

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 00/2

10831 HOUSE JUDICIARY



The Federal ESIGN Act

- ◆ Makes explicit (implicit in UETA)...
 - Application to insurance laws [See § 101(i)]
 - Authority of regulators to establish interpretive rules within substantive jurisdiction [See § 104(b)(1)]



The Federal ESIGN Act

- ◆ Unlike the UETA...

- Adopts specific standards for consumer consent to use electronic records and signatures for notices and disclosures [See § 101(c)(1)]

- Permits substitution of electronic delivery of consumer disclosures, if delivery includes acknowledgment of receipt, for other delivery requirements [See § 101(c)(2)(B)]

The Federal ESIGN Act

- ◆ Unlike the UETA...

Excludes recordings of oral communications from definition of electronic record for purposes of consumer notices and disclosures [See 101(c)(6)]

Adds additional exclusions and exemptions from statute [See § 102]

- Legal rules governing adoption, divorce, and other matters of family law
- Court documents requiring execution in connection with court proceedings
- Notice of utility termination, default or foreclosure under mortgage or lease, termination of health or life insurance, and product recalls and safety notices
- Notices that accompany transportation or handling of hazardous materials, pesticides, and other toxic materials

GOODWIN

PROCTER



The Federal ESIGN Act

- ◆ Unlike the UETA...

- Expressly limits regulatory authority to impede or obstruct effective use of the statute [See §§ 102(c), 104(b)(2), 104(c)]

- Limits Transferable Records to promissory notes secured by an interest in real property [See § 201(a)(1)(C)]

- No variation by agreement

- Omits default rules for

- ◆ Establishing when electronic record is sent or received
 - ◆ Liability for transmission errors
 - ◆ Evidence rule

The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

Statute's application is "limited" to commercial (including consumer) and business transactions in or affecting interstate or foreign commerce [See § 101(a)]

Limitation is based on breadth of Interstate Commerce Clause in Constitution

Any interstate nexus should be sufficient

- Use of interstate communications (telephone, internet, cellular phone systems)
- Involvement of federally insured or regulated institution
- Use of products created, sold, leased or licensed by out-of-state vendors

The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

State may supercede requirements of Section 101 with

- ♦ Adoption of the Official Text of the UETA (before or after ESIGN enactment)
- ♦ Adoption of another statute, or any regulation (under UETA, ESIGN or otherwise), that is
 - Consistent with ESIGN Act Titles I and II
 - Does not favor a specific technology (except for rules governing procurement)
 - If enacted after ESIGN, make specific reference to ESIGN Act
- ♦ [See § 102]



The Federal ESIGN Act

- ◆ Federal Preemption – a closer look

Four potential interpretations of exception for states enacting UETA

- ◆ Official Text or nothing – any non-uniform amendments invalidate entire statute
- ◆ Official Text survives – any non-uniform amendment is invalid
- ◆ Official Text survives if consistent – Entire statute must be evaluated for consistency with ESIGN
- ◆ Official text plus consistent provisions – Provisions from UETA Official Text survive, plus non-uniform amendments okay if consistent with ESIGN

The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

What constitutes a statute or regulation
“consistent” with Title I and Title II of ESIGN?

- ♦ Consistent -- Having agreement with itself or something else;...compatible;...not contradictory.
Black’s Law Dictionary, 4th Edition

- ♦ ESIGN Objectives

- Baseline uniformity
- Broadest possible scope
- Technology neutrality
- Minimal intrusions into freedom of contract
- Strict limits on regulatory barriers
- Deference to UETA

GOODWIN

PROCTER

The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

State can establish rules governing filing of records without regard to ESIGN

ESIGN Consumer consent requirements and retention and access rules only apply to transactions if underlying statute or rule of law requires a writing

- ♦ UCITA
- ♦ Proposed amendments to UCC Articles 2 and 2A
- ♦ Other state statutes?

Example -- The Kentucky UETA

- ◆ Excludes from the UETA any “law governing the conveyance of any interest in real property”

- ◆ Defaults to ESIGN

Nothing in ESIGN prevents state from adopting statute with consistent rules, but narrower scope than ESIGN

But...that means that ESIGN covers all transactions in interstate commerce excluded from state law

Example -- The Kentucky UETA

- ◆ Excludes any “law governing the creation or transfer of any negotiable instrument or any instrument establishing title or an interest in title.”
- ◆ Doesn't impact transferable record provisions in UETA

Transferable record is a legal construct unto itself that borrows from negotiable instruments law

No need to default to ESIGN

Example -- The Kentucky UETA

- ♦ Kentucky preserves permissive UETA consumer consent rules
- ♦ But...Changes to Official Text means UETA enactment not complete
- ♦ Does this mean ESIGN consumer consent disclosure requirements apply under “consistency rule”?

Probably moot –

- ♦ Presence of federal notices and disclosures ubiquitous
- ♦ ESIGN applies to real estate conveyances in Kentucky
- ♦ Most system designers are designing multi-jurisdiction systems – differentiation not efficient

Example -- The Kentucky UETA

- ♦ Government Agency – “an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.”
- ♦ Each governmental agency “in compliance with standards established by the governor's office for technology, shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.”

GOODWIN

PROCTER



Example -- The Kentucky UETA

- ♦ “The governor's office for technology, giving due consideration to security, may specify the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes.”
- ♦ “If electronic records must be signed by electronic means, each governmental agency, giving due consideration to security, may specify the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process”



Other Examples

- ♦ North Carolina addition of non-uniform ESIGN Consent to the UETA
- ♦ New York non-uniform statute with restrictive definition of signature
- ♦ West Virginia requirement of notice to obligor before obligation to new transferee on electronic note becomes enforceable



The Federal ESIGN Act and the UETA – An Analytical Model

- ♦ Adopt the ESIGN Act as the baseline

Assume that all ESIGN restrictions and exclusions will apply, even in UETA jurisdictions

- Consumer consent rules
- No variation of ESIGN or equivalent UETA rules by agreement
- Additional exclusions
- Record retention rules

Assume all consistent UETA provisions not covered by ESIGN survive, but build them, or variations by agreement, into system rules anyway

The Federal ESIGN Act and the UETA – An Analytical Model

- ♦ Look to UETA Official Comments, and Congressional Record at time of ESIGN adoption in House and Senate, for interpretive rules
- ♦ When interpreting ambiguous provisions, ask if interpretation serves purpose of statute and meets “common sense” test

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	Louisiana	Ohio
	Arizona	Maine	Oklahoma
	Arkansas	Maryland	Oregon
	California	Massachusetts	Pennsylvania
	Colorado	Michigan	Rhode Island
	Connecticut	Minnesota	South Dakota
	Delaware	Mississippi	Tennessee
	District of Columbia	Missouri	Texas
	Florida	Montana	U.S. Virgin Islands
	Hawaii	Nebraska	Utah
	Idaho	Nevada	Vermont
	Indiana	New Hampshire	Virginia
	Iowa	New Jersey	West Virginia
	Kansas	New Mexico	Wyoming
	Kentucky	North Carolina	
		North Dakota	

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2004 INTRODUCTIONS: Alaska

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

(1/20/04)

2:55 PM

From: art peterson <art@dillonfindley.com>
Subject: FW: UETA -- ?s at House Jud. Com. hearing -- reply #2 of 3
To: "Rep. Lesil McGuire" <Representative_Lesil_McGuire@legis.state.ak.us>,
 "Rep. Tom Anderson" <Representative_Tom_Anderson@legis.state.ak.us>,
 "Rep. Max Gruenberg" <Representative_Max_Gruenberg@legis.state.ak.us>,
 "Rep. Les Gara" <Representative_Les_Gara@legis.state.ak.us>
CC: 'Deborah Behr' <deborah_behr@law.state.ak.us>,
 "Ch. Justice Alex Bryner" <abryner@appellate.courts.state.ak.us>,
 'Grant Callow' <>wgc@customcpu.com>, 'Tam Cook' <lynn_barnes@legis.state.ak.us>,
 'Jerry Kurtz' <Lsjkj@aol.com>

Hi again,

Here's Prof. Fry's second 1/22/04 reply to my 1/21/04 inquiries, posing the remaining committee questions on HB 285 (UETA). (Please see the first one, which I forwarded to you a few minutes ago). John McCabe's reply will be next.

Incidentally, I am cc'ing the rest of the people in Alaska's uniform laws delegation.

Art

-----Original Message-----

From: Fry, Patricia B. [mailto:FryP@missouri.edu]
Sent: Thursday, January 22, 2004 5:19 AM
To: art@dillonfindley.com; John McCabe; Mike Kerr
Cc: Katie Robinson
Subject: RE: UETA -- House Jud. Com. hearing today

Art: Given your geography, I thought it might make some sense to point out that Canada has the UECA [in major part UETA and fulfilling the same policies]. It also has enacted and promulgated separate consumer protection rules. [See www.ic.gc.ca/cmb for their most recent meeting and announcements. That site has links to the Canadian Code of Practice for Consumer Protection in Electronic Commerce.] Also, remember that ESign has major preemptive effect if a state's laws do not follow UETA or are not consistent with ESign's medium-neutral and technology-neutral policies. As noted above, I believe ESign has the effect of preempting major parts of state digital signature legislation, as well as other e-commerce legislation. Pat

Patricia Brumfield Fry
 Edward W. Hinton Professor of Law
 University of Missouri-Columbia
 Law School
 Columbia, MO 65211
 Office: 573 884 7761
 Fax: 573 882 4984
 Email: fryp@missouri.edu

-----Original Message-----

From: art peterson [mailto:art@dillonfindley.com]
Sent: Wednesday, January 21, 2004 7:00 PM
To: Fry, Patricia B.; 'John McCabe'; 'Mike Kerr'
Cc: 'Katie Robinson'
Subject: UETA -- House Jud. Com. hearing today

Hi All,

V same @
THX for your hard work on this bill!

I testified this afternoon at the Alaska House Judiciary Committee hearing on UETA, and the bill (HB 285) was favorably reported out of committee. The committee adopted its committee substitute, the only change being the addition of the citation to UCC, Art. II, Sales (our AS 45.02), which had been inadvertently left our original bill's Scope section (UETA sec. 3(b)(2), and our proposed AS 09.80.010(b)(2)).

Three questions arose, for which I promised to get answers before the bill is on the House floor for third reading:

1. Have there been any court decisions since UETA was promulgated in 1999 that would suggest to any of you that different wording or difference substance would better handle some problem or issue? I.e., would you (Pat, and NCCUSL as a whole) do anything different to handle some problem that has arisen?

2. What were the hot issues, if any, in NCCUSL committee and floor debate?
(I recall some expression of concern about UETA not going far enough in including express consumer protections, but that the language worked out between NCCUSL and the Consumers Union in the Scope section, regarding sec. 101(c) of "E-Sign" and the exemptions [proposed AS 09.80.020(c) in our bill] reflects the compromise.)

3. What are the stories behind the missing states, especially Washington? I.e., are those states not in the enactment list because of some issue in UETA, some state's unique legislative procedural problem, political machinations unrelated to the merit of the Act, or what?

And one of our attorney legislators asked, out of frustration with our court system, about the wisdom of including in the Act a provision requiring courts to accept FAX filings.

Art

3:01 PM

From: art peterson <art@dillonfindley.com>
Subject: FW: UETA -- ?s at House Jud. Com. hearing -- reply #3 of 3
To: "Rep. Lesil McGuire" <Representative_Lesil_McGuire@legis.state.ak.us>,
"Rep. Tom Anderson" <Representative_Tom_Anderson@legis.state.ak.us>,
"Rep. Max Gruenberg" <Representative_Max_Gruenberg@legis.state.ak.us>,
"Rep. Les Gara" <Representative_Les_Gara@legis.state.ak.us>
CC: 'Deborah Behr' <deborah_behr@law.state.ak.us>,
"Ch. Justice Alex Bryner" <abryner@appellate.courts.state.ak.us>,
'Grant Callow' <wgc@customcpu.com>, 'Tam Cook' <lynn_barnes@legis.state.ak.us>,
'Jerry Kurtz' <Lsjkj@aol.com>

Hi yet again,

Here's John McCabe's 1/22/04 reply to my 1/21/04 inquiries posing the House Judiciary Committee's remaining questions. This is the last item in this series of three. (Please see the first two, which I forwarded to you a few minutes ago.)

My second 1/21/04 inquiry to Pat Fry and John appears just below his reply, here.

Art

-----Original Message-----

From: John M. McCabe [mailto:JMMccabe@nccusl.org]
Sent: Thursday, January 22, 2004 7:16 AM
To: art@dillonfindley.com
Subject: RE: UETA -- House Jud. Com. hearing: 1 more Q

*V-
Same*

Art - Pat has provided essential replies. I would add that UETA is coming back in Wisconsin this year, supported by the state agencies that handle electronic transactions. There is prior legislation on digital signatures that probably has been preempted by E-Sign. The prospects are good in Wisconsin. In Illinois, I made an attempt to amend the current legislation, which has a chapter that very much parallels UETA. That was done intentionally by a special commission that was formed to propose the original, pre-UETA statute. The commission worked while the Conference was drafting UETA and its chair was very much involved in Illinois and as an observer to UETA. The first effort just never got any traction in Springfield, and at some point I will attempt to bring the effort back. There is no opposition, but this segment of Illinois law probably avoids preemption. That means there is not much energy for substituting UETA, but at some point I will try again to get that done. New York and Washington are exactly as Pat describes them.

Just a comment on the fraud issue. There are opportunities for fraud in electronic transactions, exactly as there are opportunities in the paper world. The perpetration of fraud will be somewhat different, though not that different, in electronic transactions than they are in transactions memorialized by paper. UETA does not contribute to or expand opportunities for fraud. Because it deals with statute of frauds problems, which are evidentiary problems, it actually expands the evidence of transactions that is available to a court. In my view this helps people get their disputes adjudicated and resolved. Fraud claims are part of the spectrum of disputes that will be better and more truthfully resolved.

I hope this helps. JMM

John M. McCabe

2:48 PM

From: art peterson <art@dillonfindley.com>
 Subject:FW: UETA -- ?s at House Jud. Com. hearing --reply#1 of 3
 To: "Rep. Lesil McGuire" <Representative_Lesil_McGuire@legis.state.ak.us>,
 "Rep. Tom Anderson" <Representative_Tom_Anderson@legis.state.ak.us>,
 "Rep. Max Gruenberg" <Representative_Max_Gruenberg@legis.state.ak.us>,
 "Rep. Les Gara" <Representative_Les_Gara@legis.state.ak.us>
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 'Grant Callow' <wgc@customcpu.com>, 'Tam Cook' <lynn_barnes@legis.state.ak.us>,
 'Jerry Kurtz' <Lsjkj@aol.com>

*Vanessa
 P13 read
 compress
 for me
 for me
 Proab
 THKS
 J*

Hi,

Here is the first of two 1/22/04 replies I received from Prof. Pat Fry, chair of NCCUSL's committee that drafted the Uniform Electronic Transactions Act, responding to my two 1/21/04 e-mail messages posing the questions that arose at the 1/21/04 House Judiciary Committee hearing on HB 285 (proposing enactment of that Act). My first 1/21/04 inquiry is at the end of her message.

Her second reply will follow, as will one from John McCabe, NCCUSL's legislative director and legal counsel.

When I returned to my office after the committee hearing, I also phoned the attorney for the Consumers Union, in California. She confirmed that her organization was satisfied with the final UETA. See our proposed AS 09.80.010(c), in particular.

Please ignore the typos in my original message to Pat and John, but note that, in my Question #2, my reference to AS 09.80.020(c) should be to AS 09.80.010(c). (Oops!)

The gist of the three e-mail messages and my conversation with the Consumers Union attorney is that UETA is o.k. -- no special problem.

Cheers.

Art

-----Original Message-----

From: Fry, Patricia B. [mailto:FryP@missouri.edu]
 Sent: Thursday, January 22, 2004 4:31 AM
 To: art@dillonfindley.com; John McCabe; Mike Kerr
 Cc: Katie Robinson
 Subject: RE: UETA -- House Jud. Com. hearing today

Art: Quickly, as I prepare for class and then leave town, I'll try to give you some answers to this email and the second one you sent. If you need amplification this weekend, leave me a message at 954-424-3300 [my meeting hotel] and I'll call you back. I won't have email with me. If it can wait until next week, I'll send you anything I can via email.

As to your questions:

1. While I might, indeed do have qualms about parts of E-Sign [the federal statute] I know of no court decisions or even litigation which causes me to second guess UETA. A few folks have suggested we were too restrictive or timid in our definition of control when it comes to transferable instruments, but work progresses using our definition as the base and everyone I've talked to is comfortable that the solution

there is workable. As to whether it has done some good, I am told Freddie Mac is buying e-mortgages and my local county recorder has taken advantage of the permission to move to electronics and is getting ready to accept her first electronic recordings. Freddie Mac [and Fannie Mae I am sure] are working on creating securitized bundles of transferable records.

2. The consumer questions were raised on the floor at the annual meeting, and I do believe our deal with the Consumers Union is an appropriate resolution, i.e. achieves an appropriate balance. Otherwise I believe it is fair to say that the debate during the UETA drafting process was over how to achieve the goal of supporting electronic commerce, rather than whether we should, and over just how many of the problems of electronic commerce we should try to resolve in this Act. For example, there were proposals that we should try to deal with the jurisdictional thicket [e-commerce does not respect geographic boundaries]. The general consensus was that this would hold up UETA, and the need was for more rapid action.

3. I can't give you facts on too many of the missing states, but Washington state enacted a digital signature statute [technology specific and giving a kind of super-legal status to properly encrypted documents] with the support of Microsoft and its lawyers. I believe they saw UETA as interfering there. There is some sense in that reading, since UETA says that all electronic documents are enforceable and that the effect of using dual key encryption is evidentiary, rather than legally conclusive.

New York enacted an inconsistent statute prior to the promulgation of UETA -- the prized achievement of some politically powerful individuals. Despite the urging of the NY City Bar, that has been a block to UETA. [Incidentally, I personally believe that significant portions of both the Washington and NY statutes are preempted by ESign. I know of no litigation.]

Illinois has a statute which is, in major respects although not in all respects, consistent with UETA.

The Virgin Islands packaged UETA with UCITA, which of course was quite controversial.

I thought we had Wisconsin - I know it was introduced there but in a form that had some real problems.

John can give you more answers on the other states.

Your second message: UETA validates parties' use of security technology in two ways. First of all, use of electronic technologies is consensual - no one is required by the statute to participate in any electronic technologies. Accordingly parties are free to condition their assent to the use of electronic technologies on the use of agreed security procedures. Secondly, any security technologies used are to be taken into account when courts consider issues of identity and agreement. The strength of the technologies should go directly to the evidentiary weight of the electronic record or signature.

As to opening people up to fraud - all UETA does is say that people may deal electronically. As I noted, it does not require anyone to do so. Certainly there are fraudsters online. UETA is not designed to, nor does it in any way supersede the common law or statutes dealing with various forms of fraud and larceny - whether that common law or statute has been on the books for years or is newly enacted specifically for the online environment. UETA is not a regulatory or criminal statute. It is a piece of infrastructure validating electronic transactions and records. If anything, since it tells courts to accept electronic evidence, it should assist in the prosecution of frauds. At the same time, it validates the millions of legitimate transactions [look at the figures for Xmas shopping] entered into by more and more individuals every day.

Art, I hope this helps. I'll be more than happy to talk with

FRAUD?

you more about any of these points - or via email next week. Thanks for your help. Have a good weekend. Pat

Patricia Brumfield Fry
Edward W. Hinton Professor of Law
University of Missouri-Columbia
Law School
Columbia, MO 65211
Office: 573 884 7761
Fax: 573 882 4984
Email: fryp@missouri.edu

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And one of our attorney legislators asked, out of frustration with our court system, about the wisdom of including in the Act a provision requiring courts to accept FAX filings.

**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.



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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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211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
(312) 915-0195 ~ fax (312)915-0187

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

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Uniform Law Commissioners

The National Conference of Commissioners on Uniform State Laws

> A Few Facts About The...

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

2004 INTRODUCTIONS:

- ✓ Alaska
- Massachusetts

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

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 Legislatures Magazine: March 2000

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New Laws for the Digital Age

With the rapid growth of electronic commerce, the states need a legal framework that will provide clear, consistent rules for the new world of e-business.

By Jo Anne Bourquard

Two new uniform acts dealing with electronic information and transactions were recently approved by the National Conference of Commissioners on Uniform State Laws and are ready for consideration by the states.

One—the Uniform Computer Information Transactions Act (UCITA)—is based on the need for rules to govern the sale of computer information. Over the past few decades, computer software has been sold with a "shrink-wrap" or "click-wrap" license, which the consumer is able to read only after purchase. Unlike the sale of a tangible good, such as a car, a license agreement does not transfer title to the software, instead it "buys" a limited use of the product.

In essence, the act establishes rules for creating, modifying, transferring or licensing computer information. This includes the purchase of computer software, as well as other information such as computer games, on-line databases, multimedia products and the distribution of information on the Internet.

UCITA

UCITA was originally drafted as part of the Uniform Commercial Code (UCC). In the spring of 1999, amid much controversy, the commissioners redrafted it as a freestanding act.

John McCabe, legislative director of the National Conference of Commissioners on Uniform State Laws, says it became a lightning rod because it was the first uniform law governing licensing contracts. Software is an intangible product, not a tangible good like those governed by the UCC. Unlike the commercial code rules, which had a history in common law before they became part of the uniform code, the UCITA explores new territory. The uniform law commissioners adopted it last summer.

Critics charge that the act fails to provide sufficient protection for consumers because they don't get a chance to look

at the license and can't negotiate terms for use of the product before they spend their money. And they fear computer information providers may enforce unreasonable terms because they contend UCITA provides limited rights and warranties for consumers.

"Consumers would be much better served by certain rules that straightforwardly protect their reasonable interests and expectations, explains Jean Braucher, University of Arizona law professor. "Far from creating greater legal certainty, UCITA would require decades of litigation to sort out its meaning."

Supporters of the act counter that software licensing offers flexibility in a rapidly exploding industry. They point out that the act follows basic contract law. When license terms are unavailable for review before payment and delivery, it mandates that buyers have the right to a cost-free refund if the terms are not acceptable. The act extends warranty rules to all software licenses and requires a conspicuous warranty disclaimer.

Marc Pearl, senior vice president of government affairs and general counsel for The Information Technology Association of America, explains that UCITA is urgently needed to keep the country's economic engine running. "It lays down fair, clear rules that provide greater certainty and uniformity than current law."

UETA

The second measure, the Uniform Electronic Transactions Act (UETA), puts electronic and paper-based commerce on the same legal footing. It gives electronic signatures or records the same validity and enforceability as manual signatures and paper-based transactions. It doesn't make electronic transactions mandatory-it simply provides a framework to make them legal when they are used. The act allows the use of electronic records and electronic signatures in any government or business transaction except those subject to the UCC. It is designed to fit with existing state law.

The act defines electronic signatures in a technology-neutral way. It is worded broadly enough to encompass sounds, symbols or processes, that would include mouse-clicks, digitally encrypted signatures, a name at the end of an e-mail, electronic water marks, etc., when executed by a person who has the intent to "sign." In addition, it authorizes state governments to "create, generate, communicate, store, process, use and rely upon electronic records and signatures."

California was the first state to pass UETA. Some important improvements for consumers were added to the California law, according to Gail Hillebrand of the Consumers Union. The act allows states to exempt specific laws from its general rule that permits electronic records and signatures to replace written ones. California excluded several categories of statutes: those requiring specific text to be separately signed, those affecting rights or restraining particular activities, and those with special notice requirements triggering legal rights. In addition, the California law included several new provisions, such as restricting UETA only to agreements where the decision to communicate electronically has been made electronically. The state added the right to revoke the OK to receive communications electronically.

At a recent NCSL conference, Marybeth Stevens with the American Council of Life Insurance stressed the importance of having a uniform state approach to electronic signatures and records in order to support e-business transactions in the next century. She encouraged states to adopt UETA immediately so that federal legislation would not be necessary.

"Economic commerce does not recognize geopolitical boundaries," says Patricia B. Fry, law professor at the University of North Dakota and chair of the UETA drafting committee. "This act provides a solid legal framework to allow for the continued development of innovative technology to facilitate electronic transactions. When the states enact UETA, we will have a stable base that will allow e-business to move forward."

How to provide a legal structure that will foster e-commerce is clearly a major issue for state policymakers. The drafters of both of these new uniform acts, UETA and UCITA, envisioned these laws as an important part of the legal infrastructure necessary to advance e-business. By the end of 1999, UETA was passed by two states-California and Pennsylvania-and several states had conducted hearings to consider one or both of these new uniform acts. But the majority of state legislative deliberation will take place this session.

Jo Anne Bourquard directs NCSL's Legislative Information Services.

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Stats on Internet and Electronic Business

- People on the Internet -In 1994, 3 million; in 1998, 100 million (half of all U.S. adults); by 2005, an estimated 1 billion worldwide.
 - Internet financial services-More than 6 million U.S. residents have access to Internet financial transactions, including on-line banking and brokerage accounts.
 - Web sites-There are more than 3.6 million commercial Web sites in the United States alone, and 275,000 are being added each month.
 - Internet retail sales-E-commerce sales are projected to rise from \$40 billion to \$80 billion by 2002.
 - Business-to-business Internet sales-Business to business sales on the Internet are expected to hit \$1.3 trillion by 2002.
-

Congress Bent on Its Own Law for Electronic Signatures

As with many issues involving electronic commerce, the states have been the "laboratories of democracy"-42 of them had enacted some form of digital signature legislation by the end of 1999.

Now Congress is getting into the act with both houses passing a version of electronic signature legislation. Although both refer to the Uniform Electronic Transaction Act, the consequences for the states are very different. S 761, sponsored by Michigan Senator Spencer Abraham, preempts current law in states that have not yet passed the uniform act, creating equal legal status for electronic and written signatures. S 761 allows states to pass UETA or similar legislation to reestablish the jurisdiction of state law.

HR 1714, sponsored by Representative Tom Bliley of Virginia, contains more broad preemptions and includes language to create a national standard for digital records. HR 1714 preempts laws in every state, even those that have already passed the uniform act. The House bill threatens state consumer protection laws, particularly those that require paper notifications to consumers. Furthermore, HR1714 would compel states to accept required records electronically without the ability to set rules on the form or software used to deliver such records.

Members at the NCSL winter meeting in Washington, D.C., in December voted unanimously to endorse the language in the Senate bill, and oppose the House bill. Currently, the two versions are waiting to be reconciled in a conference committee, which is expected to be appointed early this session.

-Graham Williams, NCSL

A Little About NCCUSL

The National Conference of Commissioners on Uniform State Laws is a nonprofit, unincorporated association of commissioners on uniform laws from the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. The primary task of the more than 300 commissioners, most of whom are practicing lawyers, judges and law professors, is to determine which areas of the law would benefit from uniformity. They then write and recommend uniform laws to state legislatures for enactment. Since its creation in 1892, the NCCUSL has written more than 200

uniform laws, including the Uniform Partnership Act, Uniform Trade Secrets Act, Uniform Probate Code and Uniform Limited Partnerships Act. The most well-known uniform act is the Uniform Commercial Code, a joint project with the American Law Institute. www.nccusl.org

More Information

For more information on the Uniform Computer Information Transaction Act, go to:

www.law.upenn.edu/bll/ulc/ulc_frame.htm

www.nccusl.org/pressrel/ucitaqa.htm

www.2bguide.com

For the Uniform Electronic Transactions Act (UETA), look at:

www.law.upenn.edu/bll/ulc_frame.htm

www.abanet.org/nccusl/home.html

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E-Signatures for an E-World

Valid Signatures

Feds Adopt Electronic Signatures

Trust and Security

What's Ahead

States With Laws on Electronic Signatures

States Without a Law Have Options

E-Signatures for an E-World

States face a thicket of complications born of rapidly changing technology in their quest to regulate electronic commerce.

By Heather Morton

If Paul Revere lived today, how would he announce the invasion of the Internet? One if by mail, two if by e-mail? Despite the economic downturn and the dot.com bust, the Internet is thriving, and electronic commerce continues to grow.

More than 143 million people use the Internet, according to a study by the U.S. Department of Commerce, "A Nation Online: How Americans Are Expanding Their Use of the Internet." Of the people online, 67 percent use the Net for research and to get product information, while 39 percent use it to make purchases.

VALID SIGNATURES

In order to provide the legal support for electronic commerce, many states have adopted laws that make electronic signatures valid. States such as Arizona, Minnesota, Missouri, Nevada, New Hampshire, Utah and Washington started with legislation that specifically defined digital signatures. In 1999, the National Conference of Commissioners on Uniform State Laws developed a model act for the use of electronic signatures and records in government or business transactions. The Uniform Electronic Transactions Act (UETA) makes electronic records and signatures as legal as paper and manually signed signatures. Forty states now have some form of the act.

Virginia Delegate Joe T. May says the uniform act is important, because "It makes electronic signatures legal, while forming the legal backbone and providing guidelines for electronic contracting." He says that his state is approaching technology changes with "a measured pace."

Utah Senator Lyle W. Hillyard says the Uniform Electronic Transactions Act was not difficult to pass in his state because there is a lot of legislative interest in electronic commerce. "The technology, especially for the rural population, helps make government more accessible," Hillyard says. "When we did UETA, we knew we were going to have to adapt it as the technology developed. Our chief challenge at this point is education-getting people to use electronic signatures and electronic commerce."

"We need to be careful to keep the law general enough to allow competition and not favor one type of technology," he says.

FEDS ADOPT ELECTRONIC SIGNATURES

There's also federal legislation that supports electronic transactions. The Electronic Signatures in Global and National Commerce Act (E-SIGN) was adopted under President Clinton and became effective October 2000. The law establishes the validity of electronic records and signatures. It also governs in the absence of a state law or where states have made modifications to the uniform act that are inconsistent with E-SIGN. The federal law was passed to encourage the remaining states to adopt the uniform act with few modifications and promote public confidence in the integrity and reliability of electronic commerce.

The federal law, E-SIGN, applies to the sale of goods and leases under the Uniform Commercial Code. Despite its wide applicability, it doesn't cover official court documents, health and life insurance cancellation notices, and notices regarding default, repossession, foreclosure or eviction from an individual's primary residence, among others.

TRUST AND SECURITY

Although laws covering electronic signatures are now in place, people haven't started using them for their on-line shopping, nor have businesses encouraged their use. In a survey of 550 companies, only 10 percent reported that they use electronic signatures, according to GartnerG2, a research and consulting company. But that figure is expected to double in the next 18 to 24 months.

There are two reasons why electronic signatures have not replaced manual signatures—"trust and security," says Thomas Smedinghoff, a partner with Baker & McKenzie in Chicago. "Merely having a law saying electronic signatures are legal is not enough."

Individuals must be able to trust that the message authorized by the signature comes from whom it says it does and that the person had the authority to make the transaction. "Security is a prerequisite of trust," Smedinghoff says. An individual needs to trust that the message has been kept confidential and has not been altered in any way after it was electronically signed.

The uniform state act does lay out some rules for electronic signatures, but there needs to be more, Smedinghoff says. "UETA and E-SIGN make it legal to do transactions electronically. Now we need to address the issue of whether we trust electronic transactions and determine what the rules will be that govern how we behave in cyber transactions," he says.

Smedinghoff suggests that states look at the Uniform Commercial Code (UCC) to define additional rules. That's where lawmakers will find out how to deal with security, he says. There are "precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability," Smedinghoff says. The rules balanced the competing interests of the banks that provide electronic funds transfers, the commercial and financial organizations that use the transfers, and the public interest.

California Senator Debra Bowen says that privacy concerns are preventing people from using electronic signatures. "The one thing UETA has not touched on is the issue of privacy, which I believe is a huge mistake. I don't think electronic transactions will ever be fully embraced by the vast majority of people until we can ensure that the personal, financial and medical information is private, secure and not going to be auctioned off to the highest bidder."

In an effort to encourage electronic signatures, commerce and financial services companies are developing voluntary rules, the Standards and Procedures for Electronic Records and Signatures (SPeRS). "When UETA and E-SIGN were enacted, the approach was to enact broad statutory provisions without specific technology requirements or specific regulations. Consequently, there is an absence of traditional statutory guidance especially for regulated industries, such as financial service companies," says Jeremiah Buckley, partner in the Washington, D.C., office of Goodwin Procter LLP, who is acting as counsel for the rules project. His group is drafting industry models for the use of electronic records with the hopes of increasing customers' comfort levels with electronic records and signatures.

"These standards are not intended to be an alternative to regulation or best practices for the industry," says Buckley.

They will be what he calls "living standards" and will be designed to change as technology changes.

WHAT'S AHEAD

Electronic signatures were barely on the legislative radar screen a decade ago. Today it's anybody's guess what will develop in electronic commerce over the next 10 years. Already the Internet has changed how businesses, governments and individuals communicate, shop and interact with each other. State lawmakers have been passing measures to validate electronic signatures in order to support electronic commerce. In the years ahead, technology will drive them to re-examine and readjust those laws.

As for Paul Revere, if he were alive today, he would probably send his famous warning through an e-mail message to all of his customers via his Web site, PaulRevereSilver.com, along with a link to items available through his on-line catalog.

Heather Morton specializes in financial services for NCSL.

States with Laws on Electronic Signatures

Forty states have passed legislation on electronic signatures based on a model act developed by National Conference of Commissioners on Uniform State Laws They are:

1999-California, Pennsylvania

2000-Arizona, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Virginia

2001-Alabama, Arkansas, Louisiana, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Tennessee, Texas, West Virginia, Wyoming

2002-Colorado, Connecticut

States Without a Law Have Options

States without a law on electronic signatures have several options regarding the federal Electronic Signatures in Global and National Commerce Act (E-SIGN) and the Uniform Electronic Transactions Act (UETA), now law in some 40 states. They can:

- Allow the federal law to govern by not enacting the uniform act.
- Enact the uniform act without modification.
- Adopt the uniform act with minimal modifications.
- Enact electronic signature legislation separate from the uniform act being passed in other states as long as the law is consistent with the federal law and specifically supersedes it.

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America Is Online, and There's No Turning Back

How Wide the Digital Divide?

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Government Goes Electronic

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Federal Laws to Protect Kids

Merch Mania: Hold the Phone

Glossary of Terms

The Road Dash for Internet Lines

America Is Online, and There's No Turning Back

This collection of pieces was written by NCSL's Information and Telecommunications Policy staff: JoAnne Bourquard, Pam Greenberg and Robert D. Boerner.

At comet-like velocity, the Internet is propelling us into a new world of electronic products, transactions, services and communications.

More than 100 million Americans currently cruise the Net. Through this worldwide portal, we have virtually unlimited access to information and staggering new business and educational opportunities. It's no wonder the Internet is dramatically reshaping the way we live, work, play and interact with one another.

For state lawmakers, these changes create a whole new landscape for public policy. In commercial law, policymakers are examining existing rules on paper-based information and transactions to determine how best to include electronic information and agreements. New questions about security and privacy need to be resolved to increase consumers' confidence in electronic commerce. And questions about whether and how to tax Internet transactions have serious ramifications for state budgets.

The global nature of the Internet also raises jurisdictional issues that remain unresolved. States seek to regulate the

Internet to protect their own citizens, but must do so without impeding interstate commerce. Legislatures have an interest in protecting consumers from fraud and abuse. They're also hearing about problems like burdensome unsolicited junk mail. They have an interest in protecting children from harmful on-line materials. But enforcing existing laws can prove difficult or impossible in an environment where physical presence is irrelevant-criminal operations that are shut down in one state or country can simply set up shop in another.

The Internet holds great potential for improving the delivery of government services and providing instant access to resources. States provide license renewals, tax filings, applications for benefits and more through the Internet. And many state agencies use the Internet to provide information about services and products. They also publish a variety of public information on the Net, such as nursing home facts, lists of licensed physicians or even the names of sex offenders.

Every state legislature provides access to bills and other legislative information through the Internet, and almost half the states broadcast legislative proceedings for all to watch through the Web.

Not only is the Internet radically altering the lives of citizens, its unparalleled growth is influencing the shape of the information and telecommunications industries. Transporting data, voice and images is a fundamental requirement of the expanding cyberworld. Companies in the business of providing these capabilities are competing to provide an array of options. And merger mania has set in. New corporate entities and partnerships that combine entertainment, long-distance, local wireless, cable and computer capabilities are being formed every day. Companies are competing to give consumers the best in cable television, access to the Internet, movies and entertainment, telephone equipment and various kinds of telephone services.

The tremendous growth in consumer choices and advances in technology give rise to some brand new issues. State legislators are now debating the merits of whether access by competitors to high-speed Internet lines owned by cable television companies should be forced or optional. And lawmakers are trying to determine how best to eliminate regulatory barriers and encourage competition in an environment where advances in technology occur at an unprecedented pace.

What is the role of state legislatures in this new landscape? Policymakers can encourage growth and competition and offer safeguards for citizens. But, with the pace of change intensifying, can government keep up?

The challenge for state legislators is how to expand current laws to accommodate the growing electronic environment, while preserving the fundamental rights and protections rooted in existing law.

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How Wide the Digital Divide?

Government is providing more information and offering more services through the Internet, but recent studies indicate that not everyone has access to these benefits.

A December 1999 U.S. Department of Commerce report, "Falling through the Net: Defining the Digital Divide," finds that the number of Americans who use the Internet has grown rapidly. But the study also finds a gap in Internet access between those at upper and lower income levels, and between whites and blacks and Hispanics. Rural areas and central cities also fall behind. Other recent studies, however, including those done by Forrester Research and Cheskin Research, indicate that the racial gap may be narrowing with blacks and Hispanics increasing their Internet use and computer purchases at a faster rate than the general population.

Many high-tech companies, nonprofit organizations, foundations and community groups are actively pursuing programs to address the digital divide. Scholarships, job training programs, donations of telecommunications lines or computer equipment and neighborhood technology centers are just a few of the initiatives under way. The Benton

STATE OF ALASKA

FRANK H. MURKOWSKI,
GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-3075

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:pvv

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

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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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Laws

211 E. Ontario Street, Suite 1300

Chicago, Illinois 60611

(312) 915-0195 ~ fax

(312) 915-0187

[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)

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.

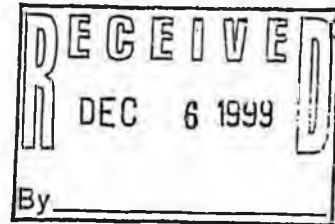
Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership comprises more than 300 attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and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

ELA

Equipment
Leasing
Association

December 1, 1999

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



of America

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.

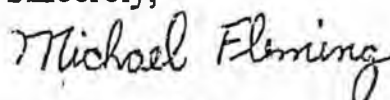
C. Other provisions. To come to grips with consumer protection writing requirements, UETA section 8(a) provides that, if a state law “requires a person to provide, send, or deliver information in writing to another person,” that requirement is satisfied if the information is provided “in an electronic 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



PRINCIPALS

Leo von Scheben
 Earl D. Korynta
 James A. Huettl
 Gary H. Pohl
 Theodore R. Kruth
 Kenneth D. Maynard
 Gregory A. Ingham
 Timothy J. Vig
 D. Lance Mearig
 Daryl D. Sorenson
 Zane W. Shanklin
 W. Wright Alcorn

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

ASSOCIATES

Danna L. Marks
 Steven M. Tjaden
 Scott V. Bell
 Bruce E. Hopper
 John M. Stadium
 Howard A. Parich
 Joann C. Mitchell
 Marshall L. Henei
 Arthur J. Johnson
 Steven M. Karl
 Lori A. Kropidkowsk
 Frederick J. Schwaderer
 Dean E. Syta
 Jeffrey N. Logan
 Sara Marks
 Daniel Mayhurst
 Jeff Hogge
 Michael N. Anderson
 Gerald Y. Neubert
 Gregory A. Uebi

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.

ADDRESS

2515 A Street
 Anchorage, Alaska 99503
 Phone (907) 276-4245
 FAX (907) 258-4653
<http://www.uskh.com>

1-888-766-USKH (8754)

OFFICE LOCATIONS

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USKH - ANCHORAGE

NO. 4355 P. 3/3

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ARCHITECTURE • ENGINEERING • LAND SURVEYING • PLANNING

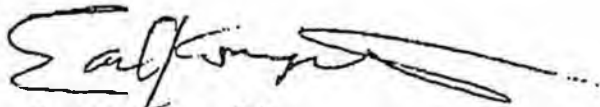
Support of House Bill (HB) No. 285 - Uniform Electronic Transactions Act

Page 2

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. McLaugherty
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. McLaugherty:

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 (IACREOT). 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.

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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.

