



LAW ALERT

March 25, 2020

By: Seth I. Rubin, Esq.

RMF
RUSKIN MOSCOU FALTISCHEK P.C.
Smart Counsel. Straight Talk.

E-Signatures and Notary Acknowledgements in the Age of COVID-19

In the age of COVID-19, the use of electronic signatures (e-signatures) and remote notary acknowledgements has become a societal imperative, as social distancing and remote working requirements have made in-person execution and acknowledgement of documents increasingly difficult, if not impossible. Given the current circumstances, a review of e-signature and remote notary acknowledgement requirements is in order so parties to transactions properly understand what can and cannot be accomplished with these tools.

Electronic Signatures

The U.S. Electronic Signatures in Global and National Commerce Act (ESIGN) was enacted in 2000, and permits the use of e-signatures in various transactions in place of so-called “wet” signatures. Although e-signatures have been permitted in New York State since the passage of ESIGN, the Electronic Signatures and Records Act (ESRA) governs the use of e-signatures in New York. Together, these laws provide that e-signatures cannot be denied legal effect simply because they are in electronic form; however, the use and validity of e-signatures is not unlimited, so it is important to understand when and how the use of e-signatures is permissible.

ESIGN and ESRA each exclude from coverage certain types of documents and areas of law – e.g., wills, trusts, decisions consenting to orders not to resuscitate, powers of attorney and health care proxies. In addition, the Uniform Commercial Code places certain restrictions on the use of e-signatures. Similarly, certain regulatory agencies may require the use of wet signatures. However, where regulatory or other legal requirements do not expressly prohibit the use of e-signatures, the parties to a transaction can – and in the age of COVID-19, should – agree that the use of e-signatures is permissible.

It is important to note that the authenticity, validity, and enforceability of e-signatures may be challenged. In order to provide contracting parties the strongest possible argument in favor of e-signatures, the parties should be able to authenticate the individual signature used and demonstrate the party’s intention to be bound. New York businesses should be careful to control and monitor the use of e-signatures, which should only be available to a limited number of people who actually have the authority to bind the business. These people should clearly indicate in an electronic communication that they do, in fact, have such authority and there should be a business record kept that confirms such authority.



Remote Notary Acknowledgements

In addition to the use of e-signatures, in response to the COVID-19 outbreak, the State of New York, pursuant to Executive Order No. 202.7, now permits the use of “remote” notary acknowledgement through the use of real-time audio-video conferencing, provided that certain conditions are met. These conditions include: (1) if the person seeking the notary’s services is not personally known to the notary, he/she must present a valid photo ID during the video conference; (2) the video conference must allow for direct interaction between the person and the notary; (3) the person must affirmatively represent that he/she is physically situated in the State of New York; (4) the person must transmit by fax or electronic means a legible copy of the signed document directly to the notary on the same date it was signed; (5) the notary may notarize the transmitted copy of the document and transmit the same back to the person; and (6) the notary may repeat the notarization of the original signed document as of the date of execution provided the notary receives such original signed document together with the electronically notarized copy within thirty days after the date of execution. The use of remote notary acknowledgement pursuant to Executive Order 202.7 is effective currently through April 18, 2020 (unless further extended).

E-Signature Providers

Neither ESIGN nor ESRA requires that a particular provider be used for e-signatures. There are many companies offering such tools, including Adobe, DocuSign, and RightSignature. Best practices require that businesses use tools that provide for maximum confidentiality, enhanced data security, and audit trails which support the authenticity of e-signatures. When determining which provider to use, businesses should consider additional key factors such as multifactor signatory authentication, linking the signature to the contract, and recording the date, time and location of execution.

Conclusion

Based on the existing state of the law, determining whether and how to use e-signatures and remote notary acknowledgements in your transaction must be viewed with respect to the specific facts and circumstances of the transaction. We are happy to assist with that assessment and answer questions relating to the use of e-signatures and remote notary acknowledgements.

If you have any questions, please contact
Seth I. Rubin, Esq.
(516) 663-6691
srubin@rmfpc.com