Permits parties to agree for future notices to be given only on paper
- Similar to ESIGN – but does not have the same protections
- Does not displace timing and content requirements from other laws



UETA

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- Does not specify how the agreement to conduct transactions via electronic means is to be proven/documented
- Allows a tape recording of a voice conversation to qualify as an electronic record that can replace a notice required by law to be in writing
- Does not impose specific hardware and software requirements for the member
- Does not fully address the inherent differences that may exist between paper documents and electronic records



UETA

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Send and Receive

- UETA ties the determination of whether something has been sent or received to the communication systems used by the parties
- Specifies unless otherwise agreed – they are sent or received from the parties' principal place of business or residence



UETA & ESIGN

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Federal Preemption – A Closer Look

- Application is “limited” to commercial (including consumer) and business transactions in or affecting interstate or foreign commerce
- Limitation is based on breadth of Interstate Commerce Clause in Constitution
- Any interstate nexus should be sufficient
 - Use of interstate communications (phone, internet)
 - Involvement of federally insured or regulated institution (credit union)
- Section 102 of ESIGN indicates that a state UETA can only supersede ESIGN with regard to state law. Since the e-Regs are federal requirements, you need to follow ESIGN to obtain the member's consent prior to delivering the various disclosures electronically.



Credit Union Bylaws

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- Federal Credit Union Bylaws
Article II. Qualifications for
Membership Selection
Sections 1 – 5
- **Section 2:** Applications for
membership from persons
eligible for membership
under Section 5 of the
charter must be signed by
applicant on forms approved
by the board



Credit Union Bylaws

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- Michigan State Chartered Credit Union Bylaws
- **Section 3:** Applications for Membership
 - Applications for membership must be in writing on a form
prescribed by the board of directors, and must be signed by the
applicant



Bylaws & ESIGN

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These both say in writing on a form approved by the board. Does ESIGN and UETA permit electronic signatures?

Remember

UETA

- If a law requires a record to be in writing, an electronic record satisfies the law
- If a law requires a signature, an electronic signature satisfies the law

ESIGN

1. A signature, contract, or other record relating to such transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form; and
2. 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.



State Chartered Credit Unions

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DIFS Interpretation

- Confusion at state level
 - Currently DIFS interprets that an online application requires an actual signature as opposed to an electronic signature

UETA MCL 450.839(1-2)

- Provides that an electronic record and/or electronic signature is attributable to a person if it is the act of the person.



Internal Controls

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Three Key Areas

- Proving Consent
- Authenticating the person(s) identity
- Establishing authority to enter into the agreement or electronically sign for membership



Internal Controls

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- Bank Secrecy Act Compliance
 - 31 CFR 1020.220 – Permits for procedures for verifying a member's identity by way of documents, OR through non-documentary methods.
 - 31 CFR 1020.220 – Non-documentary methods - Financial Institutions may verify identity by:
 - Contacting a member
 - Independently verifying the member's identity through the comparison of information provided by the member with information obtained from a consumer reporting agency (Using Out-of-Wallet questions)
 - Public database, or other source
 - Checking references with other financial institutions
 - Obtaining a financial statement



Internal Controls

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Credit union's non-documentary procedures must:

- Address situations where the member opens the account without appearing in person at the credit union
- Establish procedures to reflect this process accordingly
- Should be addressed in BSA Policy
- Should also be addressed in BSA Risk Assessment



Internal Controls

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- Are required disclosures provided at account opening?
 - Truth in Savings and Reg E and ESIGN require that disclosures are provided prior to account opening
 - * Are disclosures presented on the system until the member clicks the box accepting disclosures electronically
 - * ESIGN Disclosure
 - * Proving consent



Internal Controls

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Verifying Field of Membership

- How will you verify applicant is within your FOM?
- Dropdown for them to select?
- Do you have an internal process for which staff obtains additional verification prior to fully opening the account?



Record Retention

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Record Retention - ESIGN

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- NCUA does not recommend any particular format for record retention in Part 749, but they say the “format” you use must:
 - reflect the information in the record accurately;
 - be accessible to all persons entitled to it by statute, regulation, or rule of law; and
 - be capable of being reproduced by transmission, printing or otherwise.



Record Retention - ESIGN

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- To satisfy electronic retention requirements (as long as your documents are in electronic form) keep them:
 - accurate;
 - accessible; and
 - capable of being reproduced for later reference.
- Document retention policies apply to electronic documents as well as paper copies
- Members are not required to keep an original paper copy.



Record Retention - UETA

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- If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:
 - accurately reflects the information set forth in the record after it was first generated
 - remains accessible for later reference
- A requirement to retain a record in accordance as described above, does not apply to any information, the sole purpose of which is to enable the record to be sent, communicated, or received.
- The requirement can be met by using the services of another person (to retain the record) if the requirements described above are satisfied.



Record Retention - UETA

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- If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with the provisions described above
- A record retained electronically in accordance with these provisions satisfied a law requiring a person to retain a record for evidentiary, audit or like purposes, unless a law enacted after the state adopts UETA, specifically prohibits the use of an electronic record for the specified purpose.
- A governmental agency may specify additional requirements for the retention of records subject to that agency's jurisdiction.



Safe Harbor

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- If a credit union has a policy and procedures in reference to timing of retention and destruction of documents (i.e., all email deleted after 5 years); and
- You have made a “good faith” effort to preserve your documents, even after you received the request to provide the documents, you find they have been destroyed;

The rule states:

“Absent exceptional circumstances, a court may not impose sanctions under these rules for failing to produce [ESI – electronically stored documents] lost as a result of routine, good faith operation of an electronic information system.



Questions?

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