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ELECTRONIC UFOCS NOW A REALITY

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On June 30, 2000, the President signed into law the Electronic Signatures in Global and National Commerce Act ("E-Sign"), a law intended to facilitate the use of electronic records and signatures. E-Sign provides that, notwithstanding any statute, regulation or other rule of law, no signature, contract or other record relating to a transaction in or affecting interstate or foreign commerce shall be denied legal effect solely because an electronic signature or record was used in its formation. E-Sign's explicit preemption of inconsistent statutes, rules, and regulations has important implications for both federal and state franchise disclosure requirements.

Under the present FTC Franchise Rule, certain disclosures must be furnished in "a legible, written document." After E-Sign's effective date, which for most purposes is October 1, 2000, franchisors may provide such disclosures electronically to consenting prospective franchisees because the Franchise Rule's writing requirement will be preempted by E-Sign. See Section 101(a)(1). However, E-Sign likely does not otherwise alter the required elements or format of required disclosures. See Section 101(b)(1).

E-Sign also likely will necessitate reconsideration by the FTC of the electronic disclosure portions of the Proposed Franchise Rule, as well as the FTC's recent solicitation for demonstration projects which "meet[] the standards specified in proposed section 436.7 of the NPR." 65 Fed. Reg. 44,484 (July 18, 2000). While Section 104(b) permits agencies to interpret E-Sign, such interpretation must be consistent with E-Sign, must "not add to the requirements" of E-Sign, must be substantially justified, must be substantially equivalent to requirements for nonelectronic records, and must not impose unreasonable costs on the acceptance and use of electronic records. See Section 104(b)(2). Should the FTC adopt a final Franchise Rule without material changes, E-Sign will likely preempt several sections pertaining to electronic disclosures.

First, proposed 16 C.F.R. § 436.7(b) requires a "paper summary document" whenever disclosures are provided electronically. According to E-Sign, no regulation may "require[] that contracts or other records be written, signed, or in nonelectronic form." Section 101(b)(1). The "paper summary document" would qualify as a type of "record" that cannot be required in paper form, rendering such requirement invalid. See Section 106(9).

Second, proposed 16 C.F.R. § 436.7(a)'s prior consent requirement for electronic disclosures would also likely be preempted, although reasonable counterarguments exist. As mentioned above, regulations interpreting E-Sign may "not add to [E-Sign's] requirements." The Proposed Franchise Rule's detailed prior consent requirements clearly "add to" E-Sign's requirements, imposing disparate treatment and additional costs on electronic records. In fact, because E-Sign itself contains specific consent requirements for consumer disclosures (which would not apply to prospective franchisees because they are not defined as "consumers" under E-Sign), Congress presumably did not want rigorous consent requirements to apply to other situations. Due to the burdens of such consent requirements, Congress included in E-Sign a right for agencies to categorically waive the consumer consent requirements. See Section 104(d). Admittedly, one could argue that electronic disclosure consent provisions are not preempted because E-Sign does not "limit, alter, or otherwise affect any requirement imposed by a

statute, regulation or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form." See Section 101(b)(1). Nevertheless, the more reasoned interpretation of E-Sign is that it preempts prior consent provisions.

Finally, proposed 16 C.F.R. § 436.7(g)'s requirement that the franchisor retain a "specimen copy" of each version of its electronic disclosure documents for three years would likely be preempted. According to E-Sign, record retention requirements may be satisfied electronically, so long as the electronic versions remain accessible and reproducible. See Section 101(d)(1). E-Sign contains a limited exception authorizing agencies to require retention of paper records when there is a "compelling governmental interest" relating to "law enforcement or national security." See Section 104(b)(3)(B).

E-Sign's impact on requirements of the state franchise registration and disclosure laws and the provisions of the UFOC Guidelines will be similar, with the exception of state UFOC filing requirements. See Section 104(a). However, even in states which require the filing of a paper UFOC with a state agency, franchisors may supply electronic UFOCs to franchisees because Section 104(a) is limited to "records [to] be filed with such agency."

In conclusion, E-Sign will allow UFOCs to be delivered electronically and receipts to be signed electronically on its effective date, but states may continue to require written filings. Additionally, E-Sign's preemptive effects should induce the FTC to reconsider the Proposed Franchise Rule's electronic disclosure provisions. Accordingly, franchisors and franchisees who view increased use of electronic records, including disclosure documents, as a valuable tool for reducing their costs of doing business should not overlook the importance of E-Sign.

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