

The Wave of the Future: Can CAAs Operate and Conduct Business Electronically?

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Pushing paper to get the job done is so yesterday! It seems as if everything these days can be done more quickly, accurately and effectively using electronic means. However, like many organizations, Community Action Agencies (CAAs) are not sure what actions they can take electronically, how they can take them and, most importantly, whether they are legal. CAAs frequently ask: Can I submit a grant request electronically? Can I sign an agreement or vendor contract using an electronic signature? What exactly is an electronic signature? Is it possible to use electronic time cards? Which laws apply? This article addresses these questions and is intended to help CAAs better understand their options, benefit from using electronic means to operate and conduct business, and comply with applicable laws so that they too can save significant amounts of time and money by taking advantage of electronic transactions and signatures.

In the late 1990s and early 2000s, federal and state governments passed laws that allow for businesses, along with government agencies, to operate and conduct transactions electronically. These laws include the Government Paperwork Elimination Act of 1998 (GPEA), the Electronic Signatures in Global and National Commerce Act of 2000 (E-SIGN), and state adoptions of the Uniform Electronic Transactions Act (UETA), which address reports to federal agencies (GPEA) and the use of electronic signatures and records in business transactions (E-SIGN and UETA). E-SIGN was adopted not only to give legal effect to the use of electronic means to execute business contracts and maintain relevant records, but also to promote the adoption of UETA by states. Like E-SIGN, UETA facilitates electronic transactions. The GPEA, on the other hand, requires federal agencies to provide individuals or entities that deal with those agencies the option of submitting information and maintaining records electronically. The following questions and answers highlight the significant aspects of each of these pieces of legislation and how they apply to CAAs.

Can I submit a grant request electronically?

GPEA

When does GPEA apply?

Federal agencies have legal obligations under GPEA to accept most electronic records submitted by the public.¹ GPEA generally requires federal agencies to specify a procedure that provides for the acceptance of, and allows the public to optionally use, electronic documents, signatures, and recordkeeping in transactions with federal agencies, when practical.² This opens the door for federal grantees to use electronic recordkeeping and reporting for the purposes of federal grants. A significant number of federal grant forms

may now be electronically retrieved, filled out, signed and filed with a federal agency. Moreover, all discretionary federal grants offered by the 26 federal grant-making agencies can be searched and a significant number can be applied for on www.grants.gov.³ However, as GPEA mostly applies to the federal government primary transaction partners, grantees that make further subgrants are not required by GPEA to permit the use of an electronic option and may require that their subgrantee or contractors' partners provide paper copies of any required reports.

Does GPEA permit electronic document retention?

Can I sign an agreement or vendor contract using an electronic signature?

Under GPEA, grantees are generally allowed to retain electronic records rather than paper originals.⁴ CAAs seeking to retain records electronically should confirm the procedures for electronic retention with each funding source before relying on electronic records to meet record retention requirements, as federal agencies may have specific procedures for the acceptance of electronic records. For instance, the U.S. Department of Health and Human Services (HHS) has issued guidance that interprets record retention regulations to allow grantees to maintain electronic records in an electronic format if prior written notice is provided to HHS of the intent to maintain electronic records.⁵

Does GPEA permit electronic timekeeping?

What laws apply?

GPEA ensures that electronic records and signatures are not to be denied effect simply because they are in electronic form. However, individual federal agencies may specify standards for the acceptance of electronic records. Therefore, as a general matter, electronic records of employee time worked that are electronically signed should be acceptable to federal agencies. However, because individual agencies may establish their own electronic records standards and most CAAs will only want to have one timekeeping system, it is important to confirm that any electronic timekeeping system used complies with the strictest standards of any agency for which the records are kept. One example of a federal agency that has issued guidance on the use of electronic timekeeping is the Corporation for National and Community Service's Americorps program; this guidance allows for grantees of the program to use electronic timekeeping subject to certain requirements.⁶ Other examples of programs accepting electronic reporting and signatures are the Department of Energy's (DOE) Weatherization Assistance Program (WAP) and the Federal Housing Administration's (FHA) application process for mortgage insurance. The DOE has determined that electronic

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signatures on Davis-Bacon Act certified payroll forms (WH-357 forms) have the same legal effect as handwritten signatures as long as the state agency overseeing the WAP ensures the accuracy of the electronic signature process.⁷ The FHA recently announced that it will begin accepting electronic signatures on third-party documents originated and signed outside the lender's control, such as real estate contracts.⁸

What is an example of a federal agency that provides an electronic reporting option to grantees?

One example of a federal agency providing an electronic reporting option to grantees is the Administration for Children and Families (ACF) within HHS. ACF is responsible for federal programs that promote the economic and social well-being of families, children, individuals, and communities, including Head Start. The Online Data Collection (OLDC) system is a convenient electronic method for submitting grant forms to HHS.⁹ Additionally, both HHS and the DOE participate in the federal government's E-Grants Initiative, whereby a variety of grant opportunities may be applied for on the www.grants.gov website.¹⁰

Are federal agencies limited in how they may use the data collected in the electronic filing services pursuant to GPEA?

GPEA anticipated privacy concerns and therefore limits the use of the information collected in electronic filing services by federal agencies.¹¹ GPEA directs agencies and their staffs not to use the information collected for any purpose other than facilitating the communication to consummate a transaction.¹² Exceptions do exist, however, if the entity that is the subject of the information provides affirmative consent to the additional use of the information, or if the additional use is provided by law.¹³

How does GPEA interact with existing OMB circulars?

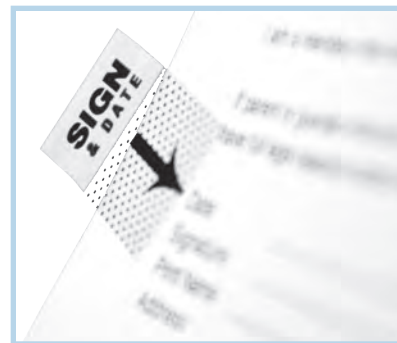
Generally, GPEA, as a federal statute, would trump inconsistent provisions from OMB circulars, federal guidance, or the codifications of OMB circulars in the form of federal agency regulations. However, one of the primary provisions of GPEA is that federal agencies are instructed to develop procedures for the acceptance of electronic documents and signatures. As a result, each federal agency may have regulations or policies that address these issues.

What Does GPEA Mean for CAAs?

GPEA instructs federal agencies to provide grantees with the option of using electronic resources to submit grant applications and post-award monitoring reports directly to a federal agency.¹⁴ GPEA allows federal agencies to make this option subject to reporting obligations set forth by individual federal agencies.¹⁵ For instance, HHS grantees receiving the majority of their funding from HHS are permitted to use electronic record retention if they provide written notice to

HHS prior to the substitution of electronically imaged records for the originals.¹⁶ It is important to note that CAAs reporting directly to the federal government (such as recipients of Head Start funds) may interact with the government electronically since such interactions are covered by the GPEA. However, CAAs in their role as subgrantees (such as recipients of CSBG of Low-Income Home Energy Assistance Program (LIHEAP) funding) should direct requests for electronic reporting to the appropriate grantee agencies (such as the state agency allocating CSBG or LIHEAP funds to the CAA) since such agencies are not subject to GPEA. Essentially, GPEA and related guidance allow CAAs to conduct government business using electronic means. However, CAPLAW recommends contacting the specific federal agency to ensure full compliance.

UETA and E-SIGN



What are UETA and E-SIGN?

UETA, drafted in 1999, is not a law, but a model for state laws on the subject of electronic transactions.¹⁷ Some form of UETA has been adopted by 47 states.¹⁸ E-SIGN is a federal statute passed in 2000 intended

to promote electronic commerce and the adoption of UETA by the states. The principal provision of E-SIGN and UETA is that a business or commercial transaction will not be denied legal effect solely because it is in electronic form.¹⁹

When do E-SIGN and UETA apply?

E-SIGN applies broadly to commercial, consumer, and business transactions in interstate commerce.²⁰ The courts have interpreted the term interstate commerce very broadly and have held that it covers transactions that use the mail, telephone, or the Internet. Generally, E-SIGN applies to transactions of a business or commercial nature among private parties and with federal or state governments, including federal and state government procurement contracts, but not to transactions that are principally for federal or state governmental purposes.²¹ Examples of transactions primarily for government purposes include applications for building permits or transitional assistance.²² Additionally, E-SIGN requires federal and state governments to accept electronic records of transactions between private parties.²³ Transactions primarily for a federal governmental purpose are covered by GPEA as previously discussed.

Generally, E-SIGN is the default rule and will preempt inconsistent state law. UETA applies to all of the same transactions that E-SIGN applies to and, unlike E-SIGN, UETA also applies to transactions that are principally for federal or state government purposes. If a state does not adopt the exact provisions of UETA in full or in part, then

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E-SIGN will apply to any transaction that is either not covered by UETA or is inconsistent with UETA. One example of where E-SIGN or UETA would apply to a CAA is when a CAA is transacting business with a vendor.

Are CAAs required to use electronic transactions or signatures?

Neither E-SIGN nor UETA requires any non-governmental party to use an electronic signature or transact business electronically in any situation, nor is any business compelled to accept electronic signatures. Rather, both E-SIGN and UETA provide that no contract, signature, or record shall be denied legal effect solely because it is in electronic form. Even though E-SIGN requires federal and state government agencies to accept electronic records and signatures as a general matter (except for contracts to which they are parties), it also allows federal or state agencies to establish regulations interpreting E-SIGN and standards for the acceptance of electronic records.²⁴ However, under UETA, modifications to laws pertaining to the state government's acceptance of electronic records are only effective if adopted after the state has adopted UETA.²⁵ The end result is that UETA, if adopted in full, establishes a new default rule for the acceptance of electronic documents by state governments that are only modified by law adopted after the state's adoption of UETA.

E-SIGN and UETA also do not require the use or acceptance of electronic signatures in a consumer transaction with a business. Normally, a CAA is not involved in a business-to-consumer transaction because CAAs mostly provide services at little or no cost to low-income individuals.²⁶ However if a CAA is engaged in a business-to-consumer transaction, E-SIGN and UETA impose different requirements regarding the use of electronic signatures. E-SIGN requires that certain consent provisions be clearly articulated to ensure that the consumer has affirmatively consented to contract electronically.²⁷ UETA, on the other hand, simply requires that both parties consent to conduct a transaction electronically and establishes that consent may be inferred from the conduct of the parties.²⁸ States that have implemented UETA as their state law may adopt additional consumer protection provisions.

What is an "electronic signature"?

UETA defines "electronic signature" as any "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 record."²⁹ The E-SIGN definition is identical to the UETA definition of electronic signature except that E-SIGN specifically mentions "contracts" as a type of record that may be associated with an electronic signature.³⁰

E-SIGN does not provide specific guidance on this broad definition, but comments to UETA provide some informal guidance. The UETA comments suggest that an electronic signature can be as sophisticated as a digital signature

using public key encryption technology or as commonplace as the mere inclusion of one's name as a part of an e-mail message.³¹ The critical elements are that the signer intended to execute or adopt the sound or symbol for the purpose of signing the related document and that the electronic signature is fairly attributable to the signer.³² While a simple e-mail may suffice, more sophisticated electronic signatures offer enhanced security or reflect a clearer intent to execute electronically.³³ It is important that CAA personnel are aware that an e-mail message can constitute a signature; any agreement formed will not be denied effect because it is in electronic form.

How do E-SIGN and UETA impact electronic and non-electronic transactions?

Both E-SIGN and UETA basically indicate that where a signature is required to complete a transaction, an electronic signature will be recognized as legally enforceable.³⁴ Any issue regarding contract formation would be covered by state laws other than UETA.³⁵

E-SIGN and UETA also specifically indicate that certain documents are exempt, including documents such as testamentary trusts and wills, as well as transactions governed by certain sections of the Uniform Commercial Code.³⁶ E-SIGN specifically exempts certain notices such as the termination of health or life insurance, foreclosure or eviction notices, product recall notifications, and the termination of utility services. These transactions are not specifically exempted by UETA as drafted by the NCCUSL.³⁷ However, states when adopting UETA may modify it to exclude other transactions.³⁸

Do E-SIGN and/or UETA permit electronic document retention?

E-SIGN prevents federal or state government agencies from requiring that records be kept in paper form.³⁹ Under E-SIGN, if a law or regulation requires that a business or commercial document be retained, that requirement is met by retaining an electronic record, so long as the record accurately reflects the information and remains accessible in a form that can be accurately reproduced for later reference.⁴⁰ However, the full adoption of UETA allows states to reimpose paper record keeping requirements. UETA essentially requires state governments to accept electronic records for record retention, evidentiary purposes, or audit purposes unless the state passes a law after the adoption of UETA that requires records be in a paper form.⁴¹

Under both E-SIGN and UETA, government agencies can specify standards for the electronic retention of records. As a result, a CAA seeking to retain records electronically, such as vendor contracts or human resources documents, should consult the government agency that regulates the retention of the records concerned.⁴² If, however, the record is generated principally for governmental purposes, such as a building permit, rather than for business or commercial purposes, it is not subject to E-SIGN but rather to GPEA.⁴³

Does E-SIGN or UETA allow agencies to specify standards for the integrity, accuracy and accessibility of electronic records?

For transactions that are regulated by federal or state agencies, E-SIGN generally preserves a federal or state agency's authority to specify standards for the integrity, accuracy and accessibility of electronic records.⁴⁴ Generally speaking, a federal or state agency may issue rules requiring the use of authentication technology with a particular level of security, but cannot limit use to specific technologies unless there is a compelling reason to do so.⁴⁵ If a state adopts UETA, then state agencies have greater freedom to determine if and how they will accept electronic records, but any requirement imposed must be specified after the state's adoption of UETA.

What Do E-SIGN and UETA Mean for CAAs?

E-SIGN and UETA (in states where it is adopted) make it possible to perform electronic transactions with vendors, clients, and subcontractors and to retain certain information related to those transactions in electronic form. Additionally, these statutes may make it possible to transact business with federal and state governments and retain records in electronic form. However, before transacting electronically with a government agency or choosing to electronically retain records related to a government-funded program, it is essential that CAAs confirm not only if the government agency will accept the records but also if the government agency has specific requirements for format and/or method. Both E-SIGN and UETA are intended to ensure that transactions are not invalidated simply because they are in electronic form.

Bottom Line – Proceed, but do so slowly and deliberately

The bottom line for CAAs is that federal and state governments have passed laws that allow for CAAs to transact business electronically in a number of settings. However, a lot of uncharted territory relating to electronic transactions and document retention still exists. Thus, to take full advantage of this capability and maintain legal compliance, a CAA should contact its funding sources and regulators with specific descriptions of its plans to ensure that the formats of electronic records and signatures meet guidelines or regulations issued by the government agencies. Additionally, in regard to transactions with vendors, clients, and employees, a CAA should consult with an attorney licensed in their respective state to ensure that its interests are protected and that it complies with applicable laws.

1. Public Law 105-277, Title XVII, §1707 (1998).
 2. Public Law 105-277, Title XVII, §1704.
 3. See Grants.gov, available at <http://www07.grants.gov/index.jsp> (last visited 04/09/2010).
 4. Public Law 105-277, Title XVII, §1707.
 5. Use of Electronically Imaged Storage, OGAM AT 99-1 (August 9, 1999) available at: <http://www.hhs.gov/asrt/og/grantinformation/ogamat.html>; 45 C.F.R. 74.53(c); 45 C.F.R. 92.42(d).
 6. Electronic timekeeping systems, Americorps FAQ No. 0611PU2, available at http://www.americorps.gov/help/ac_sn_all/C_7_Electronic_timekeeping_systems.htm (last visited 03/26/2010).
 7. DOE Q&A #40 available at http://apps1.eere.energy.gov/weatherization/davis_bacon_faqs.cfm#payroll (last visited 04/08/2010).
 8. FHA to Accept Electronic Signatures on Third Party Documents, HUD Press Release April 8,

2010, available at http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo_10-075 (last visited 04/09/2010).
 9. Available at <https://extranet.acf.hhs.gov/ssi/> (last visited 03/26/2010).
 10. For additional information on electronic transactions with the DOE and HHS visit <https://extranet.acf.hhs.gov/oldcdocs/index.htm> (HHS) and <http://e-center.doe.gov/> (DOE) (last visited 03/26/2010).
 11. Public Law 105-277, Title XVII, §1708.
 12. Id.
 13. Id.
 14. Public Law 105-277, Title XVII, §§ 1702, 1704.
 15. See Implementation of the Government Paperwork Elimination Act, Section 2: What GPEA procedures should agencies follow?, Office of Management and Budget, available at http://www.whitehouse.gov/omb/fedreg_gpea2/?print=1 (last visited 03/26/2010); OMB Circular A-130.
 16. Use of Electronically Imaged Record Storage, HHS Office of Grants and Acquisition Management Action Transmittal 99-1 (08/09/1999).
 17. UNIF. ELEC. TRANSACTIONS ACT (1999) available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf> (last visited 03/26/2010).
 18. Uniform Electronic Transactions Act, National Conference of State Legislatures Website, available at <http://www.ncsl.org/default.aspx?tabid=13484> (last visited 03/23/2010).
 19. 15 U.S.C. §7001 (a)(1); UNIF. ELEC. TRANSACTIONS ACT §7.
 20. 15 U.S.C. §7001.
 21. Case & Statute Comments: The Massachusetts Uniform Electronic Transactions Act: Continuity and Change, MASS. L. REV., Summer 2004, at 40, 44, available at http://www.massbar.org/media/35899/ir_v89n1.pdf (last visited 03/26/2010).
 22. Id.
 23. 15 U.S.C. §7001 (b)(1); Case & Statute Comments, MASS. L. REV., Summer 2004, at 40, 46, available at http://www.massbar.org/media/35899/ir_v89n1.pdf (last visited 03/26/2010).
 24. 15 U.S.C. §7004 (b)(1); OMB Memorandum M-00-15, ¶4 (September 25, 2000).
 25. UNIF. ELEC. TRANSACTIONS ACT §12(f).
 26. See 15 U.S.C. §7006 (1), (13).
 27. 15 U.S.C. §7001 (c)(1).
 28. Official Comments to UNIF. ELEC. TRANSACTIONS ACT, §5.
 29. UNIF. ELEC. TRANSACTIONS ACT §2(8).
 30. 15 U.S.C. §7006 (5).
 31. Official Comments to UNIF. ELEC. TRANSACTIONS ACT, §2(8).
 32. Id.
 33. Id.
 34. 15 U.S.C. §7001(a); UNIF. ELEC. TRANSACTIONS ACT §7.
 35. Official Comments to UNIF. ELEC. TRANSACTIONS ACT, §7.
 36. Transactions concerning sales and leases (UCC Articles 2 and 2A) are covered by E-SIGN and UETA, as are transactions covered by UCC §1-107 and §1-206 (these provisions are specifically exempted from the exemptions). 15 U.S.C. §7003 (a)(3); UNIF. ELEC. TRANSACTIONS ACT, §3.
 37. 15 U.S.C. §7003 (b). There are also exemptions for court filings, documents concerned with family law, and "any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials." 15 U.S.C. §7003 (a) - (b); see UNIF. ELEC. TRANSACTIONS ACT §3.
 38. Official Comments to UNIF. ELEC. TRANSACTIONS ACT, §3; For example, the Massachusetts UETA includes a number of exceptions additional to the exceptions identified in the UETA as drafted by the NCCUSL. Mass. Gen. Laws ch. 110G, § 3(b); UNIF. ELEC. TRANSACTIONS ACT §3.
 39. 15 U.S.C. §7004 (c)(1). Federal and state government agencies can require that records be kept in a paper format if "(i) there is a compelling governmental interest relating to law enforcement or national security for imposing such requirement; and (ii) imposing such requirement is essential to attaining such interest." 15 U.S.C. §7004 (b)(3)(B).
 40. 15 U.S.C. §7001 (d)(1).
 41. UNIF. ELEC. TRANSACTIONS ACT §12.
 42. Essentially, these statutes provide that governmental agencies are required to accept electronic records unless the agencies specifically require them in another format. Official Comments to UNIF. ELEC. TRANSACTIONS ACT §12.
 43. 15 U.S.C. §7001 (d)(1).
 44. 15 U.S.C. §7004.
 45. Id.



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