

HB

285

Alaska State Legislature

Session
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Chair, Judiciary Committee


Vice-Chair, House Committee on
Economic Development,
Trade and Tourism

Member
Oil & Gas Committee

Representative Lesil McGuire *House District 28*

MEMORANDUM

To: Senator Ralph Seekins, Chair
Senate Judiciary Committee

From: Representative Lesil McGuire, Chair 
House Judiciary Committee

Date: March 30, 2004

Re: Request for Hearing, CSHB 285 (JUD), "Electronic Transactions & Signatures"

I respectfully request that CSHB 285 (JUD): Electronic Transactions & Signatures, be scheduled for a hearing in the Senate Judiciary Committee at your earliest convenience. I have included the following in the bill packet for your information:

1. Sponsor Statement
2. CSHB 285 (JUD), Version D
The only change from the original version of the bill is the addition of AS 45.02 in Section 1 (the scope section). AS 45.02 is the UCC chapter on Sales and its omission was a drafting oversight. UETA provides that UCC sales and lease transactions may be accomplished via electronic transactions.
3. Zero Fiscal Notes
4. Bill History
5. Why States Should Adopt UETA
6. A Few Facts about UETA
7. Summary of UETA
8. Letters of Support
9. Additional Background Information

If you have any questions please feel free to contact me personally, or my staff, Vanessa Tondini, at 4990.

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Representative Lesil McGuire

House District 28

Sponsor Statement CSHB 285 (JUD)

“An Act adopting the Uniform Electronic Transactions Act; repealing certain statutes relating to electronic records and electronic signatures; amending Rule 402, Alaska Rules of Evidence; and providing for an effective date.”

With the advent of electronic means of communication and information transfer, business models and methods for doing business have evolved to take advantage of the speed, efficiencies, and cost benefits of electronic technologies. These developments have occurred in the face of existing legal barriers to the legal efficacy of records and documents that exist solely in electronic media. Whether the legal requirement that information or an agreement or contract must be contained or set forth in a pen and paper writing derives from a statute of frauds affecting the enforceability of an agreement, or from a record retention statute that calls for keeping the paper record of a transaction, such legal requirements raise real barriers to the effective use of electronic media.

One striking example of electronic barriers involves so-called check retention statutes in every State. A study conducted by the Federal Reserve Bank of Boston identified more than 2500 different state laws that require the retention of canceled checks by the issuers of those checks. These requirements not only impose burdens on the issuers, but also effectively restrain the ability of banks handling the checks to automate the process. Although check truncation is validated under the Uniform Commercial Code, if the bank's customer must store the canceled paper check, the bank will not be able to deal with the item through electronic transmission of the information. By establishing the equivalence of an electronic record of the information, the Uniform Electronic Transactions Act (UETA) removes these barriers without affecting the underlying legal rules and requirements.

It is important to understand that the purpose of the UETA is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is NOT a general contracting statute - the substantive rules of contracts remain unaffected by UETA. Nor is it a digital signature statute. To the extent that a State has a Digital Signature Law, the UETA is designed to support and compliment that statute.

Finally, recognition that the paradigm for the Act involves two willing parties conducting a transaction electronically, makes it necessary to expressly provide that some form of acquiescence or intent on the part of a person to conduct transactions electronically is

necessary before the Act can be invoked. Accordingly, UETA only applies between parties that have agreed to conduct transactions electronically. In this context, the construction of the term agreement must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, regardless of whether the intent rises to the level of a formal agreement.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 285
 (H) Publish Date: 5/13/03

Revision Date/Time (Note if correction): _____ Dept. Affected: All
 Title An Act adopting the Uniform BRU _____
Electronic Transactions Act Component _____
 Sponsor Rep. McGuire _____
 Requester House Labor and Commerce Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type--Do not abbreviate) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2003) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This bill would not have a significant fiscal impact on any state agency.

Prepared by: Jack Kreinheder, Senior Analyst
 Division: OMB
 Approved by: Jay Hogan, Deputy Director
 Agency: OMB

Phone: 465-4676
 Date/Time: 5/7/03 11:57 AM
 Date: 5/7/2003

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 285(JUD)
 (H) Publish Date: 1/23/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title: Electronic Transactions & Signatures RDU: Resource Development
 Component: Recorder's Office/UCC
 Sponsor: Representative McGuire
 Requester: (H) JUD Component No.: 802

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 | FY 2010 |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

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|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES () | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|--|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other (Specify Type-Do not abbreviate) | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2004) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

| | | | | | | |
|-----------|---|--|--|--|--|--|
| Full-time | 0 | | | | | |
| Part-time | 0 | | | | | |
| Temporary | 0 | | | | | |

ANALYSIS: (Attach a separate page if necessary)

There is no fiscal impact anticipated with implementation of this legislation.

Prepared by: Vicky Backus, State Recorder
 Division: Support Services - Recorder's Office
 Approved by: Thomas Irwin, Commissioner
 Agency: Natural Resources

Phone: 269-8882
 Date/Time: 1/20/04
 Date: 1/20/04

 **Uniform Law Commissioners**
The National Conference of Commissioners on Uniform State Laws

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Uniformity of law*

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Section Title: Introductions & Adoptions Of Uniform Acts.

> **Why States Should Adopt ...**

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

The Uniform Electronic Transactions Act (UETA) allows the use of electronic records and electronic signatures in any transaction, except transactions subject to the Uniform Commercial Code. The fundamental purpose of this act is to remove perceived barriers to electronic commerce.

The UETA is a procedural statute. It does not mandate either electronic signatures or records, but provides a means to effectuate transactions when they are used. The primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures.

There are many reasons why every state should adopt the Uniform Electronic Transactions Act.

- UETA defines and validates electronic signatures. An electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."
- UETA removes writing and signature requirements which create barriers to electronic transactions.
- UETA insures that contracts and transactions are not denied enforcement because electronic media are used.
- UETA insures that courts accept electronic records into evidence.
- UETA protects against errors by providing appropriate standards for the use of technology to assure party identification.
- UETA avoids having the selection of medium (paper vs. electronic) govern the outcome of any disputes or disagreements, and it assures that parties have the freedom to select the media for their transactions by agreement.
- UETA authorizes state governmental entities to create, communicate, receive and store records electronically, and encourages state governmental entities to move to electronic media.

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[SITE MAP](#)

[e-mail the office - click here](#)



A Few Facts About
UNIFORM ELECTRONIC TRANSACTIONS ACT

PURPOSE: The Uniform Electronic Transactions Act is designed to support the use of electronic commerce. The primary objective of this act is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce.

ORIGIN: Completed by the Uniform Law Commissioners in 1999.

APPROVED BY: American Bar Association

SUPPORTED BY: American Council of Life Insurance
Equipment Leasing Association of America

| | | | |
|-----------------------------|-------------------------|---------------|----------------|
| STATE ADOPTIONS: | Alabama | Kansas | North Carolina |
| | Arizona | Kentucky | North Dakota |
| | Arkansas | Louisiana | Ohio |
| | California | Maine | Oklahoma |
| | Colorado | Maryland | Oregon |
| | Connecticut | Michigan | Pennsylvania |
| | Delaware | Minnesota | Rhode Island |
| | District of Columbia | Mississippi | South Dakota |
| | Florida | Montana | Tennessee |
| | Hawaii | Nebraska | Texas |
| | Idaho | Nevada | Utah |
| | Indiana | New Hampshire | Virginia |
| | Iowa | New Jersey | West Virginia |
| | | New Mexico | Wyoming |

2003 INTRODUCTIONS: Alaska Missouri
Massachusetts Vermont

For any further information regarding the Uniform Electronic Transactions Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(4/28/03)

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UNIFORM ELECTRONIC TRANSACTIONS ACT

- A Summary -

The Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (UETA) in 1999. It is the first comprehensive effort to prepare state law for the electronic commerce era. Many states have already adopted legislation pertaining to such matters as digital signatures, but UETA represents the first national effort at providing some uniform rules to govern transactions in electronic commerce that should serve in every state. Although related to the Uniform Commercial Code, the rules of UETA are primarily for "electronic records and electronic signatures relating to a transaction" that is not subject to any article of the Uniform Commercial Code, except for Articles 2 and 2A. A "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. Much is excluded in this definition, including required notices, disclosures or communications by courts and governmental agencies.

UETA applies only to transactions in which each party has agreed by some means to conduct them by electronically. Agreement is essential. Nobody is forced to conduct to electronic transactions. Parties to electronic transactions come under UETA, but they may also opt out. They may vary, waive or disclaim most of the provisions of UETA by agreement, even if it is agreed that business will be transacted by electronic means. The rules in UETA are almost all default rules that apply only in the event the terms of an agreement do not govern.

Electronic commerce means, of course, persons doing business with other persons with computers and telephone or television cable lines. The Internet is the great marketplace for these kinds of transactions; a marketplace developing almost daily in 1999 (and presumably into the foreseeable future). The outlines and boundaries for this marketplace are still unknown and developments are not predictable. It is not possible to predict with any certainty how new law should develop to serve that marketplace or any other electronic marketplace that might develop in the future.

However, a few things are known about the existing electronic marketplace and there are some assumptions about the law that governs transactions within it that can be made with reasonable certainty in 1999, and that will continue to be reasonably certain into the future.

Electronic transactions are conducted by communicating digitized information from one person to another. That digitized information can be communicated and stored without the use of paper, and the basic language of electronic transactions is fully and inherently paperless. In fact, relying on paper for the memorialization of transactions and upon manual signatures for verifying them are most likely to impede electronic transactions, adding to their costs. And there is no benefit to any party to an electronic transaction, with very few exceptions, in requiring that they be memorialized on paper with signatures that are manual. The need to expand requirements in the law for writings and manual signatures so that electronic records and electronic signatures will satisfy those requirements, is the one thing that is reasonably certain with respect to electronic transactions.

UETA does not attempt to create a whole new system of legal rules for the electronic marketplace. The objective of UETA is to make sure that transactions in the electronic marketplace are as enforceable as transactions memorialized on paper and with manual signatures, but without changing any of the substantive rules of law that apply. This is a very limited objective—that an electronic record of a transaction is the equivalent of a paper record, and that an electronic signature will be given the same legal effect, whatever that might be, as a manual signature. The basic rules in UETA serve this single purpose.

The basic rules are in Section 7 of UETA. The most fundamental rule in Section 7 provides that a "record or signature may not be denied legal effect or enforceability solely because it is in electronic form." The second most fundamental rule says that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation." The third most fundamental rule states that any law that requires a writing will be satisfied by an electronic record. And the fourth basic rule provides that any signature requirement in the law will be met if there is an electronic signature.

Almost all of the other rules in UETA serve the fundamental principles set out in Section 7, and tend to answer basic legal questions about the use of electronic records and signatures. Thus, Section 15 determines when information is legally sent or delivered in electronic form. It establishes when electronic delivery occurs—when an electronic record capable of retention by the recipient is legally sent and received. The traditional and statutory rules that govern mail

delivery of the paper memorializing a transaction can't be applied to electronic transactions. Electronic rules have to be devised., and UETA provides the rule.

Another rule that supports the general validity of electronic records and signatures in transactions is the rule on attribution in Section 9. Electronic transactions are mostly faceless transactions between strangers. UETA states that a signature is attributable to a person if it is an act of that person, and that act may be shown in any manner. If a security procedure is used, its efficacy in establishing the attribution may be shown. In the faceless environment of electronic transactions, the obvious difficulties of identification and attribution must be overcome. UETA, Section 9 gives guidance in that endeavor.

Much has been much written about digital signatures in electronic commerce. What is a digital signature? It is really a method of encryption that utilizes specific technology. In the faceless environment of the electronic marketplace and particularly the Internet, such technologies are highly useful.

It is not wholly certain what the legal impact of these technologies should be. For that reason UETA may not be characterized as a digital signature statute. It does facilitate the use of digital signatures and other security procedures in rules such as the one in Section 9 on attribution. Section 10 provides some rules on errors and changes in messages. It favors the party who conforms to the security procedure used in the specific transaction against the party who does not, in the event there is a dispute over the content of the message.

But nothing in UETA requires the use of a digital signature or any security procedure. It is technologically neutral. Persons can use the most up-to-date digital signature technology, or less sophisticated security procedures such as passwords or pin numbers. Whatever parties to transactions use for attribution or assuring message integrity may be offered in evidence if there is a dispute.

UETA is procedural, not substantive. It does not require anybody to use electronic transactions or to rely upon electronic records and signatures. It does not prohibit paper records and manual signatures. Basic rules of law, like the general and statutory law of contracts, continue to apply as they have always applied.

There are three provisions in UETA that need special attention, and that are not directly in support of the basic rules in Section 7. First, UETA excludes transactions subject to the Uniform Commercial Code, except for those under Articles 2 and 2A, the Uniform Computer Information Transactions Act, laws governing estates and trusts, and any other specific laws that a state wants to exempt from the rules applied in UETA. Some writing and signature requirements in state law do not impact the enforceability of transactions, and have objectives that should not be affected by adoption of a statute like UETA. The limitation of UETA to agreed electronic transactions will eliminate any conflict with other writing requirements for the most part. However, there is some room for jurisdiction-specific tailoring of UETA permitted in each state, to assure no conflict. Exclusions should be carefully and conservatively selected. Most law relating to contracts and transactions between persons will serve the public better if electronic records and signatures are recognized.

Second, UETA provides for "transferable records" in Section 16. Notes under Article 3 and documents under Article 7 of the Uniform Commercial Code are "transferable records" when in electronic form. Notes and documents are negotiable instruments. The quality of negotiation relies upon the note or document as the single, unique token of the obligations and rights embodied in the note or document. Maintaining that quality as a unique token for electronic records is the subject of Section 16. A transferable record exists when there is a single authoritative copy of that record existing and unalterable in the "control" of a person. A person in "control" is a "holder" for the purposes of transferring or negotiating that record under the Uniform Commercial Code. Section 16 is essentially a supplement to the Uniform Commercial Code, until its relevant articles can be fully amended or revised to accommodate electronic instruments.

Third, UETA clearly validates contracts formed by electronic agents. Electronic agents are computer programs that are implemented by their principals to do business in electronic form. They operate automatically, without immediate human supervision, though they are certainly not autonomous agents. They are a kind of tool that parties use to communicate. Section 14 provides that a person may form a contract by using an electronic agent. That means that the

principal, which is the person or entity which provides the program to do business, is bound by the contract that its agent makes.

When somebody buys something on the Internet, therefore, that person will be assured that the agreement is valid, even though the transaction is conducted automatically by a computer that solicits orders and payment information. Did anyone really think that every order on the Internet involves a direct communication with a human being?

Three sections of UETA deal with electronic records that state governmental agencies create and retain. Section 17 allows a state to designate one agency or officer as the authority on creation and retention of governmental records. Section 18 allows a state to designate which agency or officer regulates the communication of electronic records and use of electronic signatures between agencies and other persons. Section 19 allows a state to designate an agency or officer to set standards that promote consistency and interoperability between state agencies with respect to the use of electronic records and signatures. All three sections are optional sections, there for the state that needs them, but not mandatory for all states in order to implement uniformity. These are very important provisions, however, because they provide a state with some root law for organizing the electronic business of the state. They should be given very serious consideration in every state.

It is not possible to cover every aspect of UETA in a short summary. This summary highlights some important aspects. The adoption of these rules will be a boon to electronic commerce. They will not artificially skew any market or make any substantive law relating to contracts any different from that governing transactions memorialized on paper. Every state should adopt them as quickly as possible.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership comprises more than 300 attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft uniform and model state laws and work toward their enactment.

STATE OF ALASKA

FRANK H. MURKOWSKI,
GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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May 14, 2003

The Hon. Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Vanessa A

Re: HB 285

Dear Representative McGuire:

On behalf of the Alaska Uniform Law Commissioners, we would appreciate early scheduling of a hearing on HB 285 (Uniform Electronic Transactions Act). The bill is important to keep Alaska as a business friendly climate by making law changes to facilitate businesses using electronic records and signatures.

The Uniform Act has been passed into law by over 42 states (see attachment). Also, we have included a fact sheet explaining the advantages of the Uniform Electronic Transactions Act.

We appreciate your consideration of this request.

Sincerely,

GREGG D. RENKES
ATTORNEY GENERAL

By: *Deborah E. Behr*
Deborah E. Behr
Assistant Attorney General

DEB:pvp

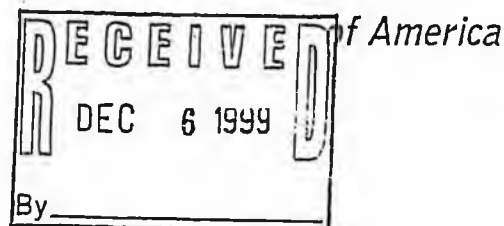
cc: Mike Tibbles, Legislative Director, Office of the Governor
Dave Marquez, Legislative Contact, Dept. of Law
Alaska Uniform Law Commissioner
Dave Jones, AAG, Governmental Affairs/Anchorage
Nico Bus, Div. of Support Services, Dept. of Natural Resources
Sharon Young, State Recorder, Dept. of Natural Resources

ELA

Equipment
Leasing
Association

December 1, 1999

National Conference of Commissioners
On Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611



Re: Uniform Electronic Transactions Act

Dear Commissioners:

I am writing on behalf of the Equipment Leasing Association of America (ELA) to voice our enthusiastic support for the new Uniform Electronic Transactions Act (UETA). Our ELA members have a vital interest in UETA to facilitate internet commerce as a way to conduct the more than \$200 billion in equipment leasing transactions that occur each year in this country.

I. Overview of the UETA Statute

The statute is minimalist and "procedural." It facilitates internet commerce by replacing the current hodge-podge of state laws¹ with a fair and predictable set of uniform rules on electronic commerce.

A. Central Provisions. Essentially, UETA provides that electronic records, signatures and contracts are just as effective and enforceable (and admissible in evidence) as their old-fashioned paper counterparts. UETA section 7 thus provides that:

¹ Over the past several years, a number of States have enacted statutes giving legal effect to certain types of electronic contracts and electronic signatures. But these new statutes are not uniform: Some of them are limited to electronic contracts and signatures that are authenticated with digital certificates and public key/private key cryptography meeting specified criteria. Other state laws validate a broader class of electronic signatures and contracts. Some state statutes recognize electronic signatures and contracts only in the context of government transactions, while others apply more broadly to both government and commercial transactions.

- o A record or signature may not be denied legal effect solely because it is in electronic form.
- o A contract may not be denied legal effect solely because an electronic record was used in its formation.
- o If a law requires a record to be in writing, an electronic record satisfies the law.
- o If a law requires a signature, an electronic signature satisfies the law.

Two other sections of UETA also provide critical support for e-commerce: Section 13 provides that evidence of a record or signature may not be excluded solely because it is in electronic form. Section 12 provides that if a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record.²

B. Scope. The scope of the UETA statute is generally limited to “transactions between parties each of which has agreed to conduct transactions by electronic means.” Wills and testamentary trusts are excluded from the coverage of UETA, as are transactions subject to UCC laws that already contain specific provisions for electronic signatures and/or electronic records. The older pre-internet UCC rules on the commercial law of sales and leases would be subject to UETA’s new procedural rules for conducting electronic commerce.³

Writing requirements in federal law are not affected by UETA, which is only a state law. However, there are a number of federal statutes, such as the

² To be able to take advantage of Section 12, the retained electronic record must: (a) accurately reflect the information in the record as first generated in its final form; and (b) remain accessible for later reference.

³ UETA section 3(b) provides that the statute does not apply to a transaction “to the extent it is governed by” the following laws: (1) A law governing the creation or execution of wills, codicils or testamentary trusts; (2) the UCC other than Sections 1-107 (written waiver of rights after breach) and 1-206 (residual statute of frauds for kinds of personal property not otherwise within the statute of frauds), Article 2 (sales) and Article 2A (leases); (3) UCC Articles 3,4,4A,5,6,7,8, or 9; and (4) the new Uniform Computer Information Transactions Act (UCITA).

federal Truth in Lending Act, that defer to state law on the issue of whether there is an agreement, or whether a consumer has authorized a transaction. UETA would apply in this context.

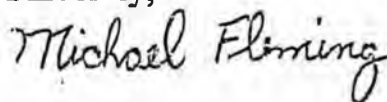
C. Other provisions. To come to grips with consumer protection writing requirements, UETA section 8(a) provides that, if a state law "requires a person to provide, send, or deliver information in writing to another person," that requirement is satisfied if the information is provided "in an electronic record capable of retention" – that is, capable of retention by printing or storing the electronic record– "by the recipient at the time of receipt." More generally, UETA section 8(c) imposes a penalty on a sender of a record that is not retainable: It provides that if a sender "inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient." Section 8(c) seems to apply to all electronic records, not just those electronic records that substitute for a legally required written disclosure or written record. Though some have questioned this aspect of section 8(c), we think it is reasonable. We see no harm in ensuring that legally enforceable records be reasonably "capable of retention." The scope of section 8(c) may be clarified by Reporter's comments issued in the future.

CONCLUSION

The member companies of ELA are leaders in the commercial use of innovative new technologies. ELA strongly supports the central provisions of UETA, which provide in section 7 for legal recognition and enforcement of electronic records, electronic signatures, and electronic contracts. Already the law in California, UETA embodies a mainstream approach to electronic commerce. It should be speedily enacted throughout the Nation.

Thank you for promulgating this much-needed set of uniform state laws to facilitate e commerce.

Sincerely,



Michael Fleming
President

USKH**PRINCIPALS**

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James A. Huettl
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May 7, 2003

The Honorable Tom Anderson, Chairman
Legislature of the State of Alaska
Labor and Commerce Committee
716 W. 4th Avenue, 2nd Floor
Anchorage, Alaska 99501
Sent via facimile: (907) 465-2418

Subject: Written Testimony in Support of House Bill (HB) No. 285
Uniform Electronic Transactions Act

Dear Mr. Anderson and Members of the Labor and Commerce Committee:

As President of USKH, Inc. (USKH), I am providing you with this written testimony stating our strong support of HB No. 285. This bill authorizes the use of electronic records and electronic signatures relating to transactions. USKH is an employee-owned multidisciplinary professional services firm providing consulting architectural, engineering, land surveying, and planning services. We have been in business in Alaska for over 31 years and have networked offices in Anchorage, Juneau, Wasilla, and Fairbanks. USKH has successfully completed numerous projects, both large and small, for a variety of public and private clients throughout the state.

In our business, the production process of designing a project has become completely electronic. That is, minus the present requirement of having a "wet" signature. The days of completing design work at a drafting table has been replaced with completing our work at a computer using computer aided drafting (CAD) software. This trend has made our designs more accurate and more efficient, and the passage of this bill will just add to that efficiency. For example, one of our recent projects for the Anchorage School District (A.J. Dimond High School Replacement) is a \$50 million-plus project that required the completion of over 400 drawings, all electronically, but the final completion of stamping and signing the drawings must be completed by "wet" signature. In this era, this process is cumbersome, chaotic, and inefficient. There is no benefit to the client or the consultant in requiring this manual signature.

MAY. 7. 2003 2:40PM

USKH - ANCHORAGE

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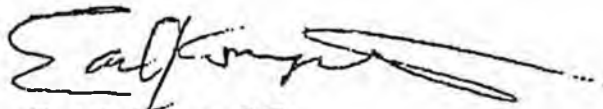
Support of House Bill (HB) No. 285 - Uniform Electronic Transactions Act

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I am not an electronic wizard or a computer guru, but I do know this industry. This law needs to be enacted so we can do this part of our business production better and more efficiently. This will not only better serve consultants such as USKH, but also our clients and the general public at large. I am confident that the industry and government will be able to find acceptable means and methods to adequately protect the public's interest against electronic fraud and I strongly support HB 285.

Very truly yours,

USKH, Inc.



Earl D. Koynta, P.E.

President

cc: The Honorable Loren Leman
Lieutenant Governor of Alaska

**American Council of Life Insurance**

Carroll A. Campbell, Jr.
President & Chief Executive Officer

November 24, 1999

Mr. John L. McClaugherty
President
National Conference of Commissioners on Uniform State Laws
211 East Ontario Street, Suite 1300
Chicago, Illinois 60611

Re: The Uniform Electronic Transactions Act

Dear Mr. McClaugherty:

I am writing on behalf of the American Council of Life Insurance ("ACLI") to express our organization's strong support for the Uniform Electronic Transactions Act ("UETA"), as adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

ACLI is a national trade association comprised of almost 500 member legal reserve life insurance companies. ACLI staff had Observer status during the UETA Drafting Committee deliberations, and we appreciate the ability to participate in NCCUSL's drafting process. Our member companies view authentication legislation as vital to the continued growth of electronic commerce, and I commend NCCUSL for accepting the challenge of drafting a model act that will help all businesses and consumers by providing legal certainty to electronic signatures and electronic records.

Our member companies believe that UETA is a well written, balanced law that will facilitate electronic commerce while preserving substantive state law. UETA is technology and industry neutral, taking into account the dynamic nature of the Internet. We believe UETA's recognition of electronic records is particularly critical to providers of financial services, including life insurers.

Thank you again for the excellent work your organization has provided. ACLI will be actively supporting enactment of UETA in the states this upcoming legislative season. Please let me know if there is any specific assistance ACLI can provide as UETA is introduced in the various states.

Sincerely,

Carroll A. Campbell, Jr.

State Recorder's Office
Department of Natural Resources

White Paper:
The Uniform Electronic Transactions Act

Introduction to the Issue

The Uniform Electronic Transactions Act (UETA) is a uniform law that fosters and supports the use of electronic commerce. According to the National Conference of Commissioners on Uniform State Laws (NCCUSL), **the primary objective of this act is "to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce."**

On its web site, NCCUSL sets forth the following significant reasons why every state should adopt UETA:

- UETA defines and validates electronic signatures. An electronic signature is defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."
- UETA removes writing and signature requirements that create barriers to electronic transactions.
- UETA insures that contracts and transactions are not denied enforcement because electronic media are used.
- UETA insures that courts accept electronic records into evidence.
- UETA protects against errors by providing appropriate standards for the use of technology to assure party identification.
- UETA avoids having the selection of medium (paper vs. electronic) govern the outcome of any disputes or disagreements, and it assures that parties have the freedom to select the media for their transactions by agreement.
- UETA authorizes state governmental entities to create, communicate, receive and store records electronically, and encourages state governmental entities to move to electronic media.

On the federal side, the Electronic Signatures in Global and National Commerce Act (also called "E-Sign") was approved by Congress and signed by the President on June 30, 2000. Although the federal E-Sign law and UETA overlap in many areas, the two acts are not identical. Because UETA is broader and more comprehensive, NCCUSL strongly recommends that states adopt UETA in its entirety, notwithstanding the existence of E-Sign.

Without UETA, the federal E-Sign law is controlling on states. However, UETA is much more comprehensive than the federal law, and addresses some subjects not included in E-

Sign. The E-Sign law specifically addresses UETA and provides that state UETA will govern if the state has enacted the uniform law in its entirety. Thus, in general E-Sign does not preempt a state's UETA enactment, but the results could differ if a state inserts non-uniform language into the state's UETA law. Some of the major differences between the federal law and UETA relate to the handling of consumer protection issues, record keeping and automated transactions.

The handling of consumer protection issues has been a concern to a number of states who have considered UETA. The federal E-Sign law strictly regulates the manner of consenting to receive electronic notices and disclosures electronically. If UETA is considered in Alaska, a full review of these consumer protections must be done. Whether UETA would preempt those federal consumer protections is beyond the scope of this paper but is an important consideration in the analysis.

Another factor that comes into play is Alaska's digital signature law, which took effect in 1998, pre-dating both E-Sign and UETA. One of the underlying forces behind the federal E-Sign law was the fact that individual states were moving forward with digital signature legislation in an inconsistent manner and the differing state requirements were becoming a barrier to electronic commerce rather than serving to promote it. Many of these state digital signature laws are at odds with the federal law and are effectively preempted by E-Sign. Whether or not this is the case with Alaska's digital signature law is a matter that must be reviewed, regardless of whether or not UETA is adopted in Alaska.

The principle behind UETA is to make sure that electronic transactions are as enforceable as paper transactions with manual signatures. UETA does not change any of the substantive rules of law that apply. It is a procedural law, not a substantive law, and does not change the substantive rules of contracts in any way. UETA simply authorizes electronic signatures and the replacement of writings with electronic records. Further, UETA is not a digital signature statute, but if a state has such a statute, UETA merely supports that law, and acts as a complement to it.

The Prefatory Note to UETA clarifies that it does not apply to all writings and signatures, but only to electronic records and signatures relating to a transaction. A transaction is defined as an action or set of actions occurring between two or more persons relating to the conduct of business, commercial and governmental affairs. Transactions that do not involve business, commercial or governmental purposes are not covered by UETA. Further, UETA does not apply to laws governing wills and trusts or to most of the Uniform Commercial Code. In adopting UETA, a state can also identify other state laws that would be excluded. States are given options within UETA of whether to adopt electronic filing systems (Sections 17 through 19 of the Act). See Discussion below.

The parties to a transaction must agree that it will be conducted electronically, but that "agreement" can be derived from the circumstances and other substantive law. For example, the circumstances surrounding a transaction and other law would determine whether an electronic signature has any effect, or whether a party actually intended to be a party to a particular document. The Act validates electronic records, signatures and

contracts and specifies standards for sending and receiving electronic records. For government entities, the Act also allows use of electronic records for retention purposes. While UETA serves to make electronic signatures the equivalent of manual signatures, it requires no specific technology to create a valid signature. The Act provides broad flexibility to the parties to determine the procedures for electronic transactions and the level of security that will be imposed.

State of the States

As of August 2002, forty (40) states and the District of Columbia have adopted UETA, and it has been introduced in five additional states and the U.S. Virgin Islands. UETA has not yet been introduced in Alaska, and it is readily apparent that Alaska will be one of the last states to even consider it, if it can be introduced in the upcoming 23rd legislative session in January. Compare this activity with the last major uniform law that was submitted to the states for adoption - the Uniform Commercial Code Revised Article Nine. In that case, Alaska was one of the early states to introduce the measure and was the 18th state to adopt it. This gave the State Recorder's Office ample time to prepare for changes in its operations and for the nationwide targeted implementation date of July 2001. While there is no similar target date for UETA, the goal of achieving uniformity in electronic commerce will be lost if it is not enacted in all states.

The Impact of UETA For Alaska's Recording System

The Recording System in Alaska is the repository for millions of records affecting real property throughout the state. In today's business world, with E-Sign and UETA laws, it is possible to complete a real estate transaction entirely without paper because these laws give an electronic transaction the same force and effect as a paper transaction. In Salt Lake County, Utah, which has been offering electronic recording for some time now, documents being recorded are available within seconds on the index for public review and access. Counties allowing electronic recording of real estate transactions have documented cost savings and increases in productivity.

The Mortgage Industry Standards Maintenance Organization (MISMO) and the Property Records Industry Joint Task Force are working together to standardize the electronic recording process nationwide. The backbone of this effort is uniformity throughout the states in terms of adopting UETA. The Property Records Industry Joint Task Force is a national standard setting public/private sector task force sponsored by the National Association of County Recorders, Election Officials and Clerks (NACRC) and the International Association of Clerks, Recorders, Election Officials and Treasurers (LACREOT). All of these organizations strongly support UETA in order to provide a uniform framework for electronic recording throughout the nation.

A high percentage of mortgage transactions in Alaska today involve out of state lenders. Standardizing the electronic recording process within the framework of a uniform law like UETA will benefit commerce in those states with a uniform approach. The handful

of states with non-uniform laws may find themselves at a disadvantage in the future world of electronic commerce and recordation.

Both E-Sign and UETA permit state and federal agencies to allow and control electronic filing but E-Sign does not provide any authority for establishing filing standards; this must be derived only from UETA or other state law. UETA encourages government filing offices to promote consistency and interoperability.

Discussion

As noted above, UETA gives states the option (in Sections 17 through 19) of determining whether to adopt and implement electronic filing systems. [Note: The Revised Article Nine of the Uniform Commercial Code gave states this authorization with regard to UCC transactions. UETA's provision would expand this to allow states to implement electronic systems for recorded documents.]

The inclusion of Sections 17-19 in a state's adoption of UETA will, according to the commentary, provide authorization for intra-governmental uses of electronic media, and further will provide a broader authorization for the State to develop systems and procedures for the use of electronic media in its relations with non-governmental entities and persons. While the impact of these provisions is beneficial to the state's recording system in general, it will also benefit other agencies whose work involves electronic transactions of any kind, including internet transactions. Impact on other agencies is outside of the scope of this paper.

Section 17 authorizes state agencies to use electronic records and electronic signatures generally for intra-governmental purposes, and to convert written records and manual signatures to electronic records and electronic signatures. It also authorizes the destruction of written records after conversion to electronic form. This provision impacts the state's retention requirements and provisions.

Section 18 authorizes state agencies to send and receive electronic records and signatures in dealing with non-governmental persons.

Section 19 is a directive to agencies to provide consistent applications and promote interoperability when developing standards for electronic systems.

Together Sections 17 through 19 provide broader authorization for a state to develop electronic systems and processes in its interactions with non-governmental entities and persons. Land recording systems have historically evolved around written records and processes based on paper documents. UETA's fundamental premise is that electronic media should be treated as the equal of written media and it recognizes and effectuates records and signatures that are generated electronically. This is the future world of recording systems in America.

Recommendation

The State Recorder's Office and the Department of Natural Resources strongly recommend introduction and adoption of UETA in Alaska at the earliest possible time. In order to promote commerce in Alaska and ensure that the state's recording system is in a position to take advantage of electronic recording capabilities in the future, it is also recommended that the state adopt the optional provisions for electronic filing systems as contained in Sections 17 through 19. The commentary to UETA indicates that inclusion of 17-19 will not have a detrimental import on the uniformity of adoption of the Act, so long as Section 1-16 are adopted uniformly as presented. It is highly important to maintain the uniformity of this Act, so it is further recommended that Sections 1-16 be adopted without change.

Conclusion

Alaska's recording system has made many significant advances in the past two years, including a premiere role as the first state in the nation to image all incoming recorded documents on a statewide basis, as well as the first state to make statewide document images available for public access in any recording office in the state. Other U.S. recording systems are county-based and unable to achieve the statewide coverage that our image base provides. Our web site contains ten different search options for researching nearly thirty years of index records and is accessible by the public on a 24/7 basis. No other state can make that claim. The web site garners more than 400,000 hits per month and is the most heavily accessed site in the Department of Natural Resources. A number of the title companies, financial institutions and other larger users of recording services have discussed forming a task force to explore electronic recording with a eye toward its implementation in Alaska. Because so many users of the recording system are out of state lenders, electronic recording processes will put Alaska on a par with the Lower 48 states in terms of instantaneous recording operations. This will serve to facilitate commerce.

Ultimate benefits of electronic recording systems include reduced recording times, reduced costs to all parties, improved productivity at recording offices and for major users, standardized processes and technologies, and improved customer service. UETA is the framework for achieving these benefits in Alaska's land recording system.

The State Recorder's Office appeals to all members of the legislature, all government agencies, and all members of the real estate recording industry to consider and support the passage of UETA in this state at the earliest possible time. In today's global economy with increasingly technological advances, a united effort for more efficient and effective land recording systems should be of paramount concern. UETA is the basic framework that will bring Alaska in synch with the vast majority of all other states vis-à-vis electronic recordation.

A single unified approach to electronic transactions is desirable from many points of view. While this white paper only addresses the view from one agency perspective - that of the State Recorder's Office - other agencies will also benefit from the passage of UETA. Increasingly, government work and services are being performed electronically and UETA is the means by which consistent procedures for such transactions can be assured. Failure to enact UETA could be detrimental to fostering electronic commerce in Alaska.

LAYING FOUNDATIONS
FOR ELECTRONIC COMMERCE

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

©Patricia Brumfield Fry
Professor of Law
Chair, Uniform Electronic Transactions Act
Drafting Committee

1. Electronic Commerce and the Law. Electronic commerce refers to the new world of economic activity created by advances in information technology and communication. This economy is generating opportunities across all sectors; it is a source of new jobs and new wealth, and is dramatically reducing the cost of communication, information and transactions.

While electronic commerce has existed for many years, with the earliest uses of EDI dating back into the 1970s, the public emergence of the Internet and the World Wide Web have revolutionized this young and vibrant economic sector. On all levels of government in the United States, efforts are underway to take advantage of these economic opportunities and realize the efficiencies made possible by the technologies.

Taken literally, electronic commerce ranges from old-fashioned telephone conversations, through the use of facsimiles, electronic mail and electronic data interchange, to establishing a presence on and conducting retail transactions

through the use of Internet websites. In each manifestation, electronic commerce presents challenges for the legal system, but these challenges are brought to their fullest, most obvious manifestations with commercial transactions based on Internet websites.

Electronic commerce poses a number of challenges for the law. The first and most fundamental challenge is presented by the simple fact that transactions may be memorialized on electronic communications, rather than solely on paper. It is no longer accurate to say that paper is required in order to assure that there will be a record of a transaction, in order to assure that a party receives a copy of terms and conditions, in order to assure that notice is given to a counter party. It is not accurate to say that paper is required in order to assure that someone has "signed" a communication. Yet most of our laws were written during an era when paper was the only realistic medium for communicating and storing information and when our mental constructs for such concepts as notice, communication, sending and delivering information, recording the terms of final agreements, etc. depended on paper.

The first step toward laying a legal foundation for electronic commerce is to clear away the barriers to electronic commerce. Each state law or regulation, each local or national law or regulation that requires a writing or signature, delivery or production of an original record impairs electronic commerce. The efficiencies are lost if the law requires the production of paper copies. A recent study on behalf of the Federal Reserve Bank of Boston discovered more than

2,500 different state law rules requiring that cancelled checks be stored by drawers. These statutes appear to be designed to assure that records of financial transactions will be available upon subsequent audit. Such records can be made available electronically, but not if the statute says only the paper cancelled check will suffice. And this does not only impose a burden on those who draw and are required to store the cancelled checks. It also means that the check collection system cannot short-circuit the physical travels of the check. If a bank's customers are required by law to store the physical, cancelled checks, the bank cannot store them or authorize anyone earlier in the collection chain to do so.

Unfortunately, it is not possible to simply wave a wand and redefine writings and signatures to include their electronic counterparts. In most instances such a redefinition would serve admirably. It certainly would suffice in all cases in which the purpose of the writing or signing requirement is to insure that there is a record of a transaction which preserves its terms or a record preserving evidence of the parties' assent to the transaction. Electronic records can serve those functions quite well. There is another body of law, however, that governing negotiable instruments, which would be badly disrupted by such a change. This body of law is one where the rights and liabilities of parties depend upon the physical delivery of a token of rights. The technologists tell us that they have not yet invented a technological scheme which would enable us to identify the single, unique and original electronic token. The rights and liabilities that now depend on or arise from negotiable instruments law can be managed in a

legal scheme, but not in one dependent upon the transfer of a single, unique token. Until that sort of technology is in place, however, a provision which merely changes the definition of writing and signature would disrupt the check collection system, the investment markets, commodity and other markets. In the meantime, electronic analogues to the existing paper worlds require a full and complete rethinking of the rights and obligations of parties in those markets, such as was done in the revision of Uniform Commercial Code Article 8. And the Article 8 experience has taught some valuable lessons to the law revisers about the wisdom of technology specific or business model specific statutes or of attempting to draft statutes to govern systems which we believe will come into being, rather than those which already exist.

2. Introduction to the Uniform Electronic Transactions Act. The Uniform Electronic Transactions Act is designed to set a solid legal foundation for the use of electronic communications in transactions. The goal of the draft is to facilitate and support the development of the information economy, and in particular its place in commercial transactions, throughout the States. If the States act in a uniform and constructive manner, the traditional role of the States in the law of commerce may be maintained. If they fail to do so, I believe the imperative need for commercial certainty may lead to a shift of a significant part of the authority of the States to the national government.

The UETA is designed to apply to any transaction where the parties have agreed to deal electronically, validating and supporting the use of electronic communications and records. It provides that parties may choose whether or not to use electronic communications in their transactions. It will put electronic commerce and paper-based commerce on the same legal footing and not discriminate between different forms of technology.

5. The Scope and Provisions of the UETA. The governing principles which have controlled the drafting are fairly simple to state, although not so simple to implement.

1. First, legal barriers to electronic commerce are to be eliminated.

2. Secondly, the barriers should be removed in a manner which assures that the parties' selection or choice of medium does not alter the outcome of disputes between the parties, i.e. whether the parties deal in the paper world or the electronic world, their relationship should be subject to the same legal principles.

3. The draft should maintain medium neutrality and technology neutrality. It should neither assume nor require any particular business model for transactions. The focus should be on the purpose of the legal requirement, rather than the form by which it is satisfied. This also should assure that the draft does not itself become a barrier to electronic commerce as technology and

business practices continue to shift and evolve. Markets and business people should be free to select technologies and business methods according to their needs.

Turning to the UETA, it provides that an electronic record, electronic signature and electronic contract shall not be denied validity on the sole ground that they are electronic. §106. It provides that electronic records shall not be denied admissibility into evidence on the sole ground that they are electronic or that it is not in its original form or is not an original. § 112. It provides that if an offer evokes an electronic response, a contract may be formed with the same effect as if the record was not electronic. §113. These are, I believe, the pivotal provisions of the draft.

A. Scope. One of the most difficult problems to resolve has been the question of the appropriate scope of the statute. Literally thousands, perhaps tens of thousands, of paper and signing requirements are buried in state law. These can range from the steps a legislature must follow to demand a special session, to how to execute a will, to rules for filing financing statements with the state, to rules for giving consumer notices, to contract formation rules. And some of the rules are tied to property and legal rights and obligations that cannot readily be translated into the electronic world, i.e. checks and other negotiable instruments.

Although there was some early sentiment favoring a statute which explicitly listed the provisions of state law which would be amended, pragmatists prevailed. They argued, with some merit, that the resources of the Drafting Committee would not permit such specific itemization and evaluation of writing and signing requirements, and that a demand that State legislatures do so prior to enactment would unduly delay enactment. Consensus emerged that the best approach is to provide that the UETA applies to electronic records and electronic signatures that "relate to any transaction." § 103. And then proceed to create appropriate exclusions. Section 103 excludes rules of law relating to the creation and execution of wills and codicils, and testamentary trusts. It excludes existing Article 1 of the Uniform Commercial Code, except §§ 1-107 and 1-206, Articles 3 through 9 of the Code as currently approved, and revised Articles 2 and 2A and UCITA, except as those statutes may provide. It recognizes that some States may choose to specifically exclude particular statutes, although the comments will urge caution in selecting additional exclusions.

In addition, §103 explicitly states that the Act will apply to electronic records or signatures otherwise excluded when used for transactions subject to a law other than the ones specified as excluded. Thus, for example, while UCC Article 9 applies generally to a transaction creating a security interest in personal property, it excludes landlord's liens. Thus this Act would apply to the creation of a landlord's lien if the law otherwise applicable to such liens did not provide otherwise.

To sum up the discussions on the scope of the UETA, and the conclusions which have been reached, the UETA will apply to "any transaction" unless the law governing it is specifically excluded. Exclusions will include testamentary documents, generally the revised UCC, and any other statutes specifically excluded. All other transactions in which the parties have agreed to deal electronically will be included..

However, the UETA only applies to the procedural aspects of the transaction, i.e. the use of electronic communications and records. A transaction subject to the Act also will be subject to applicable substantive rules of law. The UETA is designed to interact with, not supplant, the bodies of law which otherwise govern contract formation, record-retention, the performance of obligations and rights and liabilities of the parties. The UETA will not, except as is specifically stated, affect requirements relating to a specific mode of delivery or display of information. If a rule of law requires that information be provided in writing, § 107 requires that the information may be furnished in a record that is under the control of the person to which it is provided and capable of retention. This is in accord with the Federal Reserve Board's interim rule for electronic funds transfers. As to notarization, §110 provides that that if the law requires a notarization it is satisfied if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included by other applicable

law. Whether an electronic record or electronic signature will have legal consequences is determined by a combination of UETA and other applicable law

B. Security Procedures. Turning to security procedures, the UETA defines a security procedure as:

a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

The UETA does not provide that a security procedure has any particular legal effect. Rather it provides, in § 108, that an electronic record or electronic signature is attributable to a person if it was the act of the person. This may be proven in any manner, including a showing of the efficacy of a security procedure which has been applied. The effect of an electronic record or signature on the responsibility of a person is then determined from the context and surrounding circumstances, including any agreement of the parties. In other words, the effect of the use of the technology is left to the ordinary, garden variety rules of evidence, contracts, etc.

C. Electronic Agents. Although the use of automated programs for the conduct of transactions has been possible for a couple of decades, with the emergence of the Internet automation of transactions has become common. Yet most of the law of principal and agent assumes the existence of human actors. From one perspective, electronic agents or bots and automated transactions are

merely tools used by individuals or other actors. From another, there is concern that pre-programmed operations of computers or other devices will not be regarded as sufficient "manifestations of assent" in the eyes of some courts. To allay such concerns, the UETA explicitly provides that a contract may be formed by the interaction of electronic agents, whether with other electronic agents or with individuals. § 113.

D. Automated Transactions. In addition, concerns have been expressed that in automated transactions an inadvertent pressing of a computer button may result in a party being bound without intending to contract. This might be called the "finger twitching" issue. These concerns have been so pervasive that a special right to avoid a transaction is provided for inadvertent error in automated transactions in cases where the electronic agent did not allow for the prevention or correction of the error. In such a case, a party may avoid a transaction caused by an inadvertent error provided that, on learning that the other party believed a transaction had occurred, the individual gives prompt notice of the error, has not used or received the benefit of the transaction, and complies with any instructions for return or destruction of the consideration received. § 109.

E. Time and Place of Sending and Receipt. One of the most difficult issues for any drafters attempting to deal with electronic commerce, and one on which there does not seem to be any developing consensus, relates to issues arising from the irrelevance of geography in electronic commerce. There is a cluster of

issues which are being debated on local, national and international venues.

There is plenty of noise, but precious little consensus..

The UETA has taken the position that it should lay foundations.

Whatever rules may evolve in the future, they may be applied against Section 114 of the UETA, which specifies both the time and place of sending and receipt of communications. The focus in terms of geography is on the location of the respective parties, i.e. their places of business or residences. The focus in temporal terms is on when messages leave the sender's information system or enter the recipient's system, or one accessible by the recipient.

F. Transferable Records. Section 115 explicitly provides that parties may obtain the benefits of negotiability in an electronic environment. It provides that, if the issuer of a record explicitly agrees it is subject to this Act, a person in control of the record may have the rights, and an obligor may have the liabilities, which would exist for an equivalent paper note or document of title under the Uniform Commercial Code. These provisions are designed to permit commercial interests to proceed with the development of appropriate systems for establishing control of such transferable records without hampering expedited review of negotiability in an electronic environment.

G. Government Records. Part 2 of the UETA authorizes governmental entities, at all levels of the State, to create and retain electronic records and to convert written records into electronic databases. We have been urged by many to include such provisions, and of course any governmental rules concerning

commercial interactions with governmental agencies will have a major impact on the adoption of technologies, methods of record-keeping, and business models selected by commerce. The Drafting Committee has not felt at liberty to do more than authorize government agencies. We are convinced that a mandate would harm enactment, due to the price tag which could accompany such a bill in many states. Instead, Part 2 authorizes agencies to create and retain records, to accept and distribute electronic records, and to write the regulations which necessarily must govern their use of electronic technologies. Finally, it encourages and urges all such regulations to encourage and promote interoperability of their systems.

By permission of the author, Patricia Brumfield Fry. Permission to republish must be referred to Professor Patricia Brumfield Fry, University of Missouri School of Law, Missouri Avenue and Conley Avenue, Columbia, MO 65211, phone 573-884-7761, fax 573-882-4984, e-mail fryp@missouri.edu

FEDERAL PREEMPTION AND ELECTRONIC COMMERCE

by Patricia Brumfield Fry¹

President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000. Nineteen States have enacted the Uniform Electronic Transactions Act (UETA); it is pending in several others. Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. Nevertheless, the two acts are not identical, either in scope or substance. This memorandum considers the extent to which E-Sign preempts UETA.

E-Sign §102 Preemption: E-Sign § 102(a) states that States may modify, limit or supersede the electronic contracting provisions of E-Sign under limited conditions. If the State has enacted UETA as *approved and recommended by NCCUSL in 1999*, the State law will govern. This provision is subject to two important caveats. First, if a State has accepted the invitation in UETA §3(b)(4) to exclude State laws not listed by the drafters, the added exclusions are preempted to the extent inconsistent with E-Sign.

E-Sign permits States to enact the uniform version of UETA without fear of preemption. The second caveat relates to the effect of non-uniform enactment. The best interpretation, consistent with general preemption principles, is that any non-uniform provisions of such an enactment are to be evaluated under §102(a)(2), which states that State law may modify, limit or supersede the federal legislation only if it "specifies the alternative procedures or requirements for the use or acceptance of electronic records or electronic signatures, provided:

(a) any alternative procedures or requirements are consistent with Titles I and II and

(b) the alternative procedures do not require, or give greater legal status or effect to use or application of a specific technology or technological specification." [Note, however, that there is an exclusion from this provision for the procurement regulations or laws of the States.]

In addition, any State law, if enacted after E-Sign, must refer specifically to the federal legislation.

Under the preferred interpretation, inconsistent non-uniform provisions are ineffective but the balance would survive. There are other possible readings of the preemption language. Under one, if a State includes any non-uniform provision, the entire enactment is ineffective and federal law governs. This reading is consistent with the literal language of subsection (a)(1) and would force every provision to be evaluated under subsection (a)(2). Under the second alternative reading, non-uniform provisions do not survive, whether or not acceptable under subsection (a)(2).

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The preemption provision of E-Sign §102 may be unique in its drafting style. It does not follow the models found in other legislation, such as the Consumer Credit Protection Act, or in federal regulations, such as the Federal Reserve Board's Regulation CC. To the extent that State law is not an enactment of the uniform language of UETA, it may not be possible to determine whether the effect of E-Sign has been avoided until there has been judicial review.

Additional Preemption Issues in E-Sign:

- UETA §8(b) provides that if a State law requires records to be posted or displayed, sent or communicated, or provides for specific formatting for stated information, the method provided in that State law must be followed. E-Sign §102(c) states explicitly that this provision may not be used by any State to "circumvent" the federal law by imposing "nonelectronic delivery methods" which would be enforced under UETA §8(b).
- UETA §§12(f) and (g) permit States to impose requirements, in addition to the use of electronic media, for records retained for evidentiary, audit or like purposes or for records within the jurisdiction of a state agency. The provisions of E-Sign §104 limit that power by stating it may not be exercised in a manner inconsistent with the federal Act.
- E-Sign §104 specifies that State regulations or orders may not impose requirements in addition to those found in E-Sign §101 and may not require, or accord greater legal status to implementation of specific technologies. As a condition to any such regulation or order, the State agency must find that the regulations or orders are substantially justified, are substantially equivalent to requirements imposed on paper records, and will not impose unreasonable costs on the acceptance use of electronic records.

Limits on State Power to Supersede. The savings provisions of E-Sign §102 apply only to the electronic contracting provisions of the statute. They do not apply to the other titles of E-Sign, i.e. the exclusions found in §103, the provisions governing the powers of State and Federal agencies in §104, the studies required by §105, the provisions on transferable records in Title II or the provisions on promotion of international electronic commerce in Title III. This fact does not automatically render other State law ineffective, but it does mean that to the extent the federal legislation overlaps such laws, the federal legislation will prevail.

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WHY ENACT UETA?
THE ROLE OF UETA AFTER E-SIGN
by Patricia Brumfield Fry¹

President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-Sign) on June 30, 2000. Nineteen States have enacted the Uniform Electronic Transactions Act (UETA); it is pending in several others. Both acts validate the use of electronic records and signatures; they overlap significantly. Each statute provides that electronic contracts and signatures shall not be denied legal effect or enforceability because they are electronic. In some cases the federal legislation uses the language of UETA without change. Nevertheless, the two are not identical, either in scope or substance. UETA is more comprehensive than the federal legislation, including subjects not addressed by E-Sign. Other issues are addressed differently. This memorandum discusses the role of UETA after E-Sign.

How is UETA more comprehensive than E-Sign?

A. Attribution. Often the issue is not whether a record has been signed, but rather whose signature appears. Even if Patricia B. Fry appears on a record, I cannot be bound if the name was not placed by me, ratified by me, or inserted by someone acting on my authority. UETA §9 states that an electronic record or signature is attributed to a person if it was the act of the person. This can be proved by any relevant evidence, including the fact some technology or password was used to establish who attached the signature. Section 9 clarifies that the effect of a record or signature on the person to whom it is attributed is determined from the context and surrounding circumstances at the time of the creation, execution or adoption of the record. E-Sign does not address attribution.

B. Effect of Party Agreement. UETA provides that parties may enter into agreements concerning their use of electronic media. For example, UETA §9 refers to the parties' agreement as a factor in determining the effect of an electronic record and §10 refers to the parties' agreement to use security procedures. E-Sign contains no provisions on variation by agreement.

C. Send and receive. UETA §15 ties the determination of whether something has been sent or received to the communication systems used by the parties and specifies that, unless otherwise agreed, they are sent or received from the parties' principal place of business or residence. E-Sign does not deal with the question of when an electronic record is sent or received.

D. Effect of Change or Error. UETA §10 contains provisions governing the effect of failure to use an agreed security procedure and the impact of mistakes made by an individual while dealing with an electronic agent. It specifies that the rules of mistake otherwise apply. E-Sign has no provisions dealing with mistakes or errors in electronic communications.

F. Admissibility. UETA §13 specifies that electronic records are not to be denied admissibility into

evidence solely because the records are in electronic format. There is no parallel provision in E-Sign.

G. Transferable Records. E-Sign Title II provides for electronic analogs to paper negotiable notes in transactions secured by real property, and does so in language which is in material part directly imported from UETA §16. The provisions of the UETA are broader in scope, applying to all documents which would, if on paper, be either a promissory note under UCC Article 3 or a document of title under UCC Article 7.

What does UETA do differently from E-Sign? To the extent a State has enacted the uniform version of UETA, the UETA treatment of these matters should prevail.

A. Consumer Protection. The federal legislation focuses on regulating the manner of consumer assent to deal electronically, while UETA emphasizes how parties are to comply with State consumer protection rules. The federal provisions call for a study of the extent to which the regulation benefits or burdens electronic commerce and recommendations from the Department of Commerce and Federal Trade Commission on whether they should be modified.

B. Record-keeping. E-Sign §101(d) follows, in material part, UETA §12(a), (b), (d) and (e). The federal legislation requires that the record remain accessible "to all persons who are entitled to access by statute, regulation, or rule of law" for the time specified, as a condition to enforceability. Query whether it is sufficient that the record is subject to discovery. UETA requires accessibility for later reference.

UETA §12(c) specifies that persons may satisfy their record-keeping obligations through the use of third parties. E-Sign is silent. UETA states that retained electronic records satisfy evidentiary, audit and similar requirements. There is no specific parallel in the federal legislation. UETA permits the States to impose restrictions on the use of electronic records for audit or like purposes. E-Sign, in provisions which are not displaced in a State which enacted UETA [See §104], provides that states may not impose paper requirements through their rule-making power.

C. Automated transactions. E-Sign §101(h) states that the fact an electronic agent was involved in contract formation does not affect enforceability, provided that the agent's activity is attributable "to the person to be bound." UETA §14 states that the use of electronic agents will not defeat contract formation. UETA also has provisions governing changes or errors during the transmission of electronic records. UETA §10 provides rules on the effect of records when a party fails to use an available security procedure to detect the change or error and a provision for unwinding mistakes made by individuals dealing with electronic agents. It specifies that in all other cases, other State law governing mistake is applicable. There are no parallel provisions in E-Sign.

D. Effect of Other State Law. UETA defers explicitly to the provisions of other State law for most substantive determinations. Questions of authority, agency, forgery, contract formation, etc., are determined by other State law. E-Sign states in §101(b) that it does not affect any legal requirement beyond requirements for writings, signatures, and the like.

E. Powers of State governments. UETA bracketed §§17-19 authorize State governments to migrate, in an orderly fashion, to electronic technologies. Some States are far along in the process of migration, others have much work to do. The provisions of UETA are permissive and authorizing; they contain no mandatory provisions. E-Sign restrains the States by limiting their powers.