

## FUND FINANCE FRIDAY

**E-Signatures? E-Sign Me Up!**

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**By Eric Starr**  
Associate | Fund Finance

In the not-too-distant past, execution of a major commercial transaction involved gathering the parties (and their lawyers) in a large conference room to sign (*with a pen!*) multiple counterparts of a suite of documents, each dutifully arranged by a junior staffer. The pomp and circumstance of the previous era's closing rooms have given way to more efficient, convenient and cost-effective methods. Today's closings are typically uneventful, digital affairs—conducted from participants' respective offices (or on-the-go via mobile devices) and made possible in part by the advent of digital and electronic signatures. The latter category (think DocuSign, as opposed to PDFs or faxes) gives rise to questions of validity and enforcement.

Around the turn of the new millennium, legislators across the country began recognizing the need to create laws governing this burgeoning technology and provide certainty to both commercial actors and consumers. As a result, federal lawmakers enacted the Electronic Signatures in Global and National Commerce Act ("ESIGN") and 47 states enacted the Uniform Electronic Transactions Act ("UETA"); the states (including New York) that did not enact UETA adopted substantially similar legislation. Under ESIGN and UETA, an e-signature is essentially any mark or symbol coupled with the signatory's intent to execute the document to which such mark or symbol is attached. Importantly, under these legal regimes, both parties must consent to conducting the transaction electronically—a requirement typically satisfied in sophisticated commercial transactions with express provisions allowing for electronic execution and transmission.

Electronic execution and contract formation is an interesting and still-developing area of modern commerce. As a result, individual firms and institutions vary widely with respect to internal policies prohibiting or allowing e-signatures and the procedures required for accepting e-signatures. While the enforceability of contracts executed by electronic means is largely addressed by ESIGN and UETA, questions still remain that both business and legal professionals should weigh carefully.

Principal among these questions is what should be required to provide assurances that e-signed documents are genuine and enforceable. Typically, a legal opinion is obtained attesting to due authorization/execution to provide this coverage. While the due authorization/execution opinions commonly include the assumption that signatures are genuine, Secretary's Certificates certifying the genuineness of officers' signatures are also customarily provided to both the relying party and the opinion giver. Finally, if commercial e-signing platforms (such as DocuSign) are employed, such products' security systems and authentication services provide significant additional comfort that an e-signature is both genuine and enforceable—comfort, in fact, that rivals or exceeds anything short of an old-school closing room.