January 4, 2001

VIA ELECTRONIC MAIL & HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Attn: Laurie Duarte

Re: FAR Case 2000-304
Proposed Rule: Electronic Signatures
65 Federal Register 65698 (November 1, 2000)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees contain a balance of members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors and, therefore, should not be construed as representing the policy of the American Bar Association. [1]

In order to further “Government participation in electronic commerce when conducting Federal procurements,” the FAR Council issued its proposed rule on electronic signatures on November 1, 2000. 65 Fed.Reg. 65698 (November 1, 2000). The proposed rule seeks to amend the definitions of (i) “electronic commerce,” (ii) “in writing or written,” and (iii) “signature or signed,” as well as to add a subparagraph (d) to the policy provisions in FAR 4.502. The Section endorses efforts to update the FAR in light of legal and technical developments and agrees that these definitions should be amended. Nevertheless, as set forth below, the Section believes that the definitions should be aligned with those contained in the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (“E-SIGN”) and, accordingly, recommends proposed revisions. In addition, proposed subparagraph (d) of FAR 4.502 is inconsistent with E-SIGN and should be removed.

Background

The definitions of “in writing or written” and “signature or signed” were added to FAR 2.101 with a number of other changes five years ago “in order to remove any barriers to the use of electronic data interchange in Government contracting.” 60 Fed.Reg. 34735 (July 3, 1995). Most of these changes were designed to enable FACNET. Three years later, however, FACNET had largely been abandoned and additional changes were needed. In October 1998, the definition of “electronic commerce” was added, and other revisions were made, in order to “remov[e] FACNET-specific terms and requirements and replac[e] them with more flexible electronic commerce policies.” 63 Fed.Reg. 58590, 58591 (October 30, 1998). The fact that the three fundamental definitions addressed here require amendment so soon after they were initially promulgated is testimony to the rapidly changing legal and technical landscape in the area of electronic commerce.
Three pieces of legislation which are relevant and important to this analysis are summarized below:

- **The Government Paperwork Elimination Act** (“GPEA”), Title XVII of Division C of Pub.L. No. 105-277, 112 Stat. 2681-749. In October 1998, Congress enacted GPEA, which directed the Office of Management and Budget (“OMB”) to develop procedures for, *inter alia*, the use and acceptance of electronic signatures by executive agencies. GPEA included a definition of “electronic signature” and also addressed the enforceability and legal effect of electronic records and electronic signatures. GPEA did not include language expressly defining its scope; however, on its face, GPEA does not apply to commercial or business transactions as that term is defined in later legislation (see discussion below). Rather, it is directed more generally at the interface between the Government and its citizens relating to governmental (rather than commercial or business) affairs. As such, it presumptively does not apply to Federal procurement where the Government is acting as a market participant (i.e., where the Government is engaged in commercial or business affairs).

- **The Uniform Electronic Transactions Act** (“UETA”), which was adopted by The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in July 1999. The purpose of UETA, which has been enacted in 23 States to date,[2] is to put electronic records and electronic signatures on a par with paper records and pen-and-ink signatures (i.e., to ensure that the medium is not the message). Like GPEA, UETA defined “electronic signature,” but the UETA definition is materially different from the definition of that term contained in GPEA. UETA applies to electronic records and electronic signatures relating to a transaction, and “transaction” is defined as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.” UETA §§1(16), (2) (emphasis added). One of UETA’s fundamental philosophies is that legislation in this area should be minimalist and go no further than absolutely necessary to remove barriers to electronic commerce. It should not change substantive laws. Another fundamental philosophy is the importance of technology neutrality (i.e., the avoidance of embedding particular technologies in the law and giving them preferential treatment).

- **Electronic Signatures in Global and National Commerce Act**, Pub. L. No. 106-229, 114 Stat. 464. In June 2000, Congress enacted E-SIGN, which is in many respects modeled on UETA. The drafters were clearly informed by UETA’s provisions and its philosophy of favoring technology neutrality and, with the possible exception of issues relating to consumer protection, minimalism,[3] E-SIGN applies to “any transaction in or affecting interstate or foreign commerce,” but defines “transaction” somewhat more narrowly than UETA so as to exclude transactions relating to governmental affairs.[4] Thus, under E-SIGN, a “transaction” is any action or set of actions relating to the conduct of *business, consumer, or commercial affairs* between two or more persons, where "persons" is defined to include governmental agencies. Like GPEA and UETA, E-SIGN places electronic records and electronic signatures on a par with their paper-and-ink counterparts. Significantly, E-SIGN defines “electronic signature” in precisely the same manner as UETA. Perhaps more significantly, E-SIGN expressly provides that technology neutrality is a requirement for all covered transactions except in connection with Federal procurement contracts:

  (4) Exceptions for Actions by Government as Market Participant. Paragraph (2)(C)(iii) [requiring technology neutrality] shall not apply to the statutes, regulations, or other rules of law governing procurement by the Federal … government….or any agency or instrumentality thereof. E-SIGN §104(b)(4).

In September 2000, OMB issued guidance on agency implementation of E-SIGN. See OMB Memorandum M-00-
15. This guidance specifically concluded that E-SIGN applies to Federal procurement contracts and is controlling (to the exclusion of GPEA). Thus, paragraph A.5 of the OMB Memorandum states:

5. Federal Agency Contracts

E-SIGN does not force contracting parties (whether the government or the private sector) to use or accept electronic signatures and records. If agencies and the parties with whom they contract choose to use electronic methods, E-SIGN gives legal effect to those methods. Moreover, E-SIGN expressly permits agencies to require the use of specific technologies (such as specific authentication methods) in connection with Federal procurement contracts (Section 104(b)(4)). It is important to distinguish these points from other non-procurement electronic transactions provided for under GPEA, where Federal agencies ARE compelled (when practicable) to accept electronic forms with electronic signatures by October 2003.

OMB Memorandum, at 3 (emphasis on the word “ARE” in original; other emphasis added).

The OMB guidance also addressed the distinction between “business and commercial” affairs and “governmental” affairs:

Note that if a transaction is not within the scope of E-SIGN because it is governmental, rather than commercial, consumer, or business in nature, agencies must still pursue options for electronic collection, maintenance, and disclosure of information, as well as electronic signatures, under GPEA. The latter statute generally requires agencies to recognize the validity of electronic submissions in their programs by October 2003 (when practicable), in accordance with guidance issued by [OMB].

OMB Memorandum, at 3. In other words, GPEA covers non-procurement, governmental transactions, whereas E-SIGN governs procurement transactions in which the Government is acting as a market participant. Under E-SIGN, the parties may choose whether or not to employ electronic media in their business and commercial transactions (including procurement transactions). Under GPEA, Federal agencies are required to accept electronic signatures and records in connection with governmental transactions.

Thus, for purposes of the proposed amendment to the FAR, the provisions of E-SIGN and not the provisions of GPEA are controlling.

Proposed Changes to the FAR

The proposed changes to the FAR definitions, when compared to the existing versions of those definitions, are modest. Nevertheless, with or without the changes, the definitions of “signature or signed” and “electronic commerce” are confusing, inconsistent with E-SIGN, and involve substantive concepts that are best left to provisions elsewhere in the FAR. These issues are addressed below.

1. Definition of “Signature or Signed”

The proposed rule (as well as the existing version of the FAR) attempts to define “signature or signed” so as to cover both pen-and-ink signatures and electronic signatures. In doing so, the proposed rule apparently seeks to incorporate portions of the definitions of “e-signature” from both GPEA and E-SIGN, despite the fact that the definitions in those two statutes are materially different and that E-SIGN should control. For comparison purposes, the three different definitions are set forth below:

<table>
<thead>
<tr>
<th>PROPOSED FAR 2.101 DEFINITION</th>
<th>GPEA DEFINITION OF “ELECTRONIC SIGNATURE”</th>
<th>E-SIGN DEFINITION OF “ELECTRONIC SIGNATURE”</th>
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<tr>
<td>Signature or signed means the</td>
<td>The term “electronic signature” means a</td>
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Part of the confusion in the proposed FAR definition lies in the fact that it is trying to define "signature" as well as "electronic signature" in the same definition. The Section recommends that the FAR definition of "signature or signed" be abandoned. There is no need to provide a generic definition of "signature" because the dictionary definition and its common meaning are well understood. The original FAR definition, added in 1995, was added solely to address electronic signatures; prior to that time, there was no perceived need for a definition of the generic term "signature." Indeed, the drafters of UETA -- which does not define signature -- emphasized this point in the Comments on the definition of "electronic signature":

The idea of a signature is broad and not specifically defined. Whether any particular record is "signed" is a question of fact. Proof of that fact must be made under other applicable law. This Act [and the definition of electronic signature] simply assures that the signature may be accomplished through electronic means.

UETA §2, Comment on Definition of Electronic Signature (emphasis added). E-SIGN adopts the UETA definition of electronic signature and assures that the signature may be accomplished through electronic means. There is no need to define "signature" as a generic term.

However, the Section also recommends that the E-SIGN definition of "electronic signature" be included in the FAR for two reasons. First, GPEA has a different definition of that term. As is obvious from the chart above, there is some confusion about the applicability of the GPEA definition. Thus, it is important to include the actual definition from E-SIGN in order to clarify that the E-SIGN definition is controlling. Second, use of the "minimalist" E-SIGN definition will maximize flexibility and minimize the potential for confusion about what is "required" of a signature, rather than how one "proves" a signature.

The Section recognizes that the Government may choose to specify procedures for attribution, authentication, and security of electronic signatures in connection with its procurement contracts. However, any such substantive provisions should be included elsewhere in the FAR. There is no need to include the concepts of attribution, authentication, or security in a definition. To the contrary, their inclusion only creates confusion and suggests that an electronic signature must, in all cases, be self-authenticating or self-attributing. Pen-and-ink signatures are never self-authenticating and rarely self-attributing; if someone denies that a pen-and-ink signature is his or hers, the parties must resort to external means of proof to determine the result. As technology progresses, there will be instances in which, even in the context of a procurement contract, the Government does not need self-authenticating electronic signatures or is satisfied that such extraordinary security procedures are not justified.

For this reason as well, the Section recommends that the definition of electronic signature included in the FAR be limited to the E-SIGN definition, without any reference to concepts such as verification, attribution, or authentication.

Those concepts are inconsistent with the generic understanding of “signature” in the paper world. They would unnecessarily embody in the definition of electronic signatures concepts that are not embodied in the notion of a pen-and-ink signature.[7]

2. Proposed Subparagraph (d) to FAR 4.502

As noted above, in the context of Federal procurement contracts, E-SIGN controls rather than GPEA. Accordingly, it is inaccurate to state, as does the proposed subparagraph (d) to FAR 4.502, either that: (a) GPEA requires agencies to allow individuals or entities the option to submit information or transact with the agency electronically; or (b) the requirement of GPEA includes execution of contracts and associated records using electronic signatures of the offerors or contractor and the agency.

E-SIGN expressly allows the parties to Federal procurement contracts to choose whether or not to use electronic media. See E-SIGN §101(b)(2). See also OMB Memorandum, at 3 (“E-SIGN does not force contracting parties (whether the government or the private sector) to use or accept electronic signatures and records”). Accordingly, proposed subparagraph (d) should be deleted as inconsistent with Federal law.

3. Definition of “Electronic Commerce”

The proposed definition of “electronic commerce” is unnecessary for purposes of this rule because it does not provide any further guidance regarding the use of electronic signatures than that already provided in the proposed rule, and the narrow language contained in the rule may soon render the definition obsolete. Specifically, the definition unnecessarily enumerates specific technologies and technical terminology that might become outmoded (i.e., “electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds, transfer or electronic data interchange”). The Section recommends that this definition be deleted from the FAR, and that the E-SIGN definition of "electronic" be included instead.[8]

4. Definition of “In Writing or Written”

The proposed rule’s definition of “in writing or written” also is inconsistent with E-SIGN. Specifically, the proposed definition of “writing” is more narrow than the definition of “electronic record” contained in E-SIGN.[9] The proposed rule limits a “writing” to a record that can be “read, reproduced, and stored” (emphasis added), while the E-SIGN definition is more inclusive because it contemplates records that might be “created, generated, sent, communicated, received, or stored” (emphasis added). The proposed rule should be made consistent with E-SIGN, absent a compelling reason to the contrary. To correct this inconsistency, the Section recommends the following language:

In writing or written means any expression of information in words, numbers, or other symbols, including electronic expressions, that can be created, generated, sent, communicated, received, or stored.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Gregory A. Smith
Chair, Section of Public Contract Law

cc: Norman R. Thorpe
Mary Ellen Coster Williams
Herbert J. Bell, Jr.
Patricia A. Meagher
Proposed Rule: Electronic Signatures

Marshall J. Doke, Jr.
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Kent R. Morrison
Lynda T. O'Sullivan
Co-Chairs and Vice Chairs of the
Electronic Commerce Committee
Richard P. Rector

[1] Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section’s consideration of these comments, and she abstained from voting to approve and send this letter.

[2] States in which UETA has been enacted include Arizona, California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah and Virginia. Text of UETA and the reporter’s comments may be found at the NCCUSL web site, www.nccusl.org.

[3] Evidence of how closely Congress wanted to follow the UETA constructs is found in Section 102 of E-SIGN, which mandates that State law in this area is preempted unless the States adopt UETA.

[4] Statements on the floor of the House of Representatives as E-SIGN was introduced include references to this exclusion. Congressman Dingell explained that “[t]he Conferees specifically rejected including ‘Governmental’ transactions. Members should understand that this bill will not in any way affect most Governmental transactions, such as law enforcement actions, court actions, issuance of Government grants, applications for or disbursement of Government benefits, or other activities that the Government conducts that private actors would not conduct.” 146 Cong. Rec. H4357 (June 14, 2000) (emphasis added).

[5] E-SIGN §101(a) thus provides:

…with respect to any transaction in or affecting interstate or foreign commerce … 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 … 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.

[6] In this regard, the Section notes that UETA addresses attribution of an electronic signature under a separate section, UETA §9, rather than in the definition of "electronic signature." Furthermore, the comments to UETA §2 explain that the term "authentication," used in other laws, often has a narrower meaning and purpose than an electronic signature as that term is used in UETA. In E-SIGN, Congress adopted the UETA definition of electronic signature and decreed that State law is to be pre-empted by E-SIGN to the extent that States do not adopt UETA. Accordingly, the constructs and interpretive language of the comments to UETA should be given special weight.

[7] Cf. E-SIGN §104(b)(2)(C)(ii)(I) (stating that Federal regulatory agencies may only adopt regulations interpreting E-SIGN if they find that the methods selected are “substantially equivalent to the requirements imposed on records that are not electronic records”).

[8] The E-SIGN definition is at §106(2): "The term 'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities."

[9] The E-SIGN definition provides: “The term ‘electronic record’ means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.” E SIGN §106(4).