The Governing Committee has been hard at work developing programming and other resources for Forum members in 2016. In particular, we are excited about our two new publications that will be available for sale at the publications table at the Annual Meeting.

The first new monograph is Exemptions and Exclusions under Federal and State Franchise Law, edited by Beata Krakus and Leslie Curran. This book is designed to give the franchise practitioner an in-depth understanding of exemptions and exclusions under federal and state franchise statutes. It is a must-have resource for transactional franchise lawyers. Our second monograph is The Intellectual Property Handbook: A Practical Guide for Franchise, Business and IP Counsel Practitioners, Second Edition, edited by Chris Busser and Jim Sims. The first edition was published in 2005. In the 11 years since, many intellectual property issues have changed, and new issues have arisen. The second edition addresses them all.

As always, spring focuses the attention of the Governing Committee on our Annual Meeting. The 39th Annual Forum on Franchising will be held November 2 - 4, 2016, at the Fontainebleau Hotel in Miami. The historic Fontainebleau is perfectly located on Miami Beach and features stunning beach views as well as a variety of restaurants, pools, and nightclubs, a spa, and a state-of-the-art conference center. This year’s theme is Soak Up the Franchising. The co-chairs for the Annual Meeting, Chris Busser and David Oppenheim, have developed an exciting set of interactive programs and workshops and social events for Forum members.

This year’s annual meeting begins on Wednesday, November 2, with three intensive programs. First, the Forum’s Fundamentals of Franchising®, overview of franchise law for those who want a thorough introduction to this field as well as those who want a refresher on one or more areas of franchise law. Attendees will receive a copy of the recently published Fundamentals of Franchising, Fourth Edition. A second intensive program, Franchising in Latin America and the Caribbean, will provide an interactive discussion of the most salient issues faced by franchisors in expansion in this region, with a focus on some new and important markets, such as Cuba. Participants in this intensive will be invited to an attendee-only dinner on Tuesday night, November 1, prior to the Forum. A third intensive program, Beyond Disclosure — Structuring and Managing a Franchise Legal Compliance Program, will focus on what counsel within a franchise company must know and be prepared to address to ensure the company is complying with applicable laws and engaging in best practices.

On Thursday, November 3, we present our Annual Franchise and Distribution Law Developments plenary program, in which Earsa Jackson and David Gurnick will discuss the seminal cases from this past year. In a departure from prior years, we will have our second plenary, which will also serve as our ethics program, during

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The franchise relationship begins with disclosure. The last disclosure item, and often the last page of a Franchise Disclosure Document (FDD), is the receipt, requesting the prospect's signature. As more and more commerce has migrated to the internet, systems of electronic verification have evolved to allow contracting parties to rely on agreements without handwritten execution. In keeping with this evolution, the FDD rule, 16 C.F.R. 436.5(w), permits electronic signatures.

After the signed FDD receipt, the most important signed documents in the franchise relationship are the franchise agreement execution page and the form of franchise fee payment. Numerous other agreements are entered into as the franchisee is trained and prepares to commence business. At some point, the formality the parties follow may lessen. Reports, many of which are pulled from a point-of-sale system, may cease bearing all but sender emails and closing salutations. Product order agreements may devolve to the barest of emails or calls that request or advise of shipping of products or supplies. At this stage of familiarity, compliance may become lax, and problems may arise.
This article addresses laws regulating digital execution of contracts, case law, and practice pointers for parties dealing with electronic signatures in the franchise context.

**UETA**


The UETA applies only to transactions between parties that have agreed to transact business by electronic means. Parties can consent to using electronic means expressly or by the circumstances, context, and conduct. A party may opt out of UETA or vary its terms (as provided by the state law governing the contract) at any time.

Electronic signature is defined under the UETA as “an electronic sound, symbol, or process attached to or logically associated with a record [information or content recorded on a tangible medium or stored electronically] and executed or adopted by a person with the intent to sign the record.” Id. at 5. This allows a wide range of substitutes for a handwritten signature.

The lack of a handwritten signature raises issues of attribution. The UETA in Section 9 provides that a signature is attributable to a person if the signature is the person’s act. Id. at 31. That act can be shown in any manner, including showing the efficacy of a security procedure used to determine the person to whom the record or signature is attributable. UETA does not absolve any party from the traditional duties attendant to the formation of a contract.

**ESIGN**

The Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. §§ 7001-7031, also validates the use of electronic signatures. When President Bill Clinton signed ESIGN into law in June 2000, he used an electronic signature, not an ink pen. The scope of ESIGN is both national and international. The U.S. is one of 47 countries with laws providing for electronic signatures. All of the largest economies, most of Europe and South America, and many Asian countries, have laws similar to ESIGN.

In practice, ESIGN is similar to UETA, although UETA is more comprehensive. Both acts have similar definitions, attribution rules, and exceptions. Both acts except substantive areas of laws that have specific execution requirements. Certain articles of the Uniform Commercial Code are excepted, although many states’ Uniform Commercial Codes internally permit electronic signatures. Few types of agreements and documents regularly used or seen in the franchise relationship are excepted.

UETA and ESIGN do not apply to many banking requests or to court orders, wills, eviction notices, product recalls, and documents requiring witnesses. Documents requiring a notary seal are permitted and addressed with similar execution attribution requirements as for the signer.

**Courts’ Interpretations of UETA, ESIGN**

Although the author found no court decisions interpreting either UETA or ESIGN in the franchise context, decisions in other contexts are instructive.

A Michigan appellate court held that UETA does not require a showing of the efficacy of security procedures to validate an electronic signature and instead allows for attribution to be shown in any manner reasonable under the circumstances. See *Zulkiewski v. American General Life*, 2012 WL 2126068 (Mich. Ct. App. June 12, 2012) (rejecting a challenge to an online insurance beneficiary change).

A Minnesota appellate court held that under UETA each transaction must be examined to determine whether the parties would conduct the transaction electronically. See *SN4, LLC v. Anchor Bank*, 848 N.W.2d 559 (Minn. Ct. App. 2014). In that case, an unsigned contract was attached to an email presenting the attachment as the party’s offer. The recipient did not acknowledge the offer as valid. The court, ruling against the sender, held there was no express or implied agreement to use UETA.

A California appellate court held that a party’s name automatically added to the end of text and email messages can be an electronic signature, but that alone does not express the intent to be bound required under UETA. See *JBB Investment Partners Ltd. v. Fair*, 232 Cal.App.4th 974 (2014).

Finally, a federal circuit court held that under ESIGN, a website user’s click-through acceptance of terms of use was sufficient to transfer copyright rights. See *Metropolitan Regional Information Systems, Inc. v. American Home Realty Network, Inc.* 722 F.3d 591 (4th Cir. 2013). In reaching this conclusion, the court noted that intellectual property transfers are not included in ESIGN’s list of exceptions and that federal courts have applied ESIGN liberally. This decision is particularly relevant to franchising.
given the importance of intellectual property in franchise systems.

Practice Pointers

Judicial interpretation of UETA and E-SIGN tends to be liberal once the threshold issue of consent by each party is established.

The first step in compliance with the electronic signature laws is to determine the scope of coverage of applicable laws. All of E-SIGN and UETA, and potentially the laws of Illinois, New York, and Washington, may apply to the franchise relationship.

Franchise documents should expressly state that electronic signatures are acceptable and consented to. Because the intent to use or not use electronic signatures is crucial, confirmation of intent should be requested when it is not clearly expressed.

All parties to the franchise relationship should have robust record retention policies and should enforce these policies. Records can establish or refute the requisite intent to be bound. Given that a party may opt out of UETA merely by notifying the other party, an audit trail tracking all signer actions should be maintained. If higher level authentication processes are used, they should be monitored and checked.

Franchisors contemplating the use of a third-party electronic signature service company should investigate the service as thoroughly as they would any other sole-source provider of goods or services to the franchise system. They should investigate whether the service meets their needs and whether it is user-friendly and responsive to franchisees.