

**PRACTICAL GUIDE TO E-SIGN AND THE UNIFORM
ELECTRONIC TRANSACTIONS ACT**

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I. ELECTRONIC RECORDS IN GLOBAL AND NATIONAL COMMERCE ACT

A. General. On June 30, 2000, Congress enacted the Electronic Records in Global and National Commerce Act, 15 U. S. C. §§ 7001 *et seq.* [hereinafter E-Sign §]. A copy is attached as Appendix A. The federal act, sometimes called “E-Sign”, became effective October 1, 2000. It preempts almost all state laws that denied effect to a signature, contract or other record solely because it was in electronic form. The statute will make electronic transactions easier. It will reduce the amount of paper and speed transactions to completion once the public becomes more familiar and comfortable with the concept. Lenders like Fannie Mae and Freddie Mac will be able to save enormous sums through the use of electronic media rather than paper. Some of the savings should eventually pass on to borrowers. Similar benefits should be realized throughout the economy. E-Sign does not change other substantive laws that apply to any transaction. Contracts still need consideration and so on.

B. State Law Preemption. E-Sign’s preemption of state law is found in Section 7001 (a):

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

- (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation

Except for the exceptions listed below, the statute of frauds as we have known it no longer governs contracts.

C. E-Sign carves outs. E-Sign does not preempt all state laws. 15 U. S. C. § 7003 provides for limited exceptions to E-Sign, which leave existing state law in effect:

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by—

- (1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 (Sales of Goods) and 2A (Leases of Goods). E-Sign § 7003 (a).

In addition, E-Sign does not apply to:

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of—

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. E-Sign § 7003 (b).

The U. S. Secretary of Commerce is required by E-Sign to review the operation of the exceptions in subsections (a) and (b) to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers and to submit a report to the Congress on the results of such evaluation by June 30, 2003. E-Sign §7003 (c). Presumably this is intended to give Congress a chance to clean up any problems that may be revealed following implementation of the law.

D. Definitions. E-Sign contains a list of defined terms. E-Sign §7006. A review of several will give an idea of the broad scope of this law.

- The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. E-Sign §7006 (2). This appears to include, among other media, the Internet, voice mail and mobile phones.

- The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means. E-Sign §7006 (4). Examples would include email messages and oral recorded statements and conversations.
- If you need more convincing: the term "information" means data, text, images, *sounds*, codes, computer programs, software, databases, or the like. E-Sign §7006 (7).
- The term "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. E-Sign §7006 (9). The requirement that it be both retrievable and in perceivable form are important safeguards.
- The term "electronic signature" means an electronic *sound*, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the *intent* to sign the record. E-Sign §7006 (5). The requirement of intent is the single most important protective feature in this statute. E-Sign does not provide any guidance on how "intent" is to be determined.

One critic observed that E-Sign may create serious additional risk of forgery. Randolph, *Has E-sign Murdered the Statute of Frauds?*, Probate & Property (July/August 2001). Professor Randolph observes that someone could use another's computer while they are at lunch to send email messages and it is possible for a person to control another's computer electronically from a remote location. These risks will present business and the courts with novel problems.

E. Compliance with other Laws. E-Sign provides that an electronic record satisfies all statutory requirements for retention of records (with some exceptions), including any requirement to retain "originals" or checks. E-Sign §7001 (d). Notarization and acknowledgments may be done electronically. E-Sign §7001 (g). This does not mean that any provisions of applicable law other than those relating to retention are superceded.

F. Governmental Agencies. E-Sign is made applicable to Federal and state governments. E-Sign §7004. At the same time, Federal and state agencies are given authority to interpret E-Sign through the issuance of regulations. *Id.* As a result, the users will probably find disparate treatment by the many Federal and state agencies with respect to electronic records, signatures, filing and other transactions. E-Sign limits governmental rule making authority by requiring that such rules must be consistent with the requirement that electronic records and signatures receive the same treatment as other types of media, no additional requirements may be added and unreasonable costs are not imposed on the use of electronic records. E-Sign § 7004(b)(2). In any case, the government can still require filing and record keeping. Federal and state agencies are given a little leeway to require a tangible or printed record if there is a compelling governmental interest relating to law enforcement or national security and the hard copy record is essential to attaining that interest. E-Sign §7004(b)(3)(B).

The public may encounter problems attempting to use electronic means to transact business with some government agencies. E-Sign does not grant a right to parties to make

electronic filings with the government. Some observers interpret this to mean that individual governmental agencies are free to decline to accept electronic filings.¹ The Winn Article notes that E-Sign §7001 (b) (2) excludes governmental agencies from the rule that parties must agree to use or accept electronic records or signatures and suggests that this implies governmental agencies are required to accept electronic records for filing. Litigation or further legislation may be required to resolve the apparent conflict.

G. Consumer Provisions. E-Sign has specific provisions that cover consumer disclosures. E-Sign §7001 (c). This article will not address those provisions. An excellent analysis of those and other provisions of both E-Sign and UETA may found in the Winn Article. Indeed this article is the single best legal analysis of E-Sign and UETA I found in my research.

H. Transferable Record a/k/a Promissory Notes. E-Sign specifically addresses promissory notes relating to real property mortgage loan transactions. E-Sign §7021. This section provides for the rights of parties with regard to an electronic note, including control, transfer, and status as a holder in due course of an electronic note.

The term "transferable record" means an electronic record that—

(A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;

(B) the issuer of the electronic record expressly has agreed is a transferable record; and

(C) relates to a loan secured by real property. E-Sign §7021(a).

Note that use of an electronic promissory note requires an express agreement of the issuer. Query: If use of an electronic note requires an express agreement, why doesn't the election to transact business electronically require an express agreement?

A transferable record or electronic note may be executed using an electronic signature. *Id.* A person has control of a transferable record if a system employed for transfer of the record reliably establishes that person as the person to whom the record was issued or transferred. E-Sign §7021 (b). E-Sign provides a detailed set of conditions to determine how to establish "control." The reader may still be puzzled how electronic "control" of a transferable record is going to substitute for physical possession of a paper note. Comment 6 to Section 3 of the Model Uniform Electronic Transaction Act is relevant if not enlightening:

Such control is necessary as a substitute for the idea of possession, which undergirds negotiable instrument law. *The technology has yet to be developed which will allow for the possession of a unique electronic token embodying the rights associated with a*

¹ Wittie and Winn, *Electronic Records and Signatures under the Federal E-Sign Legislation and the UETA*, 56 Bus. Law 293 (November 2000) [hereinafter cited as the Winn Article]. Jane Winn is a Professor of Law at SMU Law School.

negotiable promissory note. Section 16's concept of control is intended as a substitute for possession.

In other words, Scotty is not ready to beam us up. E-Sign remains only theory in this regard.

Yet it seems inevitable that the paper note of the past half millenium or so is going to become obsolete sometime in the not too distant future, at least in transactions involving commercial lenders in the U. S. While it may take some time for the technology necessary to be developed and for public acceptance to become wide spread, the economic advantages to lenders are so great that they will apply great pressure to push out paper notes in favor of electronic ones. Once the issues of the safety, security and reliability of the system are technologically feasible and have been sufficiently litigated or the necessary modifications are made to the law, we may come to find the electronic note is superior to the paper note. However, the process will almost certainly have to work its way through many transactions involving mistake, misrepresentation, fraud and all the other bumps in the mortgage lending road that paper notes went through.

I. Exemption from preemption of state laws by E-Sign. Congress did provide a means for states to exempt themselves from E-Sign. However, the exemption can only be accomplished by adopting a version of the Model Uniform Electronic Transactions Act that is “consistent” with E-Sign. The scope of what “consistent” means has yet to be determined. Presumably the fewer variations from the Model Act, the more “consistent” with E-Sign the state’s act is apt to be. The exemption provision of E-Sign reads:

§ 7002. Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law-- (1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or (2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical

specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.

(b) Exceptions for actions by States as market participants

Subsection (a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) Prevention of circumvention

Subsection (a) does not permit a State to circumvent this subchapter or subchapter II of this chapter through the imposition of nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

The provision should be kept in mind whenever a particular state's version of UETA is being analyzed. The state UETA must comply with the Section 7002 of E-Sign or it may be subject to legal challenge.

E-Sign and UETA address the same general area of electronic agreements but are not identical. The differences are what drive the adoption of UETA to obtain exception from E-Sign. The Winn Article points out the most significant differences:

The most important UETA provisions that were omitted from E-Sign are those governing attribution of electronic signatures, the time when messages are deemed sent or received, mistakes in electronic contracting, admissibility of electronic records as evidence, electronic documents of title or promissory notes not secured by real property, and the manner in which paper processes will be converted to electronic processes by state governments. These omissions leave states that have not yet adopted UETA with an important incentive to do so.

II. MODEL UETA

A. General. The Model Uniform Electronic Transaction Act ("Model UETA" or "Model Act") referred to in E-Sign was adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL")² in July of 1999. A copy is attached as Appendix B. As with E-Sign, the primary objective of Model UETA is to establish the legal equivalence of electronic records and signatures with paper writings and manually signed signatures, removing barriers to electronic commerce. The Model UETA has been adopted in 40 states. A list of the states that have adopted some form of the Model UETA is attached as Appendix B 1. A list of the states that have introduced some form of the Model UETA but have not adopted it is attached as Appendix B 2. Note that neither New York nor Illinois has adopted UETA. E-Sign continues to control in those states as well as each other state that has not adopted a version of UETA

² NCCUSL's website is found at <http://www.nccusl.org/nccusl/default.asp>.

consistent with E-Sign. The Model UETA, like the UCC, has a series of Comments after each section and, in some cases, provides examples of transactions contemplated by specific provisions of the UETA. This commentary provides an important source for interpretation not only of the Model Act but also for the versions of UETA adopted by the various states. Like E-Sign, the Model UETA applies to electronic records and electronic signatures relating to a “transaction”. E-Sign §3(a).

B. Definitions. The Model UETA provides a list of definitions of important terms used in the act. Model Act §2. The definitions are more extensive than those contained in E-Sign. There is overlap and those definitions are substantially the same in both acts although not identical. For example, E-Sign defines “transaction”:

The term "transaction" means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct—

(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and

(B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof. E-Sign §7006 (13).

The Model Act defines “transaction”:

"Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. Model UETA §2(16).

It is interesting to note that the Federal act does not expressly include government within the list of transactions covered by E-Sign while the Model UETA does. Thus E-Sign appears to exempt some transactions. *See generally*, Winn Article footnote 139. Even if UETA is adopted, it appears that some Federal uniquely governmental affairs will not be subject to E-Sign or UETA. *Id.*

C. Model Act carve outs. The Model Act does not apply to:

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];

(3) [the Uniform Computer Information Transactions Act]; and

(4) [other laws, if any, identified by State].

In other words, the Model UETA does apply to Uniform Commercial Code Section 1-107, Section 1-206, Article 2 (Sales of Goods) and Article 2A (Leases of Goods) but does not apply to other provisions of the Uniform Commercial Code. Comment 5 to the Model UETA indicates that Articles 3, 4, and 4A are excluded from UETA because the check collection and electronic funds transfer systems governed by those Articles involve parties other than those in the underlying contract. Articles 5, 8 and 9 were excluded according to Comment 5 because those Articles have already been revised to include consideration of electronic practices.

D. Model UETA and Real Estate Transactions. The Comments to Section 3 (Scope) of the Model UETA include a discussion derived from the Report dated September 21, 1998 of The Task Force on State Law Exclusions (the "Task Force") presented to the Model UETA Drafting Committee. The Report provides some useful observations regarding the application of UETA to real estate transactions:

It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. As between the parties it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine. Of course, to be effective against third parties state law generally requires filing with a governmental office. Pending adoption of electronic filing systems by States, the need for a piece of paper to file to perfect rights against third parties, will be a consideration for the parties. In the event notarization and acknowledgment are required under other laws, Section 11 provides a means for such actions to be accomplished electronically.

With respect to the requirements of government filing, those are left to the individual States in the decision of whether to adopt and implement electronic filing systems. (See optional Sections 17-19.) However, government recording systems currently require paper deeds including notarized, manual signatures. Although California and Illinois are experimenting with electronic filing systems, until such systems become widespread, the parties likely will choose to use, at the least, a paper deed for filing purposes. Nothing in this Act precludes the parties from selecting the medium best suited to the needs of the particular transaction. Parties may wish to consummate the transaction using electronic media in order to avoid expensive travel. Yet the actual deed may be in paper form to assure compliance with existing recording systems and requirements. The critical point is that nothing in this Act prevents the parties from selecting paper or electronic media for all or part of their transaction.

E. Prospective Application. As you might expect, the Model Act is made applicable only to electronic transactions on or after the effective date of the adoption of the Act. Model Act § 4.

F. Voluntary Use. Use of the Model UETA is voluntary and parties are not required to conduct any transactions by electronic means. Model UETA §5. The critical element is the *intent* of the parties. *Id.* Comment 4. However, the election to be governed by the Model UETA may be inferred from the circumstances surrounding the transactions, including the conduct of the parties. Model UETA §5(b). If a party agrees to conduct a transaction electronically, the party has a non-waivable right to decline to conduct other transactions electronically. Model UETA §5(c). Except as specifically provided in the Model UETA, parties are free to vary its terms by agreement. Model UETA §5(d). The Comments to Section 5 of the UETA provide examples of parties reaching agreement to conduct transactions electronically, one of which is particularly interesting

Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

Does your business card contain your email address? Do your clients' business cards contain their email addresses? Do you think that your clients intend to enter into electronic agreements solely based on handing their business cards to other parties?

Another example:

Sally may have several e-mail addresses - home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.

Does this mean that a party who communicates via email agrees to make electronic agreements or signatures? One may be tempted to take some comfort that the examples use the word "communicate" rather than "contract." However, that would be an error. The following sentence appears in the Comments immediately after the examples: "The examples noted above are intended to focus the inquiry on the party's agreement to conduct a transaction electronically." The examples are not to indicate that a party agreed merely to communicate electronically but whether the party intended to conduct electronic transactions. The same paragraph goes on to state that the evidence is to be taken with a view toward broad validation of electronic transactions.

G. Other Laws Remain Applicable. The legal effect of an electronic record or electronic signature is determined by reference to other applicable law. Model UETA §3(d) & §5(e). The purpose of the UETA is to allow a transaction to be conducted electronically not to modify other portions of applicable law. If the elements or requirement of other substantive law are not found, UETA will not validate an otherwise invalid transaction. See Model UETA §5, Comment 7.

H. Legal Recognition. The Model UETA requires that electronic records, signatures and contracts not be denied legal effect or enforceability solely because they are in electronic form. Model UETA §6(a) and (b). If a law requires a record to be in writing, an electronic record and signature satisfy the law. Model UETA §6(c) and(d). This is the key provision preempting the old statute of frauds rule to the extent writing was interpreted to mean paper and ink.

I. Providing or Delivering Information. If parties agree to conduct a transaction electronically and a law requires information to be provided or delivered, the requirement is satisfied if the information is provided, sent or delivered in an electronic record “capable of retention by the recipient at the time of receipt.” Model UETA §8(a). This means that the sender does not inhibit the ability of the recipient to print or store the electronic record. *Id.* The drafters wanted to be sure that Model UETA was not interpreted to override other substantive law except with regard to the medium used.

However, if another law requires a record be posted or sent in a specific manner, the record must be posted or sent in that manner. Model UETA §8(b) For example, a notice of trustee’s sale in connection with a Texas real property foreclosure must still be posted at the place designated in the particular county and mailed by certified mail to the persons obligated to pay the debt.

J. Errors. The Model UETA provides a set of rules that apply if an error or change in an electronic record occurs. Model UETA §10. This Article will not address the details of those rules. The Comments to Section 10 offer examples of errors and how they would be treated under the Model UETA.

K. Notarization and Acknowledgment. Notarization and acknowledgment may be accomplished electronically. Model UETA §11. Note that this does not mean the act of acknowledgment may be accomplished electronically. A person must still fulfill the other requisites of a proper acknowledgment, including the formal ceremony of acknowledgment by appearing physically before the notary or other authorized officer. *See Haley, Texas Law of Acknowledgments into the 21st Century*, The University of Texas Mortgage Lending Institute (2001). It does mean that the certificate of acknowledgment and signature of the officer performing the function may be accomplished electronically.

L. Retention. If any law requires a record to be retained it may be retained electronically. Model UETA §12. Electronic retention requires that the record accurately reflect the information when it was first generated and remains accessible for later reference. Model UETA §12 (a). If a law requires a record to be presented in its “original” form, an electronic record will satisfy the law. Model UETA §12(d). Although the Model UETA expressly excludes UCC Article 4 (Bank Deposits and Collections), it provides that if a law requires retention of a check, the requirement is satisfied by retention of an electronic record of the information on the front and back of the check. Model UETA §12(e). Governmental agencies of the state are authorized to impose additional requirements for the retention of a record subject to that agency’s jurisdiction. Model UETA §12 (g). Does this mean that the County Clerk of Jim Hogg County can require all documents filed in that county be done in paper while the County Clerk of

Maverick County requires all filings to be electronic? Probably so. See Model UETA §12, Comment 7. It isn't called a "Uniform" act for nothing.

III. TEXAS UETA

A. General. In 2001, the Texas legislature enacted a version of UETA as Chapter 43 of the Business and Commerce Code, which became effective January 1, 2002. A copy is attached as Appendix C.³ There are few variations in the Texas version. This article will not address all the variations.

The words "Act", "Paragraph" and "subparagraph" are replaced with "chapter", "Section" and "subsection." The definition of "person" was deleted. I assume that the Texas Legislature intended for existing definitions to control. For example, Section 1-201(30) of the Texas Business and Commerce Code defines "person" as an individual or organization and directs the reader to Section 1.102 of the same Code. Section 1.102 provides that the intent of the Business and Commerce Code is to make the law more uniform. Hence multiple definitions of "person" would be inconsistent with that intent.

The Texas Department of Information Resources and Texas State Library and Archives Commission are given rule making authority with regard to the Texas UETA. Tex. Bus & Comm. Code § 43.017 (b). The Texas Department of Information Resources is charged with promoting consistency among government agencies and other states with respect to UETA. Tex. Bus & Comm. Code § 43.018.

B. Texas carve outs. The Texas UETA does not apply to:

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) the Uniform Commercial Code, other than Sections 1.107⁴ and 1.206⁵ and Chapters 2 and 2A. Tex. Bus & Comm. Code § 43.003 (2001).

³ Tex. Bus. & Comm. Code Chapter 43 was repealed effective April 1, 2009 and Tex. Bus. & Comm. Code Chapter 322 became effective the same day, as Texas' version of the UETA. All references to § 43 are now § 322.

⁴ Waiver or Renunciation of Claim or Right After Breach. Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party. V.T.C.A., Bus. & C. § 1.107 (2001).

⁵ Statute of Frauds for Kinds of Personal Property Not Otherwise Covered. (a) Except in the cases described in Subsection (b) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond \$5,000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent. (b) Subsection (a) of this section does not apply to contracts for the sale of goods (Section 2.201) nor of securities (Section 8.113) nor to security agreements (Section 9.203). V.T.C.A., Bus. & C. § 1.206 (2001).

The provisions of the Texas Property Code that require a conveyance of an estate for more than one year or a freehold to be in writing are subject to the Texas UETA. Tex. Prop. Code § 5.021 (2001). In other words, a deed, deed of trust, or lease may be in electronic form. As between the parties it would be valid, assuming the other requisites were met.

Section 43.003 (c) of the Texas UETA, which deals with the application of the UETA to a transaction that is expressly excluded from the UETA, is worded differently than the Model Act provision but appears to have the same intent. Texas will apply to an electronic record otherwise excluded from UETA under §43.003(b) when the record or signature is used for a transaction subject to a law other than one listed in §43.003(b). The Comments to the Model Act provide the following example:

For example, this Act does not apply to an electronic record of a check when used for purposes of a transaction governed by Article 4 of the Uniform Commercial Code, i.e., the Act does not validate so-called electronic checks. However, for purposes of check retention statutes, the same electronic record of the check is covered by this Act, so that retention of an electronic image/record of a check will satisfy such retention statutes, so long as the requirements of Section 12 are fulfilled. [*Section 12 comparable to Tex. Business & Comm. Code § 43.012.*]

C. Interpretation of Texas UETA. Given the general consistency of the Texas UETA with the Model UETA, the Commentary and examples contained in the Model UETA will be particularly useful in interpreting the Texas law. Moreover, that same consistency should make the Texas UETA safe from attack under E-Sign.

D. Other Texas Laws Relating to Electronic Filing. Texas has enacted a number of statutes addressing the issue of electronically filed records and other documents. As of January 1, 2002, county clerks in Texas may accept instruments by electronic filing and record the instruments electronically if the filing or recording complies with the rules adopted by the Texas State Library and Archives Commission. Tex. Local Gov. Code § 191.009 (2001). Take note that county clerks are not required to accept electronically filed documents under this statute. Texas Government Code § 51.801 provides for the electronic filing of certain documents in connection with judicial proceedings. The Texas Secretary of State is authorized to accept electronic filing. Tex. Misc. Corp. Laws Act Art. 1302-7.07 (A) (2001). Although there may be some question under the express terms of the statute, Article 1302-7.07 (A) may not mandate that the Secretary of State accept electronically filed records.

E. Texas Uniform Commercial Code. Although the bulk of the Uniform Commercial Code is exempted from UETA, effective July 1, 2001, the Texas Uniform Commercial Code provided the following provisions which relate to making and filing electronic documents:

§ 9.101 Uniform Commercial Code Comment 4 (h) provides, in part:

Medium-neutrality. This Article is “medium-neutral”; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored other than on paper.

§ 9.502 (a) provides:

Subject to Subsection (b), a financing statement is sufficient only if it:

- (1) provides the name of the debtor;
- (2) provides the name of the secured party or a representative of the secured party; and
- (3) indicates the collateral covered by the financing statement.

Paragraph 3 of the Uniform Commercial Code Commentary to that section provides, in part:

Whereas former Section 9-402(1) required the debtor’s signature to appear on a financing statement, this Article contains no signature requirement. The elimination of the signature facilitates paperless filing.

§9.525 (a) provides:

Except as otherwise provided . . . the fee for filing and indexing a record under this subchapter, . . . is . . . (3) \$5 if the record is communicated by another medium authorized by filing-office rule.”

IV. CALIFORNIA UETA

A. General. California took a different approach than Texas. Due in part to concerns expressed by consumer groups, its legislature adopted a significantly modified version of the Model UETA effective January 1, 2000. Cal. Civ. Code §§ 1633.1 *et seq.* (2001). A copy is attached as Appendix D. Unlike the Texas UETA, the California UETA varies in many substantive respects from the Model UETA.

B. California Consumers Union Questions. One of the principal critics was the California Consumers Union, which issued a series of memoranda (“CCC memorandum or memoranda”) outlining its concerns about the adoption of the Model UETA. Copies of the CCC memoranda are attached as Appendix D 1. The questions raised by the Union resulted in many changes to the UETA as adopted by California. The CCC memoranda raised important issues. For example, what if a person who agrees to transact business electronically changes his or her email address? Or what if the Internet service provider goes out of business? If notice is sent to an expired email address, is it fair to deemed that notice as given? Does UETA provide real safeguards against forgery of an electronic signature? UETA assumes equal bargaining power between parties. Is this a fair assumption or will powerful economic entities force weaker parties

to agree to “standard” form contracts that force the use of electronic media to be used in a transaction? Can an Internet seller of goods require that the buyer send all information electronically but require all complaints to go by regular mail?

The CCC memoranda point out that a message is deemed sent under UETA when it is outside the sender’s control and received when it enters the recipient’s computer. Thus a message could be received when a recipient cannot open the message or when automatic junk mail filters delete it.

Another complaint the Union had was that UETA would allow a record of a telephone call to substitute for a written record. There is no requirement that a hard copy of an electronic notice be delivered following sending of the electronic notice. A party does not have the unilateral right to revoke its agreement to do business electronically as to any transaction once the party has agreed to conduct business electronically. [A party can revoke as to future transactions but not as to the *initial* transaction.] A review of the CCC memoranda may be a guide to future disputes that will affect E-Sign and UETA as adopted in other jurisdictions. They are also a useful guide to those drafting agreements in connection with electronic transactions.

C. California carve outs. The most significant modification California made was the exclusion of many state laws from the UETA. Cal. Civ. Code §1633.3 (b).

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

(c) This title does not apply to any specific transaction described in Section 17511.5 of the Business and Professions Code, Section 56.11, 56.17, 798.14, 1133, or 1134 of, Sections 1350 to 1376, inclusive, of, Section 1689.6, 1689.7, or 1689.13 of, Chapter 2.5 (commencing with Section 1695) of Title 5 of Part 2 of Division 3 of, Section 1720, 1785.15, 1789.14, 1789.16, 1789.33, or 1793.23 of, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of, Section 1861.24, 1862.5, 1917.712, 1917.713, 1950.5, 1950.6, 1983, 2924b, 2924c, 2924f, 2924i, 2924j, 2924.3, or 2937 of, Article 1.5

(commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3 of, Section 2954.5 or 2963 of, Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of, or Section 3071.5 of, the Civil Code, subdivision (b) of Section 18608 or Section 22328 of the Financial Code, Section 1358.15, 1365, 1368.01, 1368.1, 1371, or 18035.5 of the Health and Safety Code, Section 658, 662, 663, 664, 666, 667.5, 673, 677, 678, 678.1, 786, 10083, 10086, 10087, 10102, 10113.7, 10127.7, 10127.9, 10127.10, 10197, 10199.44, 10199.46, 10235.16, 10235.40, 10509.4, 10509.7, 11624.09, or 11624.1 of the Insurance Code, Section 779.1, 10010.1, or 16482 of the Public Utilities Code, or Section 9975 or 11738 of the Vehicle Code.⁶ An electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure. Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means.

Anthony Marks in Jenkins & Gilchrist's L. A. office has advised me that in California, SB 97 has been introduced in the state Senate to amend the CA ETA to be consistent with E-Sign. Because of questions regarding E-sign's preemption language (i.e. whether a state must adopt UETA as adopted by NCCUSL in order not to be preempted or if the state must enact a law that is consistent with E-Sign although not exactly as adopted by NCCUSL), questions regarding preemption will likely still continue. The legislative summary also indicates that the Bill would enact a separate consumer protection law that would give consumers greater protections than under E-Sign. If SB 97 is enacted California's UETA would be much more similar to the Model Act. The carve outs under SB 97's version of the UETA would be as follows:

1633.3. (b) This title chapter does not apply to a transaction to the extent it is governed by any of the following:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(c) This title chapter does not apply to any of the following:

(1) Any notice of the cancellation or termination of utility services (including water, heat, and power).

⁶ For a list of the captions of the foregoing statutes, see CCC memorandum 1/2000 attached as part of Appendix D 1.

(2) Any notice of default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.

(3) Any notice of the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities).

(4) Any notice of recall of a product, or material failure of a product, that risks endangering health or safety.

(5) Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

D. Application of California UETA. California made extensive revisions to this section. California Civil Code Section 1633.5 provides:

(b) This title applies only to *a transaction* between parties each of which has agreed to conduct *the transaction* by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. *Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.*

The italicized portions of the preceding citation reflect California variations from the Model Act. Deletions from the Model Act are not shown. Note that the “intent” to conduct a transaction by electronic means may still be determined from the context and surrounding circumstances, including conduct.

E. Transferable Records. Another major change California made was to delete Section 16 of the Model UETA. California does not provide for electronic promissory notes in real estate mortgage lending.

F. Notice to Cancel. If another law requires notice of the right to cancel be provided or sent, an electronic record may not be substituted and this requirement may not be varied by agreement. Cal. Civ. Code § 1633.16.

G. State Mandates. If a state agency is not a party to a transaction, it may not require that electronic signatures be used unless another law authorizes such signatures. Cal. Civ. Code § 1633.17.

V. UNINTENDED AGREEMENTS

While E-Sign and UETA are here to stay and will be the principle if not sole means by which agreements are made in the future, there are some very troubling questions raised by their enactment. As noted above, absence of a requirement for express intent is one of the most serious issues. It is a trap for the unwary. Attorneys and their clients need to address this issue now. The Model UETA, Texas UETA, and E-Sign all suffer from the malady. While the existing California UETA addresses the issue in some respects it is still not wholly satisfactory. If that Act is amended by adoption of California SB 97, California would have most of the same problems as other jurisdictions.

Recall that Section 5 (b) of the Model Act provides:

This [Act] applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. *Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.* [Emphasis added.]

Comments 3 and 4 to the Section 5 of the Model Act provide:

3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full-fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such *an explicit contract should not be necessary* before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an *unreasonable* barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, *the requisite agreement, express or implied, must be determined from all available circumstances and evidence.* [Emphasis added.]

4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context *it is essential that the parties' actions and words be broadly construed* in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. *The critical element is the intent of a party to conduct a transaction electronically.* Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3, and 19. [Emphasis added.]

Tex. Bus. & Comm. Code §43.005 (b) contains virtually the same language as the Model Act; therefore the Comments cited above should have particular relevance to Texas courts.

The legislative history of E-Sign states that 15 U. S. C. §7001(b) “makes clear that any party remains free to decline to agree to any particular terms or conditions regarding the use and acceptance of electronic signatures and electronic records; the provision is not intended to deprive a party of that choice. The subsection provides:

This subchapter does not—

(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party. 15 U. S. C. §7001(b) (2001).

However, that right may prove ephemeral if courts liberally interpret conduct to mean agreement to conduct transactions electronically. The specter of a person entering into a binding and enforceable agreement based on implied intent is hovering over the person every time he hands out his business card with his email address on it or sends an email to another person. The conventional wisdom based on many years of tradition and practice is that a person almost always has a chance to cross his “t’s” and dot his “i’s” after having initial negotiations with another person. The era of the “second look” where a client could clean up errors and remove ambiguities or have his attorney provide counsel before the contract became binding may be largely a thing of the past in many situations. A careless phone call or email could result in a dispute like the *Shattuck v. Klotbach* case out of Massachusetts, which recently garnered much comment. To be sure, that case did not involve either E-Sign or the UETA, but it is instructive about the risks associated with email messages. It is important that care be taken to avoid or at least minimize the risk of unintended agreements. Failure to do so could result in some very costly lessons for all concerned.

Appendix A

Electronic Records in Global and National Commerce Act

15 U.S.C.A. § 7001 *et seq*

UNITED STATES CODE ANNOTATED TITLE 15. COMMERCE AND TRADE

CHAPTER 96--ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

SUBCHAPTER I--ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

Current through P.L. 107-89, approved 12-18-01

§ 7001. General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce—

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

(b) Preservation of rights and obligations

This subchapter does not—

(1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

(2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if—

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement—

(i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;

(C) the consumer—

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record—

(i) provides the consumer with a statement of (I) the revised hardware and software requirements for access to and retention of the electronic records, and (II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

(ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) Prospective effect

Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with

paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

(5) Prior consent

This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this subchapter to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

(d) Retention of contracts and records

(1) Accuracy and accessibility

If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that—

(A) accurately reflects the information set forth in the contract or other record; and

(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

(2) Exception

A requirement to retain a contract or other record in accordance with paragraph (1) does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received.

(3) Originals

If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided, available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).

(4) Checks

If a statute, regulation, or other rule of law requires the retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with paragraph (1).

(e) Accuracy and ability to retain contracts and other records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

(f) Proximity

Nothing in this subchapter affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.

(g) Notarization and acknowledgment

If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

(h) Electronic agents

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

(i) Insurance

It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.

(j) Insurance agents and brokers

An insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature may not be held liable for any deficiency in the electronic procedures agreed to by the parties under that contract if—

(1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct;

(2) the agent or broker was not involved in the development or establishment of such electronic procedures; and

(3) the agent or broker did not deviate from such procedures.

15 USCA Sec. 7002, Exemption to preemption

15 U.S.C.A. § 7002

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE

CHAPTER 96--ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

SUBCHAPTER I--ELECTRONIC RECORDS AND SIGNATURES IN COMMERCE

§ 7002. Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law--

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.

(b) Exceptions for actions by States as market participants

Subsection (a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) Prevention of circumvention

Subsection (a) does not permit a State to circumvent this subchapter or subchapter II of this chapter through the imposition of nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

§ 7003. Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by—

(1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A.

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to—

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of—

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or

(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(c) Review of exceptions

(1) Evaluation required

The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall review the operation of the exceptions in subsections (a) and (b) to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers. Within 3 years after June 30, 2000, the Assistant Secretary shall submit a report to the Congress on the results of such evaluation.

(2) Determinations

If a Federal regulatory agency, with respect to matter within its jurisdiction, determines after notice and an opportunity for public comment, and publishes a finding, that one or more such exceptions are no longer necessary for the protection of consumers and eliminating such exceptions will not increase the material risk of harm to consumers, such agency may extend the application of section 7001 of this title to the exceptions identified in such finding.

§ 7004. Applicability to Federal and State Governments

(a) Filing and access requirements

Subject to subsection (c)(2), nothing in this subchapter limits or supersedes any requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that

records be filed with such agency or organization in accordance with specified standards or formats.

(b) Preservation of existing rulemaking authority

(1) Use of authority to interpret

Subject to paragraph (2) and subsection (c), a Federal regulatory agency or State regulatory agency that is responsible for rulemaking under any other statute may interpret section 7001 of this title with respect to such statute through—

(A) the issuance of regulations pursuant to a statute; or

(B) to the extent such agency is authorized by statute to issue orders or guidance, the issuance of orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a Federal regulatory agency).

This paragraph does not grant any Federal regulatory agency or State regulatory agency authority to issue regulations, orders, or guidance pursuant to any statute that does not authorize such issuance.

(2) Limitations on interpretation authority

Notwithstanding paragraph (1), a Federal regulatory agency shall not adopt any regulation, order, or guidance described in paragraph (1), and a State regulatory agency is preempted by section 101 from adopting any regulation, order, or guidance described in paragraph (1), unless—

(A) such regulation, order, or guidance is consistent with section 7001 of this title;

(B) such regulation, order, or guidance does not add to the requirements of such section; and

(C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that—

(i) there is a substantial justification for the regulation, order, or guidance;

(ii) the methods selected to carry out that purpose—

(I) are substantially equivalent to the requirements imposed on records that are not electronic records; and

(II) will not impose unreasonable costs on the acceptance and use of electronic records; and

(iii) the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

(3) Performance standards

(A) Accuracy, record integrity, accessibility

Notwithstanding paragraph (2)(C)(iii), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of paragraph (2)(C)(iii) if the requirement (i) serves an important governmental objective; and (ii) is substantially related to the achievement of that objective. Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 7001(d) of this title.

(B) Paper or printed form

Notwithstanding subsection (c)(1), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to require retention of a record in a tangible printed or paper form if—

(i) there is a compelling governmental interest relating to law enforcement or national security for imposing such requirement; and

(ii) imposing such requirement is essential to attaining such interest.

(4) Exceptions for actions by Government as market participant

Paragraph (2)(C)(iii) shall not apply to the statutes, regulations, or other rules of law governing procurement by the Federal or any State government, or any agency or instrumentality thereof.

(c) Additional limitations

(1) Reimposing paper prohibited

Nothing in subsection (b) (other than paragraph (3)(B) thereof) shall be construed to grant any Federal regulatory agency or State regulatory agency authority to impose or reimpose any requirement that a record be in a tangible printed or paper form.

(2) Continuing obligation under Government Paperwork Elimination Act

Nothing in subsection (a) or (b) relieves any Federal regulatory agency of its obligations under the Government Paperwork Elimination Act (title XVII of Public Law 105-277).

(d) Authority to exempt from consent provision

(1) In general

A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

(2) Prospectuses

Within 30 days after June 30, 2000, the Securities and Exchange Commission shall issue a regulation or order pursuant to paragraph (1) exempting from section 7001(c) of this title any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940, or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 77b(a)(10)(A) of this title.

(e) Electronic letters of agency

The Federal Communications Commission shall not hold any contract for telecommunications service or letter of agency for a preferred carrier change, that otherwise complies with the Commission's rules, to be legally ineffective, invalid, or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization.

§ 7005. Studies

(a) Delivery

Within 12 months after June 30, 2000, the Secretary of Commerce shall conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the United States Postal Service and private express mail services. The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 12-month period.

(b) Study of electronic consent

Within 12 months after June 30, 2000, the Secretary of Commerce and the Federal Trade Commission shall submit a report to the Congress evaluating any benefits provided to consumers by the procedure required by section 7001(c)(1)(C)(ii) of this title; any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 7001(c)(1)(C)(ii) of this title would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses.

§ 7006. Definitions

For purposes of this subchapter:

(1) Consumer

The term "consumer" means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

(2) Electronic

The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) Electronic agent

The term "electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response.

(4) Electronic record

The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) Electronic signature

The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

(6) Federal regulatory agency

The term "Federal regulatory agency" means an agency, as that term is defined in section 552(f) of Title 5.

(7) Information

The term "information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(8) Person

The term "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(9) Record

The term "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) Requirement

The term "requirement" includes a prohibition.

(11) Self-regulatory organization

The term "self-regulatory organization" means an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such organization or entity, by a Federal regulatory agency, or by another self-regulatory organization.

(12) State

The term "State" includes the District of Columbia and the territories and possessions of the United States.

(13) Transaction

The term "transaction" means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct--

(A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and

(B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

§ 7021. Transferable records

(a) Definitions

For purposes of this section:

(1) Transferable record

The term "transferable record" means an electronic record that--

(A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;

(B) the issuer of the electronic record expressly has agreed is a transferable record; and

(C) relates to a loan secured by real property.

A transferable record may be executed using an electronic signature.

(2) Other definitions

The terms "electronic record", "electronic signature", and "person" have the same meanings provided in section 7006 of this title.

(b) Control

A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) Conditions

A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that--

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

- (2) the authoritative copy identifies the person asserting control as--
 - (A) the person to which the transferable record was issued; or
 - (B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;
- (3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;
- (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Status as holder

Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in section 1-201(20) of the Uniform Commercial Code, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under section 3-302(a), 9-308, or revised section 9-330 of the Uniform Commercial Code are satisfied, the rights and defenses of a holder in due course or a purchaser, respectively. Delivery, possession, and endorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Obligor rights

Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) Proof of control

If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

(g) UCC references

For purposes of this subsection, all references to the Uniform Commercial Code are to the Uniform Commercial Code as in effect in the jurisdiction the law of which governs the transferable record.

CREDIT(S)

2001 Electronic Update

(Pub.L. 106-229, Title II, s 201, June 30, 2000, 114 Stat. 473.)

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Conference Report No. 106-661 and Statement by President, see 2000 U.S. Code Cong. and Adm. News, p. 431.

*118754 Effective and Applicability Provisions

2000 Acts. Pub.L. 106-229, s 202, June 30, 2000, 114 Stat. 475, provided that: "This title [enacting this subchapter] shall be effective 90 days after the date of enactment of this Act [June 30, 2000]."

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15 USCA Sec. 7031, Principles governing the use of electronic signatures in international transactions

*118755 15 U.S.C.A. § 7031

UNITED STATES CODE ANNOTATED

TITLE 15. COMMERCE AND TRADE

CHAPTER 96--ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE

SUBCHAPTER III--PROMOTION OF INTERNATIONAL ELECTRONIC COMMERCE

Current through P.L. 107-89, approved 12-18-01

§ 7031. Principles governing the use of electronic signatures in international transactions

(a) Promotion of electronic signatures

(1) Required actions

The Secretary of Commerce shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2)

and in a manner consistent with section 7001 of this title. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.

(2) Principles

The principles specified in this paragraph are the following:

(A) Remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law.

(B) Permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced.

(C) Permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid.

(D) Take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

(b) Consultation

In conducting the activities required by this section, the Secretary shall consult with users and providers of electronic signature products and services and other interested persons.

(c) Definitions

As used in this section, the terms "electronic record" and "electronic signature" have the same meanings provided in section 7006 of this title. *118756

(Pub.L. 106-229, Title III, s 301, June 30, 2000, 114 Stat. 475.)

Appendix B

Model Uniform Electronic Transaction Act

UNIFORM ELECTRONIC TRANSACTIONS ACT (1999)

Drafted by the

**NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS**

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR
IN DENVER, COLORADO
JULY 23 - 30, 1999

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

1/20/00

UNIFORM ELECTRONIC TRANSACTIONS ACT (1999)

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UNIFORM ELECTRONIC TRANSACTIONS ACT (1999)

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UNIFORM ELECTRONIC TRANSACTIONS ACT (1999)

PREFATORY NOTE

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 which 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 which 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.

A. Scope of the Act and Procedural Approach. The scope of this Act provides coverage which sets forth a clear framework for covered transactions, and also avoids unwarranted surprises for unsophisticated parties dealing in this relatively new media. The clarity and certainty of the scope of the Act have been obtained while still providing a solid legal framework that allows for the continued development of innovative technology to facilitate electronic transactions.

With regard to the general scope of the Act, the Act's coverage is inherently limited by the definition of "transaction." The Act does not apply to *all* writings and signatures, but only to electronic records and signatures relating to a transaction, defined as those interactions between people relating to business, commercial and governmental affairs. In general, there are few writing or signature requirements imposed by law on many of the "standard" transactions that had been considered for exclusion. A good example relates to trusts, where the general rule on creation of a trust imposes no formal writing requirement. Further, the writing requirements in other contexts derived from governmental filing issues. For example, real estate transactions were considered potentially troublesome because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should not be validated by this Act if done via an electronic medium. No sound reason was found. Filing requirements fall within Sections 17-19 on governmental records. An exclusion of all real estate transactions would be particularly unwarranted in the event that a State chose to convert to an electronic recording system, as many have for Article 9 financing statement filings under the Uniform Commercial Code.

The exclusion of specific Articles of the Uniform Commercial Code reflects the recognition that, particularly in the case of Articles 5, 8 and revised Article 9, electronic transactions were addressed in the specific contexts of those revision processes. In the context of Articles 2 and 2A the UETA provides the vehicle for assuring that such transactions may be accomplished and effected via an electronic medium. At such time as Articles 2 and 2A are revised the extent of coverage in those Articles/Acts may make application of this Act as a gap-filling law desirable. Similar considerations apply to the recently promulgated Uniform Computer Information Transactions Act ("UCITA").

The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and

signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

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, Section 5 specifically provides that the Act 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.

B. Procedural Approach. Another fundamental premise of the Act is that it be minimalist and procedural. The general efficacy of existing law in an electronic context, so long as biases and barriers to the medium are removed, validates this approach. The Act defers to existing substantive law. Specific areas of deference to other law in this Act include: (1) the meaning and effect of "sign" under existing law, (2) the method and manner of displaying, transmitting and formatting information in Section 8, (3) rules of attribution in Section 9, and (4) the law of mistake in Section 10.

The Act's treatment of records and signatures demonstrates best the minimalist approach that has been adopted. Whether a record is attributed to a person is left to law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law. These provisions are salutary directives to assure that records and signatures will be treated in the same manner, under currently existing law, as written records and manual signatures.

The deference of the Act to other substantive law does not negate the necessity of setting forth rules and standards for using electronic media. The Act expressly validates electronic records, signatures and contracts. It provides for the use of electronic records and information for retention purposes, providing certainty in an area with great potential in cost savings and efficiency. The Act makes clear that the actions of machines ("electronic agents") programmed and used by people will bind the user of the machine, regardless of whether human review of a particular transaction has occurred. It specifies the standards for sending and receipt of electronic records, and it allows for innovation in financial services through the implementation of transferable records. In these ways the Act permits electronic transactions to be accomplished with certainty under existing substantive rules of law.

UNIFORM ELECTRONIC TRANSACTIONS ACT (1999)

SECTION 1. SHORT TITLE. This [Act] may be cited as the Uniform Electronic Transactions Act.

SECTION 2. DEFINITIONS. In this [Act]:

- (1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.
- (2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.
- (3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.
- (4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this [Act] and other applicable law.
- (5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
- (7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
- (8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
- (9) "Governmental agency" means 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.
- (10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.
- (11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.
- (12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.
- (13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Security procedure" means 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.

(15) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or in a possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a State.

(16) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

Sources: UNICTRAL Model Law on Electronic Commerce; Uniform Commercial Code; Uniform Computer Information Transactions Act; Restatement 2d Contracts.

Comment

1. "**Agreement.**" Whether the parties have reached an agreement is determined by their express language and all surrounding circumstances. The Restatement 2d Contracts § 3 provides that, "An agreement is a manifestation of mutual assent on the part of two or more persons." See also Restatement 2d Contracts, Section 2, Comment b. The Uniform Commercial Code specifically includes in the circumstances from which an agreement may be inferred "course of performance, course of dealing and usage of trade . . ." as defined in the UCC. Although the definition of agreement in this Act does not make specific reference to usage of trade and other party conduct, this definition is not intended to affect the construction of the parties' agreement under the substantive law applicable to a particular transaction. Where that law takes account of usage and conduct in informing the terms of the parties' agreement, the usage or conduct would be relevant as "other circumstances" included in the definition under this Act.

Where the law applicable to a given transaction provides that system rules and the like constitute part of the agreement of the parties, such rules will have the same effect in determining the parties agreement under this Act. For example, UCC Article 4 (Section 4-103(b)) provides that Federal Reserve regulations and operating circulars and clearinghouse rules have the effect of agreements. Such agreements by law properly would be included in the definition of agreement in this Act.

The parties' agreement is relevant in determining whether the provisions of this Act have been varied by agreement. In addition, the parties' agreement may establish the parameters of the parties' use of electronic records and signatures, security procedures and similar aspects of the transaction. See Model Trading Partner Agreement, 45 Business Lawyer Supp. Issue (June 1990). See Section 5(b) and Comments thereto.

2. **"Automated Transaction."** An automated transaction is a transaction performed or conducted by electronic means in which machines are used without human intervention to form contracts and perform obligations under existing contracts. Such broad coverage is necessary because of the diversity of transactions to which this Act may apply.

As with electronic agents, this definition addresses the circumstance where electronic records may ret in action or performance by a party although no human review of the electronic records is anticipated. Section 14 provides specific rules to assure that where one or both parties do not review the electronic records, the resulting agreement will be effective.

The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if one orders books from Bookseller.com through Bookseller's website, the transaction would be an automated transaction because Bookseller took and confirmed the order via its machine. Similarly, if Automaker and supplier do business through Electronic Data Interchange, Automaker's computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to supplier's computer. If Supplier's computer confirms the order and processes the shipment because the order falls within pre-programmed parameters in Supplier's computer, this would be a fully automated transaction. If, instead, the Supplier relies on a human employee to review, accept, and process the Buyer's order, then only the Automaker's side of the transaction would be automated. In either case, the entire transaction falls within this definition.

3. **"Computer program."** This definition refers to the functional and operating aspects of an electronic, digital system. It relates to operating instructions used in an electronic system such as an electronic agent. (See definition of "Electronic Agent.")

4. **"Electronic."** The basic nature of most current technologies and the need for a recognized, single term warrants the use of "electronic" as the defined term. The definition is intended to assure that the Act will be applied broadly as new technologies develop. The term must be construed broadly in light of developing technologies in order to fulfill the purpose of this Act to validate commercial transactions regardless of the medium used by the parties. Current legal requirements for "writings" can be satisfied by almost any tangible media, whether paper, other fibers, or even stone. The purpose and applicability of this Act covers intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form, but which lack the tangible aspect of paper, papyrus or stone.

While not all technologies listed are technically "electronic" in nature (e.g., optical fiber technology), the term "electronic" is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically "electronic," i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered

by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.

5. "**Electronic agent.**" This definition establishes that an electronic agent is a machine. As the term "electronic agent" has come to be recognized, it is limited to a tool function. The effect on the party using the agent is addressed in the operative provisions of the Act (e.g., Section 14)

An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent, by definition, is capable within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party.

While this Act proceeds on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming, it is conceivable that, within the useful life of this Act, electronic agents may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" 9 *Harv. J.L.&Tech* 25 (Winter, 1996). If such developments occur, courts may construe the definition of electronic agent accordingly, in order to recognize such new capabilities.

The examples involving Bookseller.com and Automaker in the Comment to the definition of Automated Transaction are equally applicable here. Bookseller acts through an electronic agent in processing an order for books. Automaker and the supplier each act through electronic agents in facilitating and effectuating the just-in-time inventory process through EDI.

6. "**Electronic record.**" An electronic record is a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic). The defined term is also used in this Act as a limiting definition in those provisions in which it is used.

Information processing systems, computer equipment and programs, electronic data interchange, electronic mail, voice mail, facsimile, telex, telecopying, scanning, and similar technologies all qualify as electronic under this Act. Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

7. "**Electronic signature.**"

The idea of a signature is broad and not specifically defined. Whether any particular record is "signed" is a question of fact. Proof of that fact must be made under other applicable law. This Act simply assures that the signature may be accomplished through electronic means. No specific technology need be used in order to create a valid signature. One's voice on an

answering machine may suffice if the requisite intention is present. Similarly, including one's name as part of an electronic mail communication also may suffice, as may the firm name on a facsimile. It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature. One may use a digital signature with the requisite intention, or one may use the private key solely as an access device with no intention to sign, or otherwise accomplish a legally binding act. In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record.

The definition requires that the signer execute or adopt the sound, symbol, or process with the intent to sign the record. The act of applying a sound, symbol or process to an electronic record could have differing meanings and effects. The consequence of the act and the effect of the act as a signature are determined under other applicable law. However, the essential attribute of a signature involves applying a sound, symbol or process with an intent to do a legally significant act. It is that intention that is understood in the law as a part of the word "sign", without the need for a definition.

This Act establishes, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. Therefore the term "signature" has been used to connote and convey that equivalency. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records. The term "authentication," used in other laws, often has a narrower meaning and purpose than an electronic signature as used in this Act. However, an authentication under any of those other laws constitutes an electronic signature under this Act.

The precise effect of an electronic signature will be determined based on the surrounding circumstances under Section 9(b).

This definition includes as an electronic signature the standard webpage click through process. For example, when a person orders goods or services through a vendor's website, the person will be required to provide information as part of a process which will result in receipt of the goods or services. When the customer ultimately gets to the last step and clicks "I agree," the person has adopted the process and has done so with the intent to associate the person with the record of that process. The actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted a process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them. The adoption of the process carried the intent to do a legally significant act, the hallmark of a signature.

Another important aspect of this definition lies in the necessity that the electronic signature be linked or logically associated with the record. In the paper world, it is assumed that the symbol adopted by a party is attached to or located somewhere in the same paper that is intended to be authenticated, e.g., an allonge firmly attached to a promissory note, or the classic signature at the end of a long contract. These tangible manifestations do not exist in the electronic environment, and accordingly, this definition expressly provides that the symbol must in some way be linked to, or connected with, the electronic record being signed. This linkage is consistent with the

regulations promulgated by the Food and Drug Administration. 21 CFR Part 11 (March 20, 1997).

A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as a part of an e-mail message - so long as in each case the signer executed or adopted the symbol with the intent to sign.

8. "**Governmental agency.**" This definition is important in the context of optional Sections 17-19.

9. "**Information processing system.**" This definition is consistent with the UNCITRAL Model Law on Electronic Commerce. The term includes computers and other information systems. It is principally used in Section 15 in connection with the sending and receiving of information. In that context, the key aspect is that the information enter a system from which a person can access it.

10. "**Record.**" This is a standard definition designed to embrace all means of communicating or storing information except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record. As in the case of the terms "writing" or "written," the term "record" does not establish the purposes, permitted uses or legal effect which a record may have under any particular provision of substantive law. ABA Report on Use of the Term "Record," October 1, 1996.

11. "**Security procedure.**"

A security procedure may be applied to verify an electronic signature, verify the identity of the sender, or assure the informational integrity of an electronic record. The definition does not identify any particular technology. This permits the use of procedures which the parties select or which are established by law. It permits the greatest flexibility among the parties and allows for future technological development.

The definition in this Act is broad and is used to illustrate one way of establishing attribution or content integrity of an electronic record or signature. The use of a security procedure is not accorded operative legal effect, through the use of presumptions or otherwise, by this Act. In this Act, the use of security procedures is simply one method for proving the source or content of an electronic record or signature.

A security procedure may be technologically very sophisticated, such as an asymmetric cryptographic system. At the other extreme the security procedure may be as simple as a telephone call to confirm the identity of the sender through another channel of communication. It may include the use of a mother's maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.

12. **"Transaction."** The definition has been limited to actions between people taken in the context of business, commercial or governmental activities. The term includes all interactions between people for business, commercial, including specifically consumer, or governmental purposes. However, the term does not include unilateral or non-transactional actions. As such it provides a structural limitation on the scope of the Act as stated in the next section.

It is essential that the term commerce and business be understood and construed broadly to include commercial and business transactions involving individuals who may qualify as "consumers" under other applicable law. If Alice and Bob agree to the sale of Alice's car to Bob for \$2000 using an internet auction site, that transaction is fully covered by this Act. Even if Alice and Bob each qualify as typical "consumers" under other applicable law, their interaction is a transaction in commerce. Accordingly their actions would be related to commercial affairs, and fully qualify as a transaction governed by this Act.

Other transaction types include:

1. A single purchase by an individual from a retail merchant, which may be accomplished by an order from a printed catalog sent by facsimile, or by exchange of electronic mail.
2. Recurring orders on a weekly or monthly basis between large companies which have entered into a master trading partner agreement to govern the methods and manner of their transaction parameters.
3. A purchase by an individual from an online internet retail vendor. Such an arrangement may develop into an ongoing series of individual purchases, with security procedures and the like, as a part of doing ongoing business.
4. The closing of a business purchase transaction via facsimile transmission of documents or even electronic mail. In such a transaction, all parties may participate through electronic conferencing technologies. At the appointed time all electronic records are executed electronically and transmitted to the other party. In such a case, the electronic records and electronic signatures are validated under this Act, obviating the need for "in person" closings.

A transaction must include interaction between two or more persons. Consequently, to the extent that the execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, it would not be covered by this Act because not occurring as a part of a transaction as defined in this Act. However, this Act *does* apply to all electronic records and signatures *related* to a transaction, and so does cover, for example, internal auditing and accounting records related to a transaction.

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b), this [Act] applies to electronic records and electronic signatures relating to a transaction.

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];

(3) [the Uniform Computer Information Transactions Act]; and

(4) [other laws, if any, identified by State].

(c) This [Act] applies to an electronic record or electronic signature otherwise excluded from the application of this [Act] under subsection (b) to the extent it is governed by a law other than those specified in subsection (b).

(d) A transaction subject to this [Act] is also subject to other applicable substantive law.

See Legislative Note below - Following Comments.

Comment

1. The scope of this Act is inherently limited by the fact that it only applies to transactions related to business, commercial (including consumer) and governmental matters. Consequently, transactions with no relation to business, commercial or governmental transactions would not be subject to this Act. Unilaterally generated electronic records and signatures which are not part of a transaction also are not covered by this Act. See Section 2, Comment 12.

2. This Act affects the medium in which information, records and signatures may be presented and retained under current legal requirements. While this Act covers all electronic records and signatures which are used in a business, commercial (including consumer) or governmental transaction, the operative provisions of the Act relate to requirements for writings and signatures under other laws. Accordingly, the exclusions in subsection (b) focus on those legal rules imposing certain writing and signature requirements which will *not* be affected by this Act.

3. The exclusions listed in subsection (b) provide clarity and certainty regarding the laws which are and are not affected by this Act. This section provides that transactions subject to specific laws are unaffected by this Act and leaves the balance subject to this Act.

4. Paragraph (1) excludes wills, codicils and testamentary trusts. This exclusion is largely salutary given the unilateral context in which such records are generally created and the unlikely use of such records in a transaction as defined in this Act (i.e., actions taken by two or more persons in the context of business, commercial or governmental affairs). Paragraph (2) excludes all of the Uniform Commercial Code other than UCC Sections 1-107 and 1-206, and Articles 2 and 2A. This Act does not apply to the excluded UCC articles, whether in "current" or "revised" form. The Act does apply to UCC Articles 2 and 2A and to UCC Sections 1-107 and 1-206.

5. Articles 3, 4 and 4A of the UCC impact payment systems and have specifically been removed from the coverage of this Act. The check collection and electronic fund transfer systems governed by Articles 3, 4 and 4A involve systems and relationships involving numerous parties beyond the parties to the underlying contract. The impact of validating electronic media in such systems involves considerations beyond the scope of this Act. Articles 5, 8 and 9 have been excluded because the revision process relating to those Articles included significant consideration of electronic practices. Paragraph 4 provides for exclusion from this Act of the Uniform Computer Information Transactions Act (UCITA) because the drafting process of that Act also included significant consideration of electronic contracting provisions.

6. The very limited application of this Act to Transferable Records in Section 16 does not affect payment systems, and the section is designed to apply to a transaction only through express agreement of the parties. The exclusion of Articles 3 and 4 will not affect the Act's coverage of Transferable Records. Section 16 is designed to allow for the development of systems which will provide "control" as defined in Section 16. Such control is necessary as a substitute for the idea of possession which undergirds negotiable instrument law. The technology has yet to be developed which will allow for the possession of a unique electronic token embodying the rights associated with a negotiable promissory note. Section 16's concept of control is intended as a substitute for possession.

The provisions in Section 16 operate as free standing rules, establishing the rights of parties using Transferable Records *under this Act*. The references in Section 16 to UCC Sections 3-302, 7-501, and 9-308 (R9-330(d)) are designed to incorporate the substance of those provisions into this Act for the limited purposes noted in Section 16(c). Accordingly, an electronic record which is also a Transferable Record, would not be used for purposes of a transaction governed by Articles 3, 4, or 9, but would be an electronic record used for purposes of a transaction governed by Section 16. However, it is important to remember that those UCC Articles will still apply to the transferable record in their own right. Accordingly any other substantive requirements, e.g., method and manner of perfection under Article 9, must be complied with under those other laws. See Comments to Section 16.

7. This Act does apply, *in toto*, to transactions under unrevised Articles 2 and 2A. There is every reason to validate electronic contracting in these situations. Sale and lease transactions do not implicate broad systems beyond the parties to the underlying transaction, such as are present in check collection and electronic funds transfers. Further sales and leases generally do not have as far reaching effect on the rights of third parties beyond the contracting parties, such as exists in the secured transactions system. Finally, it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act.

In the event that Articles 2 and 2A are revised and adopted in the future, UETA will only apply to the extent provided in those Acts.

8. An electronic record/signature may be used for purposes of more than one legal requirement, or may be covered by more than one law. Consequently, it is important to make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for purposes of a law which is *not* affected by this Act under subsection (b) may nonetheless be used and validated for purposes of other laws not excluded by subsection (b). For example, this Act does not apply to an electronic record of a check when used for purposes of a transaction governed by Article 4 of the Uniform Commercial Code, i.e., the Act does not validate so-called electronic checks. However, for purposes of check retention statutes, the same electronic record of the check is covered by this Act, so that retention of an electronic image/record of a check will satisfy such retention statutes, so long as the requirements of Section 12 are fulfilled.

In another context, subsection (c) would operate to allow this Act to apply to what would appear to be an excluded transaction under subsection (b). For example, Article 9 of the Uniform Commercial Code applies generally to any transaction that creates a security interest in personal property. However, Article 9 excludes landlord's liens. Accordingly, although this Act excludes from its application transactions subject to Article 9, this Act would apply to the creation of a landlord lien if the law otherwise applicable to landlord's liens did not provide otherwise, because the landlord's lien transaction is excluded from Article 9.

9. Additional exclusions under subparagraph (b)(4) should be limited to laws which govern electronic records and signatures which may be used in transactions as defined in Section 2(16). Records used unilaterally, or which do not relate to business, commercial (including consumer), or governmental affairs are not governed by this Act in any event, and exclusion of laws relating to such records may create unintended inferences about whether other records and signatures are covered by this Act.

It is also important that additional exclusions, if any, be incorporated under subsection (b)(4). As noted in Comment 8 above, an electronic record used in a transaction excluded under subsection (b), e.g., a check used to pay one's taxes, will nonetheless be validated for purposes of other, non-excluded laws under subsection (c), e.g., the check when used as proof of payment. It is critical that additional exclusions, if any, be incorporated into subsection (b) so that the salutary effect of subsection (c) apply to validate those records in other, non-excluded transactions. While a legislature may determine that a particular notice, such as a utility shutoff notice, be provided to a person in writing on paper, it is difficult to see why the utility should not be entitled to use electronic media for storage and evidentiary purposes. ***Legislative Note Regarding Possible Additional Exclusions under Section 3(b)(4).***

The following discussion is derived from the Report dated September 21, 1998 of The Task Force on State Law Exclusions (the "Task Force") presented to the Drafting Committee. After consideration of the Report, the Drafting Committee determined that exclusions other than those specified in the Act were not warranted. In addition, other inherent limitations on the applicability of the Act (the definition of transaction, the requirement that the parties acquiesce in the use of an electronic format) also militate against additional exclusions. Nonetheless, the Drafting Committee recognized that some legislatures may wish to exclude additional

transactions from the Act, and determined that guidance in some major areas would be helpful to those legislatures considering additional areas for exclusion.

Because of the overwhelming number of references in state law to writings and signatures, the following list of possible transactions is not exhaustive. However, they do represent those areas most commonly raised during the course of the drafting process as areas that might be inappropriate for an electronic medium. It is important to keep in mind however, that the Drafting Committee determined that exclusion of these additional areas was not warranted.

1. **Trusts** (other than testamentary trusts). Trusts can be used for both business and personal purposes. By virtue of the definition of transaction, trusts used outside the area of business and commerce would not be governed by this Act. With respect to business or commercial trusts, the laws governing their formation contain few or no requirements for paper or signatures. Indeed, in most jurisdictions trusts of any kind may be created orally. Consequently, the Drafting Committee believed that the Act should apply to any transaction where the law leaves to the parties the decision of whether to use a writing. Thus, in the absence of legal requirements for writings, there is no sound reason to exclude laws governing trusts from the application of this Act.

2. **Powers of Attorney.** A power of attorney is simply a formalized type of agency agreement. In general, no formal requirements for paper or execution were found to be applicable to the validity of powers of attorney.

Special health powers of attorney have been established by statute in some States. These powers may have special requirements under state law regarding execution, acknowledgment and possibly notarization. In the normal case such powers will not arise in a transactional context and so would not be covered by this Act. However, even if such a record were to arise in a transactional context, this Act operates simply to remove the barrier to the use of an electronic medium, and preserves other requirements of applicable substantive law, avoiding any necessity to exclude such laws from the operation of this Act. Especially in light of the provisions of Sections 8 and 11, the substantive requirements under such laws will be preserved and may be satisfied in an electronic format.

3. **Real Estate Transactions.** It is important to distinguish between the efficacy of paper documents involving real estate between the parties, as opposed to their effect on third parties. As between the parties it is unnecessary to maintain existing barriers to electronic contracting. There are no unique characteristics to contracts relating to real property as opposed to other business and commercial (including consumer) contracts. Consequently, the decision whether to use an electronic medium for their agreements should be a matter for the parties to determine. Of course, to be effective against third parties state law generally requires filing with a governmental office. Pending adoption of electronic filing systems by States, the need for a piece of paper to file to perfect rights against third parties, will be a consideration for the parties. In the event notarization and acknowledgment are required under other laws, Section 11 provides a means for such actions to be accomplished electronically.

With respect to the requirements of government filing, those are left to the individual States in the decision of whether to adopt and implement electronic filing systems. (See optional Sections 17-19.) However, government recording systems currently require paper deeds including notarized, manual signatures. Although California and Illinois are experimenting with electronic filing systems, until such systems become widespread, the parties likely will choose to use, at the least, a paper deed for filing purposes. Nothing in this Act precludes the parties from selecting the medium best suited to the needs of the particular transaction. Parties may wish to consummate the transaction using electronic media in order to avoid expensive travel. Yet the actual deed may be in paper form to assure compliance with existing recording systems and requirements. The critical point is that nothing in this Act prevents the parties from selecting paper or electronic media for all or part of their transaction.

4. Consumer Protection Statutes. Consumer protection provisions in state law often require that information be disclosed or provided to a consumer in writing. Because this Act does apply to such transactions, the question of whether such laws should be specifically excluded was considered. Exclusion of consumer transactions would eliminate a huge group of commercial transactions which benefit consumers by enabling the efficiency of the electronic medium. Commerce over the internet is driven by consumer demands and concerns and must be included.

At the same time, it is important to recognize the protective effects of many consumer statutes. Consumer statutes often require that information be provided in writing, or may require that the consumer separately sign or initial a particular provision to evidence that the consumer's attention was brought to the provision. Subsection (1) requires electronic records to be retainable by a person whenever the law requires information to be delivered in writing. The section imposes a significant burden on the sender of information. The sender must assure that the information system of the recipient is compatible with, and capable of retaining the information sent by, the sender's system. Furthermore, nothing in this Act permits the avoidance of legal requirements of separate signatures or initialing. The Act simply permits the signature or initialing to be done electronically.

Other consumer protection statutes require (expressly or implicitly) that certain information be presented in a certain manner or format. Laws requiring information to be presented in particular fonts, formats or in similar fashion, as well as laws requiring conspicuous displays of information are preserved. Section 8(b)(3) specifically preserves the applicability of such requirements in an electronic environment. In the case of legal requirements that information be presented or appear conspicuous, the determination of what is conspicuous will be left to other law. Section 8 was included to specifically preserve the protective functions of such disclosure statutes, while at the same time allowing the use of electronic media if the substantive requirements of the other laws could be satisfied in the electronic medium.

Formatting and separate signing requirements serve a critical purpose in much consumer protection legislation, to assure that information is not slipped past the unsuspecting consumer. Not only does this Act not disturb those requirements, it preserves those requirements. In addition, other bodies of substantive law continue to operate to allow the courts to police any

such bad conduct or overreaching, e.g., unconscionability, fraud, duress, mistake and the like. These bodies of law remain applicable regardless of the medium in which a record appears.

The requirement that both parties agree to conduct a transaction electronically also prevents the imposition of an electronic medium on unwilling parties See Section 5(b). In addition, where the law requires inclusion of specific terms or language, those requirements are preserved broadly by Section 5(e).

Requirements that information be sent to, or received by, someone have been preserved in Section 15. As in the paper world, obligations to send do not impose any duties on the sender to assure receipt, other than reasonable methods of dispatch. In those cases where receipt is required legally, Sections 5, 8, and 15 impose the burden on the sender to assure delivery to the recipient if satisfaction of the legal requirement is to be fulfilled.

The preservation of existing safeguards, together with the ability to opt out of the electronic medium entirely, demonstrate the lack of any need generally to exclude consumer protection laws from the operation of this Act. Legislatures may wish to focus any review on those statutes which provide for post-contract formation and post-breach notices to be in paper. However, any such consideration must also balance the needed protections against the potential burdens which may be imposed. Consumers and others will not be well served by restrictions which preclude the employment of electronic technologies sought and desired by consumers.

SECTION 4. PROSPECTIVE APPLICATION. This [Act] applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this [Act].

Comment

This section makes clear that the Act only applies to validate electronic records and signatures which arise subsequent to the effective date of the Act. Whether electronic records and electronic signatures arising before the effective date of this Act are valid is left to other law.

SECTION 5. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT.

(a) This [Act] does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This [Act] applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this [Act], the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this [Act] of the words "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this [Act] and other applicable law.

Comment

This section limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce.

1. This section makes clear that this Act is intended to facilitate the use of electronic means, but does not require the use of electronic records and signatures. This fundamental principle is set forth in subsection (a) and elaborated by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. The requirement that party agreement be found from all the surrounding circumstances is a limitation on the scope of this Act.

3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence.

4. Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context it is essential that the parties' actions and words be broadly construed in determining whether the requisite agreement exists. Accordingly, the Act expressly provides that the party's agreement is to be found from all circumstances, including the parties' conduct. The critical element is the intent of a party to conduct a

transaction electronically. Once that intent is established, this Act applies. See Restatement 2d Contracts, Sections 2, 3, and 19.

Examples of circumstances from which it may be found that parties have reached an agreement to conduct transactions electronically include the following:

A. Automaker and supplier enter into a Trading Partner Agreement setting forth the terms, conditions and methods for the conduct of business between them electronically.

B. Joe gives out his business card with his business e-mail address. It may be reasonable, under the circumstances, for a recipient of the card to infer that Joe has agreed to communicate electronically for business purposes. However, in the absence of additional facts, it would not necessarily be reasonable to infer Joe's agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

C. Sally may have several e-mail addresses - home, main office, office of a non-profit organization on whose board Sally sits. In each case, it may be reasonable to infer that Sally is willing to communicate electronically with respect to business related to the business/purpose associated with the respective e-mail addresses. However, depending on the circumstances, it may not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained a particular e-mail account.

D. Among the circumstances to be considered in finding an agreement would be the time when the assent occurred relative to the timing of the use of electronic communications. If one orders books from an on-line vendor, such as Bookseller.com, the intention to conduct that transaction and to receive any correspondence related to the transaction electronically can be inferred from the conduct. Accordingly, as to information related to that transaction it is reasonable for Bookseller to deal with the individual electronically.

The examples noted above are intended to focus the inquiry on the party's agreement to conduct a transaction electronically. Similarly, if two people are at a meeting and one tells the other to send an e-mail to confirm a transaction - the requisite agreement under subsection (b) would exist. In each case, the use of a business card, statement at a meeting, or other evidence of willingness to conduct a transaction electronically must be viewed in light of all the surrounding circumstances with a view toward broad validation of electronic transactions.

5. Just as circumstances may indicate the existence of agreement, express or implied from surrounding circumstances, circumstances may also demonstrate the absence of true agreement. For example:

A. If Automaker, Inc. were to issue a recall of automobiles via its Internet website, it would not be able to rely on this Act to validate that notice in the case of a person who never logged on to the website, or indeed, had no ability to do so, notwithstanding a clause in a paper purchase contract by which the buyer agreed to receive such notices in such a manner.

B. Buyer executes a standard form contract in which an agreement to receive all notices electronically is set forth on page 3 in the midst of other fine print. Buyer has never communicated with Seller electronically, and has not provided any other information in the contract to suggest a willingness to deal electronically. Not only is it unlikely that any but the most formalistic of agreements may be found, but nothing in this Act prevents courts from policing such form contracts under common law doctrines relating to contract formation, unconscionability and the like.

6. Subsection (c) has been added to make clear the ability of a party to refuse to conduct a transaction electronically, even if the person has conducted transactions electronically in the past. The effectiveness of a party's refusal to conduct a transaction electronically will be determined under other applicable law in light of all surrounding circumstances. Such circumstances must include an assessment of the transaction involved.

A party's right to decline to act electronically under a specific contract, on the ground that each action under that contract amounts to a separate "transaction," must be considered in light of the purpose of the contract and the action to be taken electronically. For example, under a contract for the purchase of goods, the giving and receipt of notices electronically, as provided in the contract, should not be viewed as discreet transactions. Rather such notices amount to separate actions which are part of the "transaction" of purchase evidenced by the contract. Allowing one party to require a change of medium in the middle of the transaction evidenced by that contract is not the purpose of this subsection. Rather this subsection is intended to preserve the party's right to conduct the next purchase in a non-electronic medium.

7. Subsection (e) is an essential provision in the overall scheme of this Act. While this Act validates and effectuates electronic records and electronic signatures, the legal effect of such records and signatures is left to existing substantive law outside this Act except in very narrow circumstances. See, e.g., Section 16. Even when this Act operates to validate records and signatures in an electronic medium, it expressly preserves the substantive rules of other law applicable to such records. See, e.g., Section 11.

For example, beyond validation of records, signatures and contracts based on the medium used, Section 7 (a) and (b) should not be interpreted as establishing the legal effectiveness of any given record, signature or contract. Where a rule of law requires that the record contain minimum substantive content, the legal effect of such a record will depend on whether the record meets the substantive requirements of other applicable law.

Section 8 expressly preserves a number of legal requirements in currently existing law relating to the presentation of information in writing. Although this Act now would allow such information to be presented in an electronic record, Section 8 provides that the other substantive requirements of law must be satisfied in the electronic medium as well.

SECTION 6. CONSTRUCTION AND APPLICATION. This [Act] must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law; (2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

Comment

1. The purposes and policies of this Act are

(a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;

(b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;

(c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;

(d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;

(e) to promote uniformity of the law among the States (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;

(f) to promote public confidence in the validity, integrity and reliability of electronic commerce and governmental transactions; and

(g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

2. This Act has been drafted to permit flexible application consistent with its purpose to validate electronic transactions. The provisions of this Act validating and effectuating the employ of electronic media allow the courts to apply them to new and unforeseen technologies and practices. As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow. Accordingly, this legislation is intended to set a framework for the validation of media which may be developed in the future and which demonstrate the same qualities as the electronic media contemplated and validated under this Act.

SECTION 7. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS.

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Source: UNCITRAL Model Law on Electronic Commerce, Articles 5, 6, and 7.

Comment

1. This section sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance. Subsections (a) and (b) are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or contract. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

2. Under Restatement 2d Contracts Section 8, a contract may have legal effect and yet be unenforceable. Indeed, one circumstance where a record or contract may have effect but be unenforceable is in the context of the Statute of Frauds. Though a contract may be unenforceable, the records may have collateral effects, as in the case of a buyer that insures goods purchased under a contract unenforceable under the Statute of Frauds. The insurance company may not deny a claim on the ground that the buyer is not the owner, though the buyer may have no direct remedy against seller for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

While this section would validate an electronic record for purposes of a statute of frauds, if an agreement to conduct the transaction electronically cannot reasonably be found (See Section 5(b)) then a necessary predicate to the applicability of this Act would be absent and this Act would not validate the electronic record. Whether the electronic record might be valid under other law is not addressed by this Act.

3. Subsections (c) and (d) provide the positive assertion that electronic records and signatures satisfy legal requirements for writings and signatures. The provisions are limited to requirements in laws that a record be in writing or be signed. This section does not address requirements imposed by other law in addition to requirements for writings and signatures See, e.g., Section 8.

Subsections (c) and (d) are particularized applications of subsection (a). The purpose is to validate and effectuate electronic records and signatures as the equivalent of writings, subject to all of the rules applicable to the efficacy of a writing, except as such other rules are modified by the more specific provisions of this Act.

Illustration 1: A sends the following e-mail to B: "I hereby offer to buy widgets from you, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your offer to buy widgets for delivery next Tuesday. /s/ B." The e-mails may not be denied effect solely because they are electronic. In addition, the e-mails do qualify as records under the Statute of Frauds. However, because there is no quantity stated in either record, the parties' agreement would be unenforceable under existing UCC Section 2-201(1).

Illustration 2: A sends the following e-mail to B: "I hereby offer to buy 100 widgets for \$1000, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your offer to purchase 100 widgets for \$1000, delivery next Tuesday. /s/ B." In this case the analysis is the same as in Illustration 1 except that here the records otherwise satisfy the requirements of UCC Section 2-201(1). The transaction may not be denied legal effect solely because there is not a pen and ink "writing" or "signature".

4. Section 8 addresses additional requirements imposed by other law which may affect the legal effect or enforceability of an electronic record in a particular case. For example, in Section 8(a) the legal requirement addressed is *the provision of information* in writing. The section then sets forth the standards to be applied in determining whether the provision of information by an electronic record is the equivalent of the provision of information in writing. The requirements in Section 8 are in addition to the bare validation that occurs under this section.

5. Under the substantive law applicable to a particular transaction within this Act, the legal effect of an electronic record may be separate from the issue of whether the record contains a signature. For example, where notice must be given as part of a contractual obligation, the effectiveness of the notice will turn on whether the party provided the notice regardless of whether the notice was signed (See Section 15). An electronic record attributed to a party under Section 9 and complying with the requirements of Section 15 would suffice in that case, notwithstanding that it may not contain an electronic signature.

SECTION 8. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS.

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.

(c) 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.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this [Act] requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law.

Source: Canadian - Uniform Electronic Commerce Act

Comment

1. This section is a savings provision, designed to assure, consistent with the fundamental purpose of this Act, that otherwise applicable substantive law will not be overridden by this Act. The section makes clear that while the pen and ink provisions of such other law may be satisfied electronically, nothing in this Act vitiates the other requirements of such laws. The section addresses a number of issues related to disclosures and notice provisions in other laws.

2. This section is independent of the prior section. Section 7 refers to legal requirements for a writing. This section refers to legal requirements for the provision of information in writing or relating to the method or manner of presentation or delivery of information. The section addresses more specific legal requirements of other laws, provides standards for satisfying the more particular legal requirements, and defers to other law for satisfaction of requirements under those laws.

3. Under subsection (a), to meet a requirement of other law that information be provided in writing, the recipient of an electronic record of the information must be able to get to the electronic record and read it, and must have the ability to get back to the information in some way at a later date. Accordingly, the section requires that the electronic record be capable of retention for later review.

The section specifically provides that any inhibition on retention imposed by the sender or the sender's system will preclude satisfaction of this section. Use of technological means now existing or later developed which prevents the recipient from retaining a copy the information

would ret in a determination that information has not been provided under subsection (a). The policies underlying laws requiring the provision of information in writing warrant the imposition of an additional burden on the sender to make the information available in a manner which will permit subsequent reference. A difficulty does exist for senders of information because of the disparate systems of their recipients and the capabilities of those systems. However, in order to satisfy the *legal requirement* of other law to make information available, the sender must assure that the recipient receives and can retain the information. However, it is left for the courts to determine whether the sender has complied with this subsection if evidence demonstrates that it is something peculiar the recipient's system which precludes subsequent reference to the information.

4. Subsection (b) is a savings provision for laws which provide for the means of delivering or displaying information and which are not affected by the Act. For example, if a law requires delivery of notice by first class US mail, that means of delivery would not be affected by this Act. The information to be delivered may be provided on a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal service. Display, delivery and formatting requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, e.g., the information can be presented in the equivalent of 20 point bold type as required by other law, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements. If a law requires that particular records be delivered together, or attached to other records, this Act does not preclude the delivery of the records together in an electronic communication, so long as the records are connected or associated with each other in a way determined to satisfy the other law.

5. Subsection (c) provides incentives for senders of information to use systems which will not inhibit the other party from retaining the information. However, there are circumstances where a party providing certain information may wish to inhibit retention in order to protect intellectual property rights or prevent the other party from retaining confidential information about the sender. In such cases inhibition is understandable, but if the sender wishes to enforce the record in which the information is contained, the sender may not inhibit its retention by the recipient. Unlike subsection (a), subsection (c) applies in all transactions and simply provides for unenforceability against the recipient. Subsection (a) applies only where another law imposes the writing requirement, and subsection (a) imposes a broader responsibility on the sender to assure retention capability by the recipient.

6. The protective purposes of this section justify the non-waivability provided by subsection (d). However, since the requirements for sending and formatting and the like are imposed by other law, to the extent other law permits waiver of such protections, there is no justification for imposing a more severe burden in an electronic environment.

SECTION 9. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Comment

1. Under subsection (a), so long as the electronic record or electronic signature resulted from a person's action it will be attributed to that person - the legal effect of that attribution is addressed in subsection (b). This section does not alter existing rules of law regarding attribution. The section assures that such rules will be applied in the electronic environment. A person's actions include actions taken by human agents of the person, as well as actions taken by an electronic agent, i.e., the tool, of the person. Although the rule may appear to state the obvious, it assures that the record or signature is not ascribed to a machine, as opposed to the person operating or programming the machine.

In each of the following cases, both the electronic record and electronic signature would be attributable to a person under subsection (a):

A. The person types his/her name as part of an e-mail purchase order;

B. The person's employee, pursuant to authority, types the person's name as part of an e-mail purchase order;

C. The person's computer, programmed to order goods upon receipt of inventory information within particular parameters, issues a purchase order which includes the person's name, or other identifying information, as part of the order.

In each of the above cases, law other than this Act would ascribe both the signature and the action to the person if done in a paper medium. Subsection (a) expressly provides that the same result will occur when an electronic medium is used.

2. Nothing in this section affects the use of a signature as a device for attributing a record to a person. Indeed, a signature is often the primary method for attributing a record to a person. In the foregoing examples, once the electronic signature is attributed to the person, the electronic record would also be attributed to the person, unless the person established fraud, forgery, or other invalidating cause. However, a signature is not the only method for attribution.

3. The use of facsimile transmissions provides a number of examples of attribution using information other than a signature. A facsimile may be attributed to a person because of the

information printed across the top of the page that indicates the machine from which it was sent. Similarly, the transmission may contain a letterhead which identifies the sender. Some cases have held that the letterhead actually constituted a signature because it was a symbol adopted by the sender with intent to authenticate the facsimile. However, the signature determination resulted from the necessary finding of intention in that case. Other cases have found facsimile letterheads NOT to be signatures because the requisite intention was not present. The critical point is that with or without a signature, information within the electronic record may well suffice to provide the facts resulting in attribution of an electronic record to a particular party.

In the context of attribution of records, normally the content of the record will provide the necessary information for a finding of attribution. It is also possible that an established course of dealing between parties may result in a finding of attribution. Just as with a paper record, evidence of forgery or counterfeiting may be introduced to rebut the evidence of attribution.

4. Certain information may be present in an electronic environment that does not appear to attribute but which clearly links a person to a particular record. Numerical codes, personal identification numbers, public and private key combinations all serve to establish the party to whom an electronic record should be attributed. Of course security procedures will be another piece of evidence available to establish attribution.

The inclusion of a specific reference to security procedures as a means of proving attribution is salutary because of the unique importance of security procedures in the electronic environment. In certain processes, a technical and technological security procedure may be the best way to convince a trier of fact that a particular electronic record or signature was that of a particular person. In certain circumstances, the use of a security procedure to establish that the record and related signature came from the person's business might be necessary to overcome a claim that a hacker intervened. The reference to security procedures is not intended to suggest that other forms of proof of attribution should be accorded less persuasive effect. It is also important to recall that the particular strength of a given procedure does not affect the procedure's status as a security procedure, but only affects the weight to be accorded the evidence of the security procedure as tending to establish attribution.

5. This section does apply in determining the effect of a "click-through" transaction. A "click-through" transaction involves a process which, if executed with an intent to "sign," will be an electronic signature. See definition of Electronic Signature. In the context of an anonymous "click-through," issues of proof will be paramount. This section will be relevant to establish that the resulting electronic record is attributable to a particular person upon the requisite proof, including security procedures which may track the source of the click-through.

6. Once it is established that a record or signature is attributable to a particular party, the effect of a record or signature must be determined in light of the context and surrounding circumstances, including the parties' agreement, if any. Also informing the effect of any attribution will be other legal requirements considered in light of the context. Subsection (b) addresses the effect of the record or signature once attributed to a person.

SECTION 10. EFFECT OF CHANGE OR ERROR. If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

Source: Restatement 2d Contracts, Sections 152-155.

Comment

1. This section is limited to changes and errors occurring in transmissions between parties - whether person-person (paragraph 1) or in an automated transaction involving an individual and a machine (paragraphs 1 and 2). The section focuses on the effect of changes and errors occurring when records are exchanged between parties. In cases where changes and errors occur in contexts other than transmission, the law of mistake is expressly made applicable to resolve the conflict.

The section covers both changes and errors. For example, if Buyer sends a message to Seller ordering 100 widgets, but Buyer's information processing system changes the order to 1000 widgets, a "change" has occurred between what Buyer transmitted and what Seller received. If on the other hand, Buyer typed in 1000 intending to order only 100, but sent the message before noting the mistake, an error would have occurred which would also be covered by this section.

2. Paragraph (1) deals with any transmission where the parties have agreed to use a security procedure to detect changes and errors. It operates against the non-conforming party, i.e., the party in the best position to have avoided the change or error, regardless of whether that person is the sender or recipient. The source of the error/change is not indicated, and so both human and machine errors/changes would be covered. With respect to errors or changes that would not be detected by the security procedure even if applied, the parties are left to the general law of mistake to resolve the dispute.

3. Paragraph (1) applies only in the situation where a security procedure would detect the error/change but one party fails to use the procedure and does not detect the error/change. In such a case, consistent with the law of mistake generally, the record is made avoidable at the instance of the party who took all available steps to avoid the mistake. See Restatement 2d Contracts Sections 152-154.

Making the erroneous record avoidable by the conforming party is consistent with Sections 153 and 154 of the Restatement 2d Contracts because the non-conforming party was in the best position to avoid the problem, and would bear the risk of mistake. Such a case would constitute mistake by one party. The mistaken party (the conforming party) would be entitled to avoid any resulting contract under Section 153 because s/he does not have the risk of mistake and the non-conforming party had reason to know of the mistake.

4. As with paragraph (1), paragraph (2), when applicable, allows the mistaken party to avoid the effect of the erroneous electronic record. However, the subsection is limited to human error on the part of an individual when dealing with the electronic agent of the other party. In a transaction between individuals there is a greater ability to correct the error before parties have acted on it. However, when an individual makes an error while dealing with the electronic agent of the other party, it may not be possible to correct the error before the other party has shipped or taken other action in reliance on the erroneous record.

Paragraph (2) applies only to errors made by individuals. If the error results from the electronic agent, it would constitute a system error. In such a case the effect of that error would be resolved under paragraph (1) if applicable, otherwise under paragraph (3) and the general law of mistake.

5. The party acting through the electronic agent/machine is given incentives by this section to build in safeguards which enable the individual to prevent the sending of an erroneous record, or correct the error once sent. For example, the electronic agent may be programmed to provide a "confirmation screen" to the individual setting forth all the information the individual initially approved. This would provide the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the electronic agent might receive the record sent by the individual and then send back a confirmation which the individual must again accept before the transaction is completed. This would allow for correction of an erroneous record. In either case, the electronic agent would "provide an opportunity for prevention or correction of the error," *and the subsection would not apply*. Rather, the effect of any error is governed by other law.

6. Paragraph (2) also places additional requirements on the mistaken individual before the paragraph may be invoked to avoid an erroneous electronic record. The individual must take prompt action to advise the other party of the error and the fact that the individual did not intend the electronic record. Whether the action is prompt must be determined from all the circumstances including the individual's ability to contact the other party. The individual should advise the other party both of the error and of the lack of intention to be bound (i.e., avoidance) by the electronic record received. Since this provision allows avoidance by the mistaken party, that party should also be required to expressly note that it is seeking to avoid the electronic record, i.e., lacked the intention to be bound.

Second, restitution is normally required in order to undo a mistaken transaction. Accordingly, the individual must also return or destroy any consideration received, adhering to instructions from the other party in any case. This is to assure that the other party retains control over the consideration sent in error.

Finally, and most importantly in regard to transactions involving intermediaries which may be harmed because transactions cannot be unwound, the individual cannot have received any benefit from the transaction. This section prevents a party from unwinding a transaction after the delivery of value and consideration which cannot be returned or destroyed. For example, if the consideration received is information, it may not be possible to avoid the benefit conferred. While the information itself could be returned, mere access to the information, or the ability to redistribute the information would constitute a benefit precluding the mistaken party from unwinding the transaction. It may also occur that the mistaken party receives consideration which changes in value between the time of receipt and the first opportunity to return. In such a case restitution cannot be made adequately, and the transaction would not be avoidable. In each of the foregoing cases, under subparagraph (2)(c), the individual would have received the benefit of the consideration and would NOT be able to avoid the erroneous electronic record under this section.

7. In all cases not covered by paragraphs (1) or (2), where error or change to a record occur, the parties contract, or other law, specifically including the law of mistake, applies to resolve any dispute. In the event that the parties' contract and other law would achieve different results, the construction of the parties' contract is left to the other law. If the error occurs in the context of record retention, Section 12 will apply. In that case the standard is one of accuracy and retrievability of the information.

8. Paragraph (4) makes the error correction provision in paragraph (2) and the application of the law of mistake in paragraph (3) non-variable. Paragraph (2) provides incentives for parties using electronic agents to establish safeguards for individuals dealing with them. It also avoids unjustified windfalls to the individual by erecting stringent requirements before the individual may exercise the right of avoidance under the paragraph. Therefore, there is no reason to permit parties to avoid the paragraph by agreement. Rather, parties should satisfy the paragraph's requirements.

SECTION 11. NOTARIZATION AND ACKNOWLEDGMENT. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Comment

This section permits a notary public and other authorized officers to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.

For example, Buyer wishes to send a notarized Real Estate Purchase Agreement to Seller via e-mail. The notary must appear in the room with the Buyer, satisfy him/herself as to the identity of the Buyer, and swear to that identification. All that activity must be reflected as part of the electronic Purchase Agreement and the notary's electronic signature must appear as a part of the electronic real estate purchase contract.

As another example, Buyer seeks to send Seller an affidavit averring defects in the products received. A court clerk, authorized under state law to administer oaths, is present with Buyer in a room. The Clerk administers the oath and includes the statement of the oath, together with any other requisite information, in the electronic record to be sent to the Seller. Upon administering the oath and witnessing the application of Buyer's electronic signature to the electronic record, the Clerk also applies his electronic signature to the electronic record. So long as all substantive requirements of other applicable law have been fulfilled and are reflected in the electronic record, the sworn electronic record of Buyer is as effective as if it had been transcribed on paper.

SECTION 12. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record in accordance with subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a).

(f) A record retained as an electronic record in accordance with subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this [Act] specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Source: UNCITRAL Model Law On Electronic Commerce Articles 8 and 10.

Comment

1. This section deals with the serviceability of electronic records as retained records and originals. So long as there exists reliable assurance that the electronic record accurately reproduces the information, this section continues the theme of establishing the functional equivalence of electronic and paper-based records. This is consistent with Fed.R.Evid. 1001(3) and Unif.R.Evid. 1001(3) (1974). This section assures that information stored electronically will remain effective for all audit, evidentiary, archival and similar purposes.

2. In an electronic medium, the concept of an original document is problematic. For example, as one drafts a document on a computer the "original" is either on a disc or the hard drive to which the document has been initially saved. If one periodically saves the draft, the fact is that at times a document may be first saved to disc then to hard drive, and at others vice versa. In such a case the "original" may change from the information on the disc to the information on the hard drive. Indeed, it may be argued that the "original" exists solely in RAM and, in a sense, the original is destroyed when a "copy" is saved to a disc or to the hard drive. In any event, in the context of record retention, the concern focuses on the integrity of the information, and not with its "originality."

3. Subsection (a) requires accuracy and the ability to access at a later time. The requirement of accuracy is derived from the Uniform and Federal Rules of Evidence. The requirement of continuing accessibility addresses the issue of technology obsolescence and the need to update and migrate information to developing systems. It is not unlikely that within the span of 5-10 years (a period during which retention of much information is required) a corporation may evolve through one or more generations of technology. More to the point, this technology may

be incompatible with each other necessitating the reconversion of information from one system to the other.

For example, certain operating systems from the early 1980's, e.g., memory typewriters, became obsolete with the development of personal computers. The information originally stored on the memory typewriter would need to be converted to the personal computer system in a way meeting the standards for accuracy contemplated by this section. It is also possible that the medium on which the information is stored is less stable. For example, information stored on floppy discs is generally less stable, and subject to a greater threat of disintegration, than information stored on a computer hard drive. In either case, the continuing accessibility issue must be satisfied to validate information stored by electronic means under this section.

This section permits parties to convert original written records to electronic records for retention so long as the requirements of subsection (a) are satisfied. Accordingly, in the absence of specific requirements to retain written records, written records may be destroyed once saved as electronic records satisfying the requirements of this section.

The subsection refers to the information contained in an electronic record, rather than relying on the term electronic record, as a matter of clarity that the critical aspect in retention is the information itself. What information must be retained is determined by the purpose for which the information is needed. If the addressing and pathway information regarding an e-mail is relevant, then that information should also be retained. However if it is the substance of the e-mail that is relevant, only that information need be retained. Of course, wise record retention would include all such information since what information will be relevant at a later time will not be known.

4. Subsections (b) and (c) simply make clear that certain ancillary information or the use of third parties, does not affect the serviceability of records and information retained electronically. Again, the relevance of particular information will not be known until that information is required at a subsequent time.

5. Subsection (d) continues the theme of the Act as validating electronic records as originals where the law requires retention of an original. The validation of electronic records and electronic information as originals is consistent with the Uniform Rules of Evidence. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

6. Subsection (e) specifically addresses particular concerns regarding check retention statutes in many jurisdictions. A Report compiled by the Federal Reserve Bank of Boston identifies hundreds of state laws which require the retention or production of original canceled checks. Such requirements preclude banks and their customers from realizing the benefits and efficiencies related to truncation processes otherwise validated under current law. The benefits to banks and their customers from electronic check retention are effectuated by this provision.

7. Subsections (f) and (g) generally address other record retention statutes. As with check retention, all businesses and individuals may realize significant savings from electronic record retention. So long as the standards in Section 12 are satisfied, this section permits all parties to

obtain those benefits. As always the government may require records in any medium, however, these subsections require a governmental agency to specifically identify the types of records and requirements that will be imposed.

SECTION 13. ADMISSIBILITY IN EVIDENCE. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Source: UNCITRAL Model Law on Electronic Commerce Article 9.

Comment

Like Section 7, this section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record. See Uniform Rules of Evidence 1001(3), 1002, 1003 and 1004.

SECTION 14. AUTOMATED TRANSACTION. In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.

Source: UNICTRAL Model Law on Electronic Commerce Article 11.

Comment

1. This section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction. It negates any claim that lack of human intent, at the time of contract formation, prevents contract formation. When machines are involved, the requisite intention flows from the programming and use of the machine. As in other cases, these are salutary provisions consistent with the fundamental purpose of the Act to remove barriers to electronic transactions while leaving the substantive law, e.g., law of mistake, law of contract formation, unaffected to the greatest extent possible.

2. The process in paragraph (2) validates an anonymous click-through transaction. It is possible that an anonymous click-through process may simply result in no recognizable legal relationship, e.g., A goes to a person's website and acquires access without in any way identifying herself, or otherwise indicating agreement or assent to any limitation or obligation, and the owner's site grants A access. In such a case no legal relationship has been created.

On the other hand it may be possible that A's actions indicate agreement to a particular term. For example, A goes to a website and is confronted by an initial screen which advises her that the information at this site is proprietary, that A may use the information for her own personal purposes, but that, by clicking below, A agrees that any other use without the site owner's permission is prohibited. If A clicks "agree" and downloads the information and then uses the information for other, prohibited purposes, should not A be bound by the click? It seems the answer properly should be, and would be, yes.

If the owner can show that the only way A could have obtained the information was from his website, and that the process to access the subject information required that A must have clicked the "I agree" button after having the ability to see the conditions on use, A has performed actions which A was free to refuse, which A knew would cause the site to grant her access, i.e., "complete the transaction." The terms of the resulting contract will be determined under general contract principles, but will include the limitation on A's use of the information, as a condition precedent to granting her access to the information.

3. In the transaction set forth in Comment 2, the record of the transaction also will include an electronic signature. By clicking "I agree" A adopted a process with the intent to "sign," i.e., bind herself to a legal obligation, the resulting record of the transaction. If a "signed writing" were required under otherwise applicable law, this transaction would be enforceable. If a "signed writing" were not required, it may be sufficient to establish that the electronic record is attributable to A under Section 9. Attribution may be shown in any manner reasonable including showing that, of necessity, A could only have gotten the information through the process at the website.

SECTION 15. TIME AND PLACE OF SENDING AND RECEIPT.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Source: UNCITRAL Model Law on Electronic Commerce Article 15.

Comment

1. This section provides default rules regarding when and from where an electronic record is sent and when and where an electronic record is received. This section does not address the efficacy of the record that is sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was sent or received. The effectiveness of an illegible record, whether it binds any party, are questions left to other law.

2. Subsection (a) furnishes rules for determining when an electronic record is sent. The effect of the sending and its import are determined by other law once it is determined that a sending has occurred.

In order to have a proper sending, the subsection requires that information be properly addressed or otherwise directed to the recipient. In order to send within the meaning of this section, there must be specific information which will direct the record to the intended recipient. Although mass electronic sending is not precluded, a general broadcast message, sent to systems rather than individuals, would not suffice as a sending.

The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. Records sent through e-mail or the internet will pass through many different server systems. Accordingly, the critical element when more than one system is involved is the loss of control by the sender.

However, the structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, within a university or corporate setting, e-mail sent within the system to another faculty member is technically not out of the sender's control since it never leaves the organization's server. Accordingly, to qualify as a sending, the e-mail must arrive at a point where the recipient has control. This section does not address the effect of an electronic record that is thereafter "pulled back," e.g., removed from a mailbox. The analog in the paper world would be removing a letter from a person's mailbox. As in the case of providing information electronically under Section 8, the recipient's ability to receive a message should be judged from the perspective of whether the sender has done any action which would preclude retrieval. This is especially the case in regard to sending, since the sender must direct the record to a system designated or used by the recipient.

3. Subsection (b) provides simply that when a record enters the system which the recipient has designated or uses and to which it has access, in a form capable of being processed by that system, it is received. Keying receipt to a system accessible by the recipient removes the potential for a recipient leaving messages with a server or other service in order to avoid receipt. However, the section does not resolve the issue of how the sender proves the time of receipt.

To assure that the recipient retains control of the place of receipt, subsection (b) requires that the system be specified or used by the recipient, and that the system be used or designated for the type of record being sent. Many people have multiple e-mail addresses for different purposes. Subsection (b) assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes. Whether actual knowledge upon seeing it at home would qualify as receipt is determined under the otherwise applicable substantive law.

4. Subsections (c) and (d) provide default rules for determining where a record will be considered to have been sent or received. The focus is on the place of business of the recipient and not the physical location of the information processing system, which may bear absolutely no relation to the transaction between the parties. It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. Accordingly, where the place of sending or receipt is an issue under other applicable law, e.g., conflict of laws issues, tax issues, the relevant location should be the location of the sender or recipient and not the location of the information processing system.

Subsection (d) assures individual flexibility in designating the place from which a record will be considered sent or at which a record will be considered received. Under subsection (d) a person may designate the place of sending or receipt unilaterally in an electronic record. This ability, as with the ability to designate by agreement, may be limited by otherwise applicable law to places having a reasonable relationship to the transaction.

5. Subsection (e) makes clear that receipt is not dependent on a person having notice that the record is in the person's system. Receipt occurs when the record reaches the designated system whether or not the recipient ever retrieves the record. The paper analog is the recipient who never reads a mail notice.

6. Subsection (f) provides legal certainty regarding the effect of an electronic acknowledgment. It only addresses the fact of receipt, not the quality of the content, nor whether the electronic record was read or "opened."

7. Subsection (g) limits the parties' ability to vary the method for sending and receipt provided in subsections (a) and (b), when there is a legal requirement for the sending or receipt. As in other circumstances where legal requirements derive from other substantive law, to the extent that the other law permits variation by agreement, this Act does not impose any additional requirements, and provisions of this Act may be varied to the extent provided in the other law.

SECTION 16. TRANSFERABLE RECORDS.

(a) In this section, "transferable record" means an electronic record that:

(1) would be a note under [Article 3 of the Uniform Commercial Code] or a document under [Article 7 of the Uniform Commercial Code] if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in [Section 1-201(20) of the Uniform Commercial Code], of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under [the Uniform Commercial Code], including, if the applicable statutory requirements under [Section 3-302(a), 7-501, or 9-308 of the Uniform Commercial Code] are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under [the Uniform Commercial Code].

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Source: Revised Article 9, Section 9-105.

Comment

1. Paper negotiable instruments and documents are unique in the fact that a tangible token - a piece of paper - actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper negotiable document or instrument dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognized by the inclusion of this section on Transferable Records.

This section provides legal support for the creation, transferability and enforceability of electronic note and document equivalents, as against the issuer/obligor. The certainty created by the section provides the requisite incentive for industry to develop the systems and processes, which involve significant expenditures of time and resources, to enable the use of such electronic documents.

The importance of facilitating the development of systems which will permit electronic equivalents is a function of cost, efficiency and safety for the records. The storage cost and space needed for the billions of paper notes and documents is phenomenal. Further, natural disasters can wreak havoc on the ability to meet legal requirements for retaining, retrieving and delivering paper instruments. The development of electronic systems meeting the rigorous standards of this section will permit retention of copies which reflect the same integrity as the original. As a result, storage, transmission and other costs will be reduced, while security and the ability to satisfy legal requirements governing such paper records will be enhanced.

Section 16 provides for the creation of an electronic record which may be controlled by the holder, who in turn may obtain the benefits of holder in due course and good faith purchaser status. If the benefits and efficiencies of electronic media are to be realized in this industry it is essential to establish a means by which transactions involving paper promissory notes may be accomplished completely electronically. Particularly as other aspects of such transactions are accomplished electronically, the drag on the transaction of requiring a paper note becomes evident. In addition to alleviating the logistical problems of generating, storing and retrieving paper, the mailing and transmission costs associated with such transactions will also be reduced.

2. The definition of transferable record is limited in two significant ways. First, only the equivalent of paper promissory notes and paper documents of title can be created as transferable records. Notes and Documents of Title do not impact the broad systems that relate to the broader payments mechanisms related, for example, to checks. Impacting the check collection system by allowing for "electronic checks" has ramifications well beyond the ability of this Act to address. Accordingly, this Act excludes from its scope transactions governed by UCC Articles 3 and 4. The limitation to promissory note equivalents in Section 16 is quite important in that regard because of the ability to deal with many enforcement issues by contract without affecting such systemic concerns.

Second, not only is Section 16 limited to electronic records which would qualify as negotiable promissory notes or documents if they were in writing, but the issuer of the electronic record must expressly agree that the electronic record is to be considered a transferable record. The definition of transferable record as "an electronic record that...the issuer of the electronic record expressly has agreed is a transferable record" indicates that the electronic record itself will likely set forth the issuer's agreement, though it may be argued that a contemporaneous electronic or written record might set forth the issuer's agreement. However, conversion of a paper note issued as such would not be possible because the issuer would not be the issuer, in such a case, of an electronic record. The purpose of such a restriction is to assure that transferable records can only be created at the time of issuance by the obligor. The possibility that a paper note might be converted to an electronic record and then intentionally destroyed, and the effect of such action, was not intended to be covered by Section 16.

The requirement that the obligor expressly agree in the electronic record to its treatment as a transferable record does not otherwise affect the characterization of a transferable record (i.e., does not affect what would be a paper note) because it is a statutory condition. Further, it does not obligate the issuer to undertake to do any other act than the payment of the obligation evidenced by the transferable record. Therefore, it does not make the transferable record "conditional" within the meaning of Section 3-104(a)(3) of the Uniform Commercial Code.

3. Under Section 16 acquisition of "control" over an electronic record serves as a substitute for "possession" in the paper analog. More precisely, "control" under Section 16 serves as the substitute for delivery, indorsement and possession of a negotiable promissory note or negotiable document of title. Section 16(b) allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes [the person claiming control] as the person to which the transferable record was issued or transferred." The key point is that a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of *the* person entitled to payment. Section 16(c) then sets forth a safe harbor list of very strict requirements for such a system. The specific provisions listed in Section 16(c) are derived from Section 105 of Revised Article 9 of the Uniform Commercial Code. Generally, the transferable record must be unique, identifiable, and except as specifically permitted, unalterable. That "authoritative copy" must (i) identify the person claiming control as the person to whom the record was issued or most recently transferred, (ii) be maintained by the person claiming control or its designee, and (iii) be unalterable except with the permission of the person claiming control. In addition any copy of the authoritative copy must be readily identifiable as a copy and all revisions must be readily identifiable as authorized or unauthorized.

The control requirements may be satisfied through the use of a trusted third party registry system. Such systems are currently in place with regard to the transfer of securities entitlements under Article 8 of the Uniform Commercial Code, and in the transfer of cotton warehouse receipts under the program sponsored by the United States Department of Agriculture. This Act would recognize the use of such a system so long as the standards of subsection (c) were satisfied. In addition, a technological system which met such exacting standards would also be permitted under Section 16.

For example, a borrower signs an electronic record which would be a promissory note or document if it were paper. The borrower specifically agrees in the electronic record that it will qualify as a transferable record under this section. The lender implements a newly developed technological system which dates, encrypts, and stores all the electronic information in the transferable record in a manner which lender can demonstrate reliably establishes lender as the person to which the transferable record was issued. In the alternative, the lender may contract with a third party to act as a registry for all such transferable records, retaining records establishing the party to whom the record was issued and all subsequent transfers of the record. An example of this latter method for assuring control is the system established for the issuance and transfer of electronic cotton warehouse receipts under 7 C.F.R. section 735 et seq.

Of greatest importance in the system used is the ability to securely and demonstrably be able to transfer the record to others in a manner which assures that only one "holder" exists. The need for such certainty and security resulted in the very stringent standards for a system outlined in subsection (c). A system relying on a third party registry is likely the most effective way to satisfy the requirements of subsection (c) that the transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.

It must be remembered that Section 16 was drafted in order to provide sufficient legal certainty regarding the rights of those in control of such electronic records, that legal incentives would exist to warrant the development of systems which would establish the requisite control. During the drafting of Section 16, representatives from the Federal Reserve carefully scrutinized the impact of any electronicization of any aspect of the national payment system. Section 16 represents a compromise position which, as noted, serves as a bridge pending more detailed study and consideration of what legal changes, if any, are necessary or appropriate in the context of the payment systems impacted. Accordingly, Section 16 provides limited scope for the attainment of important rights derived from the concept of negotiability, in order to permit the development of systems which will satisfy its strict requirements for control.

4. It is important to note what the section does not provide. Issues related to enforceability against intermediate transferees and transferors (i.e., indorser liability under a paper note), warranty liability that would attach in a paper note, and issues of the effect of taking a transferable record on the underlying obligation, are NOT addressed by this section. Such matters must be addressed, if at all, by contract between and among the parties in the chain of transmission and transfer of the transferable record. In the event that such matters are not addressed by the contract, the issues would need to be resolved under otherwise applicable law. Other law may include general contract principles of assignment and assumption, or may include rules from Article 3 of the Uniform Commercial Code applied by analogy.

For example, Issuer agrees to pay a debt by means of a transferable record issued to A. Unless there is agreement between issuer and A that the transferable record "suspends" the underlying obligation (see Section 3-310 of the Uniform Commercial Code), A would not be prevented from enforcing the underlying obligation without the transferable record. Similarly, if A transfers the

transferable record to B by means granting B control, B may obtain holder in due course rights against the obligor/issuer, but B's recourse against A would not be clear unless A agreed to remain liable under the transferable record. Although the rules of Article 3 may be applied by analogy in an appropriate context, in the absence of an express agreement in the transferable record or included by applicable system rules, the liability of the transferor would not be clear.

5. Current business models exist which rely for their efficacy on the benefits of negotiability. A principal example, and one which informed much of the development of Section 16, involves the mortgage backed securities industry. Aggregators of commercial paper acquire mortgage secured promissory notes following a chain of transfers beginning with the origination of the mortgage loan by a mortgage broker. In the course of the transfers of this paper, buyers of the notes and lenders/secured parties for these buyers will intervene. For the ultimate purchaser of the paper, the ability to rely on holder in due course and good faith purchaser status creates the legal security necessary to issue its own investment securities which are backed by the obligations evidenced by the notes purchased. Only through their HIDC status can these purchasers be assured that third party claims will be barred. Only through their HIDC status can the end purchaser avoid the incredible burden of requiring and assuring that each person in the chain of transfer has waived any and all defenses to performance which may be created during the chain of transfer.

6. This section is a stand-alone provision. Although references are made to specific provisions in Article 3, Article 7, and Article 9 of the Uniform Commercial Code, these provisions are incorporated into this Act and made the applicable rules for purposes of this Act. The rights of parties to transferable records are established under subsections (d) and (e). Subsection (d) provides rules for determining the rights of a party in control of a transferable record. The subsection makes clear that the rights are determined under this section, and not under other law, by incorporating the rules on the manner of acquisition into this statute. The last sentence of subsection (d) is intended to assure that requirements related to notions of possession, which are inherently inconsistent with the idea of an electronic record, are not incorporated into this statute.

If a person establishes control, Section 16(d) provides that that person is the "holder" of the transferable record which is equivalent to a holder of an analogous paper negotiable instrument. More importantly, if the person acquired control in a manner which would make it a holder in due course of an equivalent paper record, the person acquires the rights of a HIDC. The person in control would therefore be able to enforce the transferable record against the obligor regardless of intervening claims and defenses. However, by pulling these rights into Section 16, this Act does NOT validate the wholesale electrification of promissory notes under Article 3 of the Uniform Commercial Code.

Further, it is important to understand that a transferable record under Section 16, while having no counterpart under Article 3 of the Uniform Commercial Code, would be an "account," "general intangible," or "payment intangible" under Article 9 of the Uniform Commercial Code. Accordingly, two separate bodies of law would apply to that asset of the obligee. A taker of the transferable record under Section 16 may acquire purchaser rights under Article 9 of the Uniform Commercial Code, however, those rights may be defeated by a trustee in bankruptcy of a prior

person in control unless perfection under Article 9 of the Uniform Commercial Code by filing is achieved. If the person in control also takes control in a manner granting it holder in due course status, of course that person would take free of any claim by a bankruptcy trustee or lien creditor.

7. Subsection (e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Accordingly, unless a waiver of defense clause is obtained in the electronic record, or the transferee obtains HDC rights under subsection (d), the obligor has all the rights and defenses available to it under a contract assignment. Additionally, the obligor has the right to have the payment noted or otherwise included as part of the electronic record.

8. Subsection (f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay. This will allow the obligor to protect its interest and obtain the defense of discharge by payment or performance. This is particularly important because a person receiving subsequent control under the appropriate circumstances may well qualify as a holder in course who can enforce payment of the transferable record.

9. Section 16 is a singular exception to the thrust of this Act to simply validate electronic media used in commercial transactions. Section 16 actually provides a means for expanding electronic commerce. It provides certainty to lenders and investors regarding the enforceability of a new class of financial services. It is hoped that the legal protections afforded by Section 16 will engender the development of technological and business models which will permit realization of the significant cost savings and efficiencies available through electronic transacting in the financial services industry. Although only a bridge to more detailed consideration of the broad issues related to negotiability in an electronic context, Section 16 provides the impetus for that broader consideration while allowing continuation of developing technological and business models.

[SECTION 17. CREATION AND RETENTION OF ELECTRONIC RECORDS AND CONVERSION OF WRITTEN RECORDS BY GOVERNMENTAL AGENCIES. [Each governmental agency] [The [designated state officer]] of this State shall determine whether, and the extent to which, [it] [a governmental agency] will create and retain electronic records and convert written records to electronic records.]

Comment

See Comments following Section 19.

[SECTION 18. ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES.

(a) Except as otherwise provided in Section 12(f), [each governmental agency] [the [designated state officer]] of this State shall determine whether, and the extent to which, [it] [a governmental agency] 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.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a), the [governmental agency] [designated state officer], giving due consideration to security, may specify:

(1) 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;

(2) if electronic records must be signed by electronic means, 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;

(3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in Section 12(f), this [Act] does not require a governmental agency of this State to use or permit the use of electronic records or electronic signatures.]

Source: Illinois Act Section 25-101; Florida Electronic Signature Act, Chapter 96-324, Section 7 (1996).

Comment

See Comments following Section 19.

[SECTION 19. INTEROPERABILITY. The [governmental agency] [designated officer] of this State which adopts standards pursuant to Section 18 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other States and the federal government and nongovernmental persons interacting with governmental agencies of this State. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this State may choose in implementing the most appropriate standard for a particular application.]

Source: Illinois Act Section 25-115.

See Legislative Note below - Following Comments.

Comment

1. Sections 17-19 have been bracketed as optional provisions to be considered for adoption by each State. Among the barriers to electronic commerce are barriers which exist in the use of electronic media by state governmental agencies - whether among themselves or in external dealing with the private sector. In those circumstances where the government acts as a commercial party, e.g., in areas of procurement, the general validation provisions of this Act will apply. That is to say, the government must agree to conduct transactions electronically with vendors and customers of government services.

However, there are other circumstances when government ought to establish the ability to proceed in transactions electronically. Whether in regard to records and communications within and between governmental agencies, or with respect to information and filings which must be made with governmental agencies, these sections allow a State to establish the ground work for such electronicization.

2. The provisions in Sections 17-19 are broad and very general. In many States they will be unnecessary because enacted legislation designed to facilitate governmental use of electronic records and communications is in place. However, in many States broad validating rules are needed and desired. Accordingly, this Act provides these sections as a baseline.

Of paramount importance in all States however, is the need for States to assure that whatever systems and rules are adopted, the systems established are compatible with the systems of other governmental agencies and with common systems in the private sector. A very real risk exists that implementation of systems by myriad governmental agencies and offices may create barriers because of a failure to consider compatibility, than would be the case otherwise.

3. The provisions in Section 17-19 are broad and general to provide the greatest flexibility and adaptation to the specific needs of the individual States. The differences and variations in the organization and structure of governmental agencies mandates this approach. However, it is imperative that each State always keep in mind the need to prevent the erection of barriers through appropriate coordination of systems and rules within the parameters set by the State.

4. 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. By its terms the section gives enacting legislatures the option to leave the decision to use electronic records or convert written records and signatures to the governmental agency or assign that duty to a designated state officer. It also authorizes the destruction of written records after conversion to electronic form.

5. Section 18 broadly authorizes state agencies to send and receive electronic records and signatures in dealing with non-governmental persons. Again, the provision is permissive and not obligatory (see subsection (c)). However, it does provide specifically that with respect to electronic records used for evidentiary purposes, Section 12 will apply unless a particular agency expressly opts out.

6. Section 19 is the most important section of the three. It requires governmental agencies or state officers to take account of consistency in applications and interoperability to the extent practicable when promulgating standards. This section is critical in addressing the concern that inconsistent applications may promote barriers greater than currently exist. Without such direction the myriad systems that could develop independently would be new barriers to electronic commerce, not a removal of barriers. The key to interoperability is flexibility and adaptability. The requirement of a single system may be as big a barrier as the proliferation of many disparate systems.

Legislative Note Regarding Adoption of Sections 17-19

1. Sections 17-19 are optional sections for consideration by individual legislatures for adoption, and have been bracketed to make this clear. The inclusion or exclusion of Sections 17-19 will not have a detrimental impact on the uniformity of adoption of this Act, so long as Sections 1-16 are adopted uniformly as presented. In some States Sections 17-19 will be unnecessary because legislation is already in place to authorize and implement government use of electronic media. However, the general authorization provided by Sections 17-19 may be critical in some States which desire to move forward in this area.

2. In the event that a state legislature chooses to adopt Sections 17-19, a number of issues must be addressed:

A. Is the general authorization to adopt electronic media, provided by Sections 17-19 sufficient for the needs of the particular jurisdiction, or is more detailed and specific authorization necessary? This determination may be affected by the decision regarding the appropriate entity or person to oversee implementation of the use of electronic media (See next paragraph). Sections 17-19 are broad and general in the authorization granted. Certainly greater specificity can be added subsequent to adoption of these sections. The question for the legislature is whether greater direction and specificity is needed at this time. If so, the legislature should not enact Sections 17-19 at this time.

B. Assuming a legislature decides to enact Sections 17-19, what entity or person should oversee implementation of the government's use of electronic media? As noted in each of Sections 17-19, again by brackets, a choice must be made regarding the entity to make critical decisions regarding the systems and rules which will govern the use of electronic media by the State. Each State will need to consider its particular structure and administration in making this determination. However, legislatures are strongly encouraged to make compatibility and interoperability considerations paramount in making this determination.

C. Finally, a decision will have to be made regarding the process by which coordination of electronic systems will occur between the various branches of state government and among the various levels of government within the State. Again this will require consideration of the unique situation in each State.

3. If a State chooses not to enact Sections 17-19, UETA Sections 1-16 will still apply to governmental entities when acting as a "person" engaging in "transactions" within its scope. The definition of transaction includes "governmental affairs." Of course, like any other party, the circumstances surrounding a transaction must indicate that the governmental actor has agreed to act electronically (See Section 5(b)), but otherwise all the provisions of Sections 1-16 will apply to validate the use of electronic records and signatures in transactions involving governmental entities.

If a State does choose to enact Sections 17-19, Sections 1-16 will continue to apply as above. In addition, Sections 17-19 will provide authorization for intra-governmental uses of electronic media. Finally, Sections 17-19 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.

SECTION 20. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 21. EFFECTIVE DATE. This [Act] takes effect

Appendix B 1

States That Have Adopted UETA as of 6/5/2002⁷

⁷ Source: NCCUSL website.

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

Appendix B 2

UETA 2002 Introductions⁸

Colorado	HB 02-1326	To the governor
Illinois	HB 1075	House Rules
Massachusetts	SB 1805	Senate Sci & Tech
Missouri	SB 1014	Passed House Judiciary
U.S. Virgin Islands	24-0168	Introduced
Vermont	HB 46	Died
Wisconsin	SB 55 AB 144	Died

⁸ Source: NCCUSL website.

Appendix C

Texas UETA

UNIFORM ELECTRONIC TRANSACTIONS ACT

- BUS & COM T. 4, Ch. 43
- BUS & COM 43.001 Short Title
- BUS & COM 43.002 Definitions
- BUS & COM 43.003 Scope
- BUS & COM 43.004 Prospective Application
- BUS & COM 43.005 Use of Electronic Records and Electronic Signatures; Variation by Agreement
- BUS & COM 43.006 Construction and Application
- BUS & COM 43.007 Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts
- BUS & COM 43.008 Provision of Information in Writing; Presentation of Records
- BUS & COM 43.009 Attribution and Effect of Electronic Record and Electronic Signature
- BUS & COM 43.010 Effect of Change or Error
- BUS & COM 43.011 Notarization and Acknowledgment
- BUS & COM 43.012 Retention of Electronic Records; Originals
- BUS & COM 43.013 Admissibility in Evidence
- BUS & COM 43.014 Automated Transaction
- BUS & COM 43.015 Time and Place of Sending and Receipt
- BUS & COM 43.016 Transferable Records
- BUS & COM 43.017 Acceptance and Distribution of Electronic Records by Governmental Agencies
- BUS & COM 43.018 Interoperability
- BUS & COM 43.019 Exemption to Preemption by Federal Electronic Signatures Act
- BUS & COM 43.020 Applicability of Penal Code
- BUS & COM 43.020 Certain Requirements Considered to be Recommendations

§ 43.001. Short Title

This chapter may be cited as the Uniform Electronic Transactions Act.

§ 43.002. Definitions

In this chapter:

- (1) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.
- (2) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.
- (3) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.
- (4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this chapter and other applicable law.
- (5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.
- (7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.
- (8) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.
- (9) "Governmental agency" means 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.
- (10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.
- (11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Security procedure" means 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.

(14) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(15) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

§ 43.003. Scope

(a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or

(2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

§ 43.004. Prospective Application

This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2002.

§ 43.005. Use of Electronic Records and Electronic Signatures; Variation by Agreement

(a) This chapter does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

§ 43.006. Construction and Application

This chapter must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law;

(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

§ 43.007. Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

§ 43.008. Provision of Information in Writing; Presentation of Records

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and

(3) the record must contain the information formatted in the manner specified in the other law.

(c) 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.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under Subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail may be varied by agreement to the extent permitted by the other law.

§ 43.009. Attribution and Effect of Electronic Record and Electronic Signature

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

§ 43.010. Effect of Change or Error

(a) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(c) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(1) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(2) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(3) has not used or received any benefit or value from the consideration, if any, received from the other person.

(d) If neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(e) Subsections (c) and (d) may not be varied by agreement.

§ 43.011. Notarization and Acknowledgment

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

§ 43.012. Retention of Electronic Records; Originals

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) A requirement to retain a record in accordance with Subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with Subsection (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with Subsection (a).

(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

§ 43.013. Admissibility in Evidence

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

Practice and Remedies Code, or Section 35.531, Business & Commerce Code."

§ 43.014. Automated Transaction

(a) In an automated transaction, the rules provided by this section apply.

(b) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(c) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the

individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) The terms of the contract are determined by the substantive law applicable to it.

§ 43.015. Time and Place of Sending and Receipt

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under Subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) if the sender or the recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) if the sender or the recipient does not have a place of business, the place of business is the sender's or the recipient's residence, as the case may be.

(e) An electronic record is received under Subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in Subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under Subsection (a), or purportedly received under Subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

§ 43.016. Transferable Records

(a) In this section, "transferable record" means an electronic record that:

(1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in Subdivisions (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 3.302(a), 7.501, or 9.330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

§ 43.017. Acceptance and Distribution of Electronic Records by Governmental Agencies

(a) Except as otherwise provided by Section 43.012(f), each state agency shall determine whether, and the extent to which, the agency 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.

(b) To the extent that a state agency uses electronic records and electronic signatures under Subsection (a), the Department of Information Resources and Texas State Library and Archives Commission, pursuant to their rulemaking authority under other law and giving due consideration to security, may specify:

(1) 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;

(2) if electronic records must be signed by electronic means, 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;

(3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in Section 43.012(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

§ 43.018. Interoperability

The Department of Information Resources may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

§ 43.019. Exemption to Preemption by Federal Electronic Signatures Act

This chapter modifies, limits, or supersedes the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) as authorized by Section 102 of that Act (15 U.S.C. Section 7002).

§ 43.020. Applicability of Penal Code

Text of section as added by Acts 2001, 77th Leg., ch. 702, s 1

This chapter does not authorize any activity that is prohibited by the Penal Code.

For text of section as added by Acts 2001, 77th Leg., ch. 1158, s 2, see § 43.020, post.

§ 43.020. Certain Requirements Considered to be Recommendations

Text of section as added by Acts 2001, 77th Leg., ch. 1158, s 2

Any requirement of the Department of Information Resources or the Texas State Library and Archives Commission under this chapter that generally applies to one or more state agencies using electronic records or electronic signatures is considered to be a recommendation to the comptroller concerning the electronic records or electronic signatures used by the comptroller. The comptroller may adopt or decline to adopt the recommendation.

Added by Acts 2001, 77th Leg., ch. 1158, s 2, eff. Jan. 1, 2002.

For text of section as added by Acts 2001, 77th Leg., ch. 702, s 1, see § 43.020, ante.

Appendix C

California UETA

CALIFORNIA CIVIL CODE

DIVISION 3. Obligations

PART 2. Contracts

TITLE 2.5. Electronic Transactions⁹

Cal Civ Code, prec § 1633.1 *et seq.* (2001)

§ 1633.1. Citation of title

This title may be cited as the Uniform Electronic Transactions Act.

§ 1633.2. Definitions

In this title the following terms have the following definitions:

(a) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(b) "Automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(c) "Computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(d) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this title and other applicable law.

(e) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

⁹ Current through the 2002 Supplement (2001 Session) including urgency legislation through 2002 Reg. Sess. Ch. 17, 3/27/02 And 2001-2002 3rd Extra Sess. Ch. 2xxx, 2/2/02

(f) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review by an individual.

(g) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(h) "Electronic signature" means 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.

(i) "Governmental agency" means 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.

(j) "Information" means data, text, images, sounds, codes, computer programs, software, data bases, or the like.

(k) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(l) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(m) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(n) "Security procedure" means 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.

(o) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

§ 1633.3. Transactions governed by title; Exceptions

(a) Except as otherwise provided in subdivisions (b) and (c), this title applies to electronic records and electronic signatures relating to a transaction.

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

(c) This title does not apply to any specific transaction described in Section 17511.5 of the Business and Professions Code, Section 56.11, 56.17, 798.14, 1133, or 1134 of, Sections 1350 to 1376, inclusive, of, Section 1689.6, 1689.7, or 1689.13 of, Chapter 2.5 (commencing with Section 1695) of Title 5 of Part 2 of Division 3 of, Section 1720, 1785.15, 1789.14, 1789.16, 1789.33, or 1793.23 of, Chapter 1 (commencing with Section 1801) of Title 2 of Part 4 of Division 3 of, Section 1861.24, 1862.5, 1917.712, 1917.713, 1950.5, 1950.6, 1983, 2924b, 2924c, 2924f, 2924i, 2924j, 2924.3, or 2937 of, Article 1.5 (commencing with Section 2945) of Chapter 2 of Title 14 of Part 4 of Division 3 of, Section 2954.5 or 2963 of, Chapter 2b (commencing with Section 2981) or 2d (commencing with Section 2985.7) of Title 14 of Part 4 of Division 3 of, or Section 3071.5 of, the Civil Code, subdivision (b) of Section 18608 or Section 22328 of the Financial Code, Section 1358.15, 1365, 1368.01, 1368.1, 1371, or 18035.5 of the Health and Safety Code, Section 658, 662, 663, 664, 666, 667.5, 673, 677, 678, 678.1, 786, 10083, 10086, 10087, 10102, 10113.7, 10127.7, 10127.9, 10127.10, 10197, 10199.44, 10199.46, 10235.16, 10235.40, 10509.4, 10509.7, 11624.09, or 11624.1 of the Insurance Code, Section 779.1, 10010.1, or 16482 of the Public Utilities Code, or Section 9975 or 11738 of the Vehicle Code. An electronic record may not be substituted for any notice that is required to be sent pursuant to Section 1162 of the Code of Civil Procedure. Nothing in this subdivision shall be construed to prohibit the recordation of any document with a county recorder by electronic means.

(d) This title applies to an electronic record or electronic signature otherwise excluded from the application of this title under subdivision (b) when used for a transaction subject to a law other than those specified in subdivision (b).

(e) A transaction subject to this title is also subject to other applicable substantive law.

(f) The exclusion of a transaction from the application of this title under subdivision (b) or (c) shall be construed only to exclude the transaction from the application of this title, but shall not be construed to prohibit the transaction from being conducted by electronic means if the transaction may be conducted by electronic means under any other applicable law.

HISTORY: Added Stats 1999 ch 428 § 1 (SB 820).

§ 1633.4. Application of title

This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000.

§ 1633.5. Date following which transactions are governed by title

(a) This title does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This title applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. If a seller sells goods or services by both electronic and nonelectronic means and a buyer purchases the goods or services by conducting the transaction by electronic means, the buyer may refuse to conduct further transactions regarding the goods or services by electronic means. This subdivision may not be varied by agreement.

(d) Except as otherwise provided in this title, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this title of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

§ 1633.6. Construction of title

This title shall be construed and applied according to all of the following:

- (1) To facilitate electronic transactions consistent with other applicable law.
- (2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it.

§ 1633.7. Influence of electronic form on effect or enforceability of record or signature

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

§ 1633.8. Satisfaction of writing requirement by sending of electronic record; Effect of requirement that record be sent or formatted in a certain way

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this title requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specified method, or to contain information that is formatted in a certain manner, all of the following rules apply:

(1) The record shall be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in paragraph (2) of subdivision (d), the record shall be sent, communicated, or transmitted by the method specified in the other law.

(3) The record shall contain the information formatted in the manner specified in the other law.

(c) 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.

(d) The requirements of this section may not be varied by agreement, except as follows:

(1) To the extent a law other than this title requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subdivision (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement.

(2) A requirement under a law other than this title to send, communicate, or transmit a record by first-class mail may be varied by agreement to the extent permitted by the other law.

§ 1633.9. Attributing electronic signature or record to a person

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

§ 1633.10. Effect of change or error in electronic record

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, all of the following conditions are met:

(i) The individual promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person.

(ii) The individual takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record.

(iii) The individual has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

§ 1633.11. Notarization of electronic signature

(a) If a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature 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 in a notarization by other applicable law.

(b) In a transaction, if a law requires that a statement be signed under penalty of perjury, the requirement is satisfied with respect to an electronic signature, if an electronic record includes, in addition to the electronic signature, all of the information as to which the declaration pertains together with a declaration under penalty of perjury by the person who submits the electronic signature that the information is true and correct.

§ 1633.12. Retention of record

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record, if the electronic record reflects accurately the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise, and the electronic record remains accessible for later reference.

(b) A requirement to retain a record in accordance with subdivision (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subdivision (a) by using the services of another person if the requirements of subdivision (a) are satisfied.

(d) If a law requires a record to be retained in its original form, or provides consequences if the record is not retained in its original form, that law is satisfied by an electronic record retained in accordance with subdivision (a).

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subdivision (a).

(f) A record retained as an electronic record in accordance with subdivision (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this title specifically prohibits the use of an electronic record for a specified purpose.

(g) This section does not preclude a governmental agency from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

§ 1633.13. Evidence of record or signature

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

§ 1633.14. Formation and terms of contract in automated transaction

(a) In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(b) The terms of the contract are determined by the substantive law applicable to it.

§ 1633.15. Time that electronic record is sent; Place of sending and receiving; Effect of electronic acknowledgment

(a) Unless the sender and the recipient agree to a different method of sending that is reasonable under the circumstances, an electronic record is sent when the information is addressed properly or otherwise directed properly to the recipient and either (1) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender, or (2) enters a region of an information processing system that is under the control of the recipient.

(b) Unless the sender and the recipient agree to a different method of receiving that is reasonable under the circumstances, an electronic record is received when the electronic record enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent, in a form capable of being processed by that system, and from which the recipient is able to retrieve the electronic record.

(c) Subdivision (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subdivision (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business or, if the recipient is an individual acting on his or her own behalf, at the recipient's place of residence. For purposes of this subdivision, the following rules apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subdivision (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subdivision (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subdivision (a), or purportedly received under subdivision (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, this subdivision may not be varied by agreement.

§ 1633.16. Requirements for notice of right to cancel

If a law other than this title requires that a notice of the right to cancel be provided or sent, an electronic record may not substitute for a writing under that other law unless, in addition to satisfying the requirements of that other law and this title, the notice of cancellation may be returned by electronic means. This section may not be varied by agreement.

§ 1633.17. Prohibition of use of electronic signature by state agency that is not party to transaction

No state agency, board, or commission may require, prohibit, or regulate the use of an electronic signature in a transaction in which the agency, board, or commission is not a party unless a law other than this title expressly authorizes the requirement, prohibition, or regulation.

Appendix D 1

California Consumer Union Memoranda regarding UETA

prepared: 8/23/99

[Author's note: This article was written while the California proposal was still in bill form. It has since been enacted. All of the protections described here as found in the California bill are now part of the California UETA.]

Uniform Electronic Transactions Act: Consumer Nightmare or Opportunity?

Should a lender be allowed to send a foreclosure notice only to an email address that is five years old?

If a consumer needs a paper copy of a disclosure sent by email, should the consumer have to pay for that notice?

Should a salesperson be able to sign a consumer up to receive all future notices by email when the consumer does not own a computer?

If a law requires that a certain type of contract record of a phone call satisfy that requirement?

Should utility shutoff warnings go only to an email address that might be shared within a family and checked primarily by the children?

Are the consumer warning bells going off in your head? Well, all of these scenarios and more will be permitted by the new Uniform Electronic Transactions Act (UETA). UETA is coming soon to your state legislature.

What is UETA?

UETA is a uniform law approved July 1999 by the National Conference of Commissioners on Uniform State Laws (NCCUSL).⁽¹⁾ If adopted by state legislatures, UETA will elevate electronic records and signatures to the same legal status accorded paper records and handwritten signatures. UETA is grounded on three premises:

- That most state law requirements for a writing can be satisfied by an electronic record, including an email.
- That most state law requirements for a signature can be satisfied by an electronic signature.
- That, in most cases, the parties to a contract can agree to any form of electronic communication.

UETA's Underlying Premises Are Problematic

Often, however, these premises do not apply in consumer contracts. The first premise will be true in only some consumer situations. An electronic record may be just as good as a written record for an inexpensive transaction that is completed in a short time. On the other hand, a consumer entering into a five-year car loan or a 30-year mortgage needs the note and contract in a form which he or she can keep. Home computers are replaced every few years, and previously

downloaded contracts are unlikely to be copied over to a new system. Change-of-terms notices for a service provider operating only on the Internet probably can be delivered by email, but a notice that your car is being recalled for a safety problem should arrive in the mail.

The first premise also assumes that email arrives at least as reliably as regular mail, which is contrary to the experience of many consumers. Consumers currently may change email addresses more frequently than they move. Those with email addresses seem to check them either far more frequently or far less frequently than their daily check of the regular mail. In addition, an Internet email provider may go out of business, leaving a consumer with no choice but to obtain a new email address.

As to the second premise, an electronic signature does not always fully serve the purposes of a written signature. Where there is a risk of forgery, a written signature may provide additional safeguards because it may be harder to forge than a purported electronic signature. An electronic click made at home may not serve the purpose of emphasizing the seriousness or the particular risks of a transaction as well as a written signature.

The third premise of UETA is reflected in the broad deference it gives to the autonomy of contracting parties. It defers to the agreement without distinguishing between negotiated agreements and standard form contracts or contracts of adhesion. This approach could give wide latitude to drafters of standard form contracts to define and impose the conditions of electronic communication.

For example, UETA adopts the principle that each party should be able to determine when it will receive information electronically, and when it wishes to insist on receiving a paper communication. This sounds good in theory, but in practice it allows one-sided contracts. UETA also allows an on-line seller to insist on sending all information to the consumer electronically. The seller, however, can require that the consumer communicate any complaints, refund requests, billing disputes or other communications to the same company only by regular mail.

Here is another example of a perverse effect created by UETA's rule of autonomy to contracting parties. UETA contains definitions of both "sent" and "received." According to these provisions, material is "sent" when it enters a computer system or a server that is outside the control of the sender. Further, that information is "received" when it enters the recipient's computer. These definitions contain loopholes. A message is received even when the recipient cannot open or read it; or when the message was automatically discarded by a junk mail filter. The definitions nevertheless do capture the basic idea that something is received when it gets to you or to a place where you can retrieve it.

UETA permits the parties to the contract to vary these definitions so that "sent" and "received" can be redefined to be anything. Under UETA, a web seller could define information to have been received by the buyer at the moment that the seller posts that information to its own web site-even if the customer is not aware of its posting.

Other Drawbacks

UETA:

- Permits using a paper contract followed by an electronic change in the terms of that paper contract.
- Permits using email to substitute for legal requirements to provide a paper notice even when the consumer has not been doing business with the company by email.
- Permits an electronic signature to be made to a paper record.

- Exposes consumers to the risk that notices with a legal or contractual effect will be sent only to a rarely checked email address.
- Exposes consumers to the risk that notices with a legal or contractual effect will be considered received even if the consumer is unable to open or read them, or if the notice is automatically discarded by a junk mail filter.
- Permits a party to redefine "sent" and "received" so that both are satisfied merely by posting a notice to a web site.
- Allows a record of a telephone call to substitute for a written record.(2)
- Fails to include a right to a free, written copy of a contract or notice delivered electronically.
- Lacks a rule stating that an electronic record is not considered delivered if it is delivered in a form which cannot be opened and read by the recipient.
- Offers no unfettered right on the part of the consumer to revoke an authorization to communicate electronically and revert to paper communication. (The consumer may revoke the authorization with respect to future transactions, but not for the initial transaction).
- Lacks a statutory restriction on the use of old email addresses.(3)

Challenges for Consumers Abound

Electronic commerce has pluses and minuses for consumers. For those consumers who have access to the Internet, on-line shopping holds out the promise of increased price competition and selection. At the same time, electronic commerce also offers some new opportunities for sellers to hide contract terms, posting them in ways that make the consumer unlikely to find or read them, or even sending the terms only after payment. UETA also produces some new opportunities for scam artists, e.g., by allowing a seller to switch to electronic communication after a paper contract has been signed. For the creative and criminal mind, UETA offers few limits.

UETA was introduced in California before it was finalized as a uniform act. Some important improvements for consumers were added to the California version.(4) These improvements are absent from the uniform version which will be offered in other state legislatures. Legislators, consumers, consumer law enforcement officials, consumer advocates, and others should consider insisting upon both the California changes and other improvements to UETA before it moves forward in their states.

A Roadmap for Improving UETA

Two kinds of changes should be made to UETA in each state legislature. First, those interested in consumer protection should develop a list of state statutes which should be exempt from the general UETA rule permitting electronic records and electronic signatures to replace written records and signatures. Section 3 of UETA allows a state to exempt specifically identified state laws from UETA's reach.

Second, both the California amendments and certain other consumer protections should be added. Unfortunately, the drafters of this law did not see consumer protection as their job. They

argue that UETA is merely a procedural law which facilitates electronic commerce without changing underlying substantive laws. Procedural rules, though, often affect substantive rights. Permitting electronic delivery of consumer notices, contracts, and disclosures may undermine effectiveness of some existing consumer protection statutes.

Types of statutes that should be exempted from UETA

- All statutes which require that specifically identifiable text or disclosures in a record or a portion of a record be separately signed or initialed. Separate signature and separate initialing requirements are often used in consumer laws to draw attention to contractual provisions with a special impact on the customer. If these statutes are not exempted, some of their requirements may be weakened by UETA's broad substitution of electronic signatures for ordinary signatures.
- Statutes with special notice requirements or where the notices trigger particular legal rights such as the running of a time period to appeal. Special notice statutes include a notice before infringing upon a medical patient's privacy. Notices affecting legal rights include health-care denial notices.
- Statutes affecting post-contract rights or activities. Examples of these statutes include foreclosure statutes, auto conditional sale and loan repossession-related notices, and eviction notices.
- Statutes which were passed to restrain particular types of activities. Statutes falling into this category include statutes requiring notices before life, health and Medigap insurance policies may be replaced; credit repair statutes; usury laws; and statutes addressing the rent-to-own business, payday loans, and foreclosure consultants.

All of these types of state laws were exempted in the California version of UETA.⁽⁵⁾

Necessary substantive improvements to UETA

Consumer protection law enforcement officers and consumer advocates should push to add certain basic consumer protections to UETA as a precondition to any broad substitution of electronic records for writings and of electronic signatures for written signatures. UETA can be improved by:

- Restricting UETA only to agreements to communicate electronically which are made electronically. (This change was made in the California UETA bill.) ⁽⁶⁾
- Adding a right to revoke an authorization to receive communications electronically. (This change was made in the California UETA bill.)
- Restricting the use of stale email addresses.
- Adding a requirement of good faith and fair dealing in the implementation of an agreement to communicate electronically.
- Deleting transactions resulting from telephone calls for personal, family, or household purposes from coverage of the Act, and narrowing the definition of electronic record so it does not include phone calls.

- Adding a right to get a paper copy of any document delivered electronically at any time and without charge.⁽⁷⁾
- Tightening the definitions of "sent" and "received" so that they cannot be unreasonably varied by agreement. (This change was made in the California UETA bill.)
- Restricting redefinition by agreement of "sent" and "received." (The California version of UETA only contains a reasonableness restriction on redefinitions of sent and received).⁽⁸⁾
- Requiring that if notices of the right to cancel are delivered electronically, then the right to cancel must also be permitted to be exercised electronically.⁽⁹⁾ (This change was made in the California UETA bill.)
- Defining the on-line consumer transaction to have been made at the consumer's home.⁽¹⁰⁾
- Broadening when a consumer can raise an error defense for orders placed using electronic agents by eliminating the current rule that defeats the defense whenever a confirmation screen is used in the transaction.
- Tightening the definition of an electronic signature so that it must occur in connection with an electronic record, not a paper one. (This change was made to the California UETA bill.)
- Eliminating the broad authorization for electronic acknowledgement, verification, and sworn statements. (This change was made to the California UETA bill.)

Consumer protection enforcement officials and consumer advocates in other states can look to the California precedent which should make it easier to argue for and obtain these critical amendments to UETA.

Electronic Commerce is Here to Stay

Advocates need to recognize that electronic commerce is here and will affect all consumers, rich or poor. Consequently, consumer laws must be evaluated in light of electronic commerce. In many cases, consumer laws will be rendered obsolete if they are not updated at the same time that rules facilitating electronic commerce are put into place.

Despite its problems, UETA is more balanced than many of the electronic record and electronic signature proposals that have been made in Congress. Some of those proposals would simply substitute electronic records and signatures for written records and signatures without any exceptions. Unlike those proposals, UETA contemplates that some statutes will be exempt, and it expressly preserves state law requirements for the formatting of records when those records are delivered electronically. UETA also avoids formalistic definitions of assent and mechanical rules that attribute messages to consumers who did not send them—a weakness found in some other electronic commerce proposals.

With the addition of the pro-consumer changes made in California and other strengthening amendments, UETA could become a statute that facilitates electronic commerce without harm to consumers.

Many key issues must be resolved before UETA can serve the purpose of facilitating electronic commerce when both parties desire to deal electronically without creating new avenues for the abuse of consumers. Much work is needed by consumer enforcement agencies, public and private consumer advocates, and state legislators to meet that challenge.(11)

(1) *The full text of UETA, with official commentary, can be downloaded from: http://www.law.upenn.edu/library/ulc/ulc_frame.htm*

The above address will take you to the NCCUSL Drafts of Uniform and Model Acts Official Site page. Click on the Final Acts link, which will take you to the NCCUSL Final Acts page. Scroll through the Index on this page and choose the Uniform Electronic Transactions Act link, which will take you to the UETA Final Draft link at the bottom of the page.

(2) *UETA defines an electronic record to include information that is either inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. A telephone call that is tape-recorded or digitally retrievable is an electronic record under this definition.*

(3) *Even in a five-year car loan or a 30-year mortgage, UETA would allow the creditor to keep using the same email address whether or not there is any reason to believe that address is still good. UETA does contain a limited restriction on the use of bad addresses if the email bounces back to the sender.*

(4) *The full text of the California's UETA bill, SB 820, can be found at: [http://www.sen.ca.gov/htbin/testbin/ca.html?GOPHER_ROOT2:\[BILL.CURRENT.SB.FROM0800.SB0820\]CURRVER.TXT;1/bill/SB820](http://www.sen.ca.gov/htbin/testbin/ca.html?GOPHER_ROOT2:[BILL.CURRENT.SB.FROM0800.SB0820]CURRVER.TXT;1/bill/SB820)*

(5) *Wide consultation with regulators, law enforcement, and consumer groups will be needed to develop that list in each state. Coalition-building will critical in this process.*

(6) *A seller should not be able to use a preprinted paper contract to sign a consumer up to receive all future communications by email. Requiring that the initial agreement be made electronically at least ensures that the consumer had the capacity to process email at the time the agreement was first made.*

(7) *Consumers are unlikely to request a paper copy unless they need one. When they need a paper copy, they should be able to get it promptly and without a fee.*

(8) *It is unfair if a contract provision promises notice to a consumer of an important event, e.g., an increase in the loan interest rate, but then uses a redefinition of sent and received to require the consumer to "come and get it from our web site."*

(9) *The current rule of UETA could lead to confusion: it would allow a seller to email the notice of right to cancel but insist that the notice be mailed back to exercise that right.*

(10) *This may affect which state's consumer protection laws are applicable, among other issues.*

(11) *A copy of the pro-consumer amendments made in the California UETA bill, plus proposed legislative language to implement the additional consumer protections described here can be found at www.consumersunion.org/finance/finance.htm.*

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Uniform Electronic Transactions Act: Proposed amendments to protect consumers

I. Amendments made to UETA in the pending California UETA bill, [SB 820](#)

1. Proposed Amendment: UETA section 2(8), modify:

Change "record" to "electronic record" so that the definition would read:

(8) "Electronic signature" means 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.

Source: California SB 820, section 1633.2(h)

Reason: Without the word "electronic" in the definition, UETA would give legal recognition to an electronic signature which is logically associated with a paper document. Part of the solemnity and notice functions of a signature will be lost if an electronic signature can be used to agree to a paper record. Allowing electronic "signature" to paper records also could open new vistas for scam artists. A scam artist might assert the existence of an electronic signature to a paper record that lacks the consumer's actual signature.

2. Proposed Amendment: UETA Section 3, use this text for (b)(4):

(b)(4) This title does not apply to any specific transaction described in [here describe state laws addressing]:

Statutes requiring notice after default, including notices related to disposition, eviction, repossession, foreclosure, balloon payments, and utility shutoff;

Special regulatory statutes, including payday loans, tenant screening services, waiver of protections of the state's home solicitation act based on a signed personal statement of emergency, credit service organizations, and insurance replacement notices; and

Notices where nonresponse creates a legal obligation or conclusive presumption, or the notice has a serious and immediate effect, including insurance denials or cancellations and health care denials.

Source: California SB 820, section 1633.3(c)

Reason: Electronic notice and signature doesn't always fully serve the notice function of written notice and signature. The types of statutes called out are ones in which paper notice and a real signature serve a special notice function, or where the risk of non-delivery (perhaps due to inconsistent email delivery or a wrong address) is not to be tolerated.

3. Proposed Amendment: UETA Section 3, add a new (b)(5):

(b)(5) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record.

Source: California SB 820, section 1633.3(b)(5)

Reason: Separate signature and separate initialing requirements are often used in state consumer laws to draw attention to contractual provisions with a special impact on the customer. Each of

these requirements must be individually considered in order to determine whether and how their statutory purposes would best be served in the electronic world. Exempting these statutes from UETA would be the best way to ensure that state legislatures examine these statutes one by one to determine whether and how electronic rules should apply to them. If they are left in UETA, some of these statutes may be weakened by UETA's broad substitution of electronic signatures for ordinary signatures.

4. Proposed Amendment: UETA section 3(c), modify:

Eliminate "to the extent it is governed by a law other than those specified in subsection (b)" and substitute: "when used for a transaction subject to a law other than those specified in subsection (b)."

Source: California SB 820, section 1633.3(d)

Reason: This subsection sweeps exempt electronic records and signatures back into UETA. The uniform language is too broad because (c) would bring back into UETA every electronic record or signature "to the extent it is governed by" a law other than those listed for exemption in (b). Nearly every transaction which is governed by a law specified in (b) will also be governed by other law, such as general contract formation law. To sweep the electronic record or signature back into UETA "to the extent that it is governed by" another law could cause the back-door reassertion of UETA to seriously undermine the exemption of transactions under specific consumer statutes.

The language of the proposed amendment is narrower. It would sweep a record back into UETA only when the record which is otherwise excluded is used for "a transaction subject to" a law other than those listed for exemption.

5. Proposed Amendment: UETA section 5(b), add after the existing text:

Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction electronically may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions electronically. An agreement to conduct a transaction electronically may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.

Source: California SB 820, section 1633.5(b)

Reason: This is the most important amendment that should be made in UETA. It does several important things. First, it simply says that the consumer has to be communicating with the other party electronically before an agreement to communicate electronically in the future can be established. This is needed to prevent a boilerplate alleged "agreement" that future notices will be sent by email, which might even be used with consumers who lack email accounts, never check those accounts or infrequently check them. A written, rather than electronic, record of the agreement is allowable only if it is separate, optional, and its primary purpose is to authorize future electronic communication.

This change ensures that a seller can't enter into a paper contract, list the customer's email address somewhere on the form, and then try to enforce a requirement in the fine print that the

customer agrees to receive all further information about that paper contract at the listed email address.

The theory behind UETA's broad authorization to replace paper records and notices with electronic records and notices is that it facilitates electronic commerce when both parties want to communicate electronically. Unfortunately, the text of the UETA would permit a drafter of a standard form contract to try to impose this choice unilaterally on its customers. The imposition could even occur in a paper document. This amendment is designed to ensure that an agreement to communicate electronically is not found from mere boilerplate in a paper communication.

The amendment also would clarify that the conduct of communicating electronically just to register or open an account is not enough to create an agreement to communicate electronically. This part of the amendment is needed because UETA permits an agreement to communicate electronically to be inferred from conduct.

6. Proposed Amendment: UETA section 5(c), add after the first sentence:

If a seller sells goods or services by both electronic and nonelectronic means and a buyer purchases the goods or services by conducting the transaction electronically, the buyer may refuse to conduct further transactions regarding the goods or services electronically.

The final sentence, "This subdivision may not be varied by agreement" would remain.

Source: California SB 820, section 1633.5(c)

Reason: If email communication isn't working for the customer, he or she should be able to opt back to paper. The amendment would create a limited right. The right would only exist if the seller uses both paper and electronic communications with its customers.

7. Proposed Amendment: UETA section 11, modify:

Delete acknowledgement and verification. This would restrict the section to electronic notarization and sworn statements. It would be better policy to restrict it solely to electronic notarization.

As amended, the section would read:

If a law requires that a signature be notarized the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to a logically associated with the signature or record.

In a transaction, if a law requires that a statement be signed under penalty of perjury, the requirement is satisfied with respect to an electronic signature, if an electronic record includes, in addition to the electronic signature, all of the information as to which the declaration pertains together with a declaration under penalty of perjury by the person who submits the electronic signature that the information is true and correct.

Source: California SB 820, section 1633.11

Reason: Without this amendment, this section of UETA would permit not only electronic notarization but also electronic acknowledgement, verification, and sworn statements. Whether or not electronic notarization can provide adequate protection for consumers, the existing legal standards for acknowledgement, verification, and making statements under oath do not require

the participation of a notary. There is no third party in those processes to verify the identity of the person.

It is probably bad public policy to say, as UETA does, that acknowledgement, verification and sworn statements can always be satisfied by an electronic signature which is attached to or logically associated with the information required by other applicable law. The ease of impersonation in the electronic environment makes it likely that, if permitted at all, electronic acknowledgement, verification and sworn statements should require additional identification requirements beyond those found in current law for the same activities done on paper. The California amendment leaves the problem for electronically sworn statements, but avoids creating this problem for verifications and acknowledgements.

8. Proposed Amendment: UETA section 12(a)(1), modify:

Change "after" to "at the time"

Source: California SB 820, section 1633.12(a)

Reason: This section permits a statutory requirement to retain a document to be satisfied by an electronic record-including an electronic record which was created from a paper original. The change would ensure that the electronic record satisfies the statute only if it accurately reflects the information set forth in the original record at the time the original record was generated.

9. Proposed Amendment: UETA section 15(a) and (b), amend:

Amend the first line of UETA section 15(a) and (b) to read:

(a) Unless the sender and the recipient agree to a different method of sending that is reasonable under the circumstances,....

and

(b) Unless the sender and the recipient agree to a different method of receiving that is reasonable under the circumstances,....

Source: California SB 820, section 1633.15a) and (b)

Reason: The broad authorization in UETA subsections 15(a) and (b) to vary the definitions of "sent" and "received" by agreement creates the possibility that a form contract could define something to have been both "sent" and "received" when in fact it has only been posted to the seller's web site and not sent in any fashion. While there are circumstances where placing the burden on the customer to check a web site for information about an order might be reasonable-particularly for smaller dollar orders-there are other circumstances where the power to redefine "sent" and "received" could be used to abuse the customer. This addition would place a reasonableness test on redefinitions of "sent" and "received."

10. Proposed Amendment: After UETA section 15, add a new section:

If a law other than this title requires that a notice of the right to cancel be provided or sent, an electronic record may not substitute for a writing under that other law unless, in addition to satisfying the requirements of that other law and this title, the notice of cancellation may be returned by electronic means. This section may not be varied by agreement.

Source: California SB 820, section 1633.16

Reason: This amendment would prevent emailing a notice of cancellation that the consumer must download, print, and return by mail. This is needed to prevent confusion and deception. If a

consumer receives a notice of right to cancel by email, he or she will think that the notice of cancellation can be responded to by email.

II. Additional proposed amendments that would improve UETA

1. Proposed Amendment: UETA section 2(7), add:

Electronic record does not include a telephone call or a record of a telephone call.

Reason: The definition of an electronic record is so broad that a tape recording of a phone call would qualify. This is not the kind of record that should be able to fulfill a statutory requirement for a written record.

2. Proposed Amendment: UETA section 5, add a new subsection (f):

(f) A consumer who makes an agreement to conduct a transaction electronically with a commercial party is entitled to a copy, on request and at no charge, of a written copy of the original contract, notice, or other document communicated to the consumer electronically.

Reason: The consumer is likely to request a written copy only if he or she can no longer access the electronic version, or if a dispute has arisen about the contents of the material first communicated electronically. The consumer may need a copy of the contract to determine his or her rights and obligations, yet a computer upgrade or other event may render the electronic copy unavailable.

3. Proposed Amendment: UETA section 5, add a new subsection (g):

(g) An agreement to conduct a transaction electronically is subject to a requirement of good faith and fair dealing with respect to both the inducement to agree and the implementation of the agreement.

Reason: Such a general standard may be useful in controlling one-sided agreements, as well as in controlling deceptive practices. An example of such a practice that could occur under UETA is: a salesperson brings a laptop into the consumer's home and signs the consumer up electronically for a transaction that requires the consumer to go on-line to get the contract terms or to receive the benefits of the transaction even though the consumer doesn't have a computer in his or her home.

4. Proposed Amendment: UETA section 5, add a new subsection (h):

(h) This title does not apply to a transaction entered into for personal, family or household purposes that was solicited or negotiated by any voice communication by telephone.

Reason: Defining voice telephone activities to be electronic records and electronic signatures would have unknown effects. Telephone conversations can lead to contracts by conduct-there is no need to convert oral communications into signatures and records. Coverage of voice telephone communications may also disturb the case law on where a contract is formed, affecting a state's consumer protection policies. This issue was raised by the California Attorney General's office in connection with SB 820.

5. Proposed Amendment: Delete part of UETA section 10(2):

Delete from section 10(2) "the electronic agent did not provide an opportunity for the prevention or correction of the error," so that the subsection would read:

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error on the part of the individual in dealing with the electronic agent of another person if, at the time the individual learns of the error, the individual:

(a) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(b) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record.

(c) has not used or received any benefit or value from the consideration, if any, received from the other person.

Reason: Under the uniform language the error correction defense evaporates whenever a confirmation screen was provided. This makes it fairly meaningless. If the consumer can meet all the other conditions such as returning the items ordered, why not give the error correction defense?

6. Proposed Amendment: Add a new UETA section 15(d)(3):

(d)(3) Notwithstanding any other provision of this title, if an individual enters into a transaction for personal, family or household purposes that is created or documented by an electronic record, the transaction shall be deemed to have been made or to have occurred at the individual's residence. This subsection is not variable by agreement.

Reason: This section is needed to ensure that the contract formation rules of the UETA do not cause the contract to have been formed outside the state, thus perhaps calling into question the application of the state's consumer law. The last sentence is important because of the general provision in UETA that any of its provisions may be varied by agreement unless they explicitly state otherwise.

7. Proposed Amendment: Modify UETA subsections 15(a) and (b):

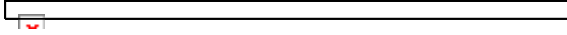
Delete from 15(a) and (b) the authorization to reduce the standards for what constitutes "sent" and "received" in a consumer transaction.

This would be done by adding: "in a transaction not involving a consumer" to the "unless otherwise agreed" language and by adding at the end of (a) and (b): "This subsection may not be varied by agreement." Subsections 15(a) and (b) would then read:

(a) Unless the sender and the recipient agree in a transaction not involving a consumer to a different method of sending, an electronic record is sent when the information is properly addressed or otherwise properly directed to the recipient and either

(1) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender, or

(2) Enters a region of an information processing system that is under the control of the recipient. This subsection may not be varied by agreement in a transaction involving a consumer.



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**This document is to be used in conjunction with the two documents listed at the [end](#).*

The California exemptions to UETA take three forms:

First, there is a general exemption for all statutes that require that "specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record."

Second, there is a special rule for statutes requiring notices of cancellation. While not technically an exemption, this special rule restricts the application of UETA so that a notice of the right to cancel can't be delivered electronically unless the right to cancel can be exercised electronically.

Third, there is a list of specific statutes. The statutes are listed in the bill text. The remainder of this document describes statutes that Consumers Union sought to have exempted, and which were exempted. We believed that the purpose of the statutory requirements for a written notice to the consumer would not be equally well satisfied by sending only an electronic notice.

1. Statutes requiring notice of disposition, eviction, repossession, and balloon payments:

California's loan statutes contain two kinds of notice requirements: 1) notices that must be contained in the initial contract and 2) notices that must be provided at the time of or following repossession or other action to foreclose on the security. A broad variety of disclosure requirements for initial contracts were not exempted. However, post-default notices present a different issue. There will be far fewer of these notices. They serve a special notice function, and they often inform consumers that their legal rights will be affected by the next step taken by the other party or by a failure to respond to the notice. Certain kinds of post-contract notices, including notices of intent to dispose of collateral, were exempted from SB 820, California's UETA.

Civil Code section 2983.2, Rees-Levering notice of intent to dispose of a repossessed or surrendered motor vehicle.

Civil Code section 2963, balloon payment notice.

Civil Code section 2987, notice of disposition of leased vehicle to lessee and guarantor after early termination by the lessee.

Civil Code section 2924i, balloon payment notice.

Civil Code section 2924j, foreclosure.

Civil Code section 2924.3, collection on mortgage by agent.

Civil Code section 3071.5, signed release of an interest in a vehicle subject to a lien. Because this is a permanent release and relinquishment of a property interest, it should not be satisfied by an electronic click that other documents have defined to equal a signature.

Civil Code sections 1950.5(f) and (g)(1), requirement for landlord to provide a written accounting of disposition of security deposit.

Financial Code section 22328, post repossession, predisposition notice to all persons liable on a loan secured by a motor vehicle lien. Includes notice of right to redeem notice of conditional right to reinstate loan.

Civil Code section 1812.2, 1812.3, retail installment accounts, predisposition notice. Ten day predisposition notice of intent to resell or retain goods financed under a retail installment account. Includes notice of right to redeem.

Public Utilities Code sections 779.1, 10010.1, and 16482, utility shutoff

These provisions allow utilities to notify customers by mail that their services will be shut off or discontinued, first at least 10 days prior to the proposed termination, and then within 24-48 hours of termination. The provisions include notification to a third party designated by customers 65 years of age or older. Electronic mail is not yet reliable enough in its delivery for these notices. Further, the definition of receipt in the UETA is not certain enough to assure actual receipt for it to apply to these provisions.

Code of Civil Procedure section 1162, This section is cited in the various eviction codes. It requires mailed notice to augment posting or to augment personal delivery to a person other than the addressee. A variety of eviction-related statutes require of notice in the manner prescribed by Section 1162 of the Code of Civil Procedure. See e.g. Civil Code Sections 799.65 and 827. The following was added to California's UETA:

An electronic record may not be substituted for any notice that is required to be sent pursuant to Code of Civil Procedure Section 1162.

Civil Code sections 1789.14, 1789.16, Credit Services Organization Statute.

California's statute on credit service organizations severely restricts the activities of these agencies. The requirement for a written contract and the requirement for a physical tear-off notice of cancellation form are very important to the operation of the statute. For this reason, this statute was exempted from SB 820.

Civil Code section 1789.33, requirement of a written agreement for deferred deposit check cashing, ("payday loans"). The Civil Code Section requirement for a written agreement including a statement of the amount of the APR which is signed by the customer cannot be satisfied by an electronic click definition of a signature. One important purpose of the signature in this Civil Code requirement is to bring to the attention of customer the extraordinary APR associated with these loans. In California, the average annual percentage rate on a payday loan covered by Civil Code Section 1789.33 is several hundred percent.

Insurance Code sections 10197, 10199.44, 10199.46, and 10253.16, 10509.4, 10509.7, insurance replacement warnings.

Insurance replacement has been a longstanding problem. Salespersons sometimes induce consumers to purchase a new policy when the customer would be better off with the old policy, usually because of new time periods for contestability or preexisting condition restrictions. The Insurance Code addresses this issue by requiring a particular mailed notice to the consumer by the insurer, and in some cases the selling agent, when the seller is aware that an insurance replacement is occurring. The special warning and notice function of these notices is not equally well served by an email notice, and the need to receive them requires at least the level of reliability provided by regular mail. In addition, some of these provisions require a signature, which has a special notice function that may not be equally well served by an electronic click.

2. Notices where nonresponse creates a legal obligation or conclusive presumption, or the notice has a serious and immediate effect

Insurance Code sections 10083, 10086, 10087, CEA offers. These code sections require mailed notices related to the offer of earthquake insurance coverage. Each defines nonresponse by the consumer as a conclusive presumption of a rejection of the offer of coverage. Because nonresponse has binding consequences, the method of delivery and likelihood of receipt should be at least as reliable as regular mail. Electronic mail does not yet meet that standard.

Insurance Code sections 11624.09 and 11624.1, mailed notice of defect in certificate of eligibility or application for assigned risk plan. If the consumer doesn't respond to these mailed

notices within ten days, the assigned risk insurance policy is void from its inception. Electronic mail is not yet reliable enough in its delivery, and the definition of receipt in UETA is not certain enough to assure actual receipt, for it to apply to these provisions.

Health and Safety Code section 1368.1, plan denying coverage to an enrollee with a terminal illness must provide enrollee with certain information within 5 business days (i.e. reasons for denying coverage, alternate treatment programs, etc.). Electronic mail is not yet reliable enough in its delivery for this to be the only means of delivering this information; and the definition of receipt in the UETA is not certain enough to assure actual receipt for it to apply to this provision. Health and Safety Code section 1358.15(a), A plan supplementing Medicare must notify recipients 30 days prior to any modifications to Medicare supplement contracts.

Civil Code Sections 1803.7, 2984.3, and 2986.4, These provisions create a presumption that the consumer received a copy of a contract and any credit statement for a retail installment contract (1803.7), vehicle purchase (2984.3), or a vehicle lease (2986.4) if the consumer does not indicate within 30 days that he or she was not furnished with a copy of those documents. Again, electronic mail is not yet reliable enough in its delivery, and the definition of receipt in SB 820 is not certain enough to assure actual receipt for it to apply to these provisions.

3. Insurer cancellation and lapse notices

Health and Safety Code section 1365(a)(1), Health plans may cancel enrollment or subscription within 15 days after a subscriber has been duly notified of failure to pay a charge.

Insurance Code section 10235.40, lapse notice for long term care insurance.

Insurance Code section 662, cancellation of auto insurance.

Insurance Code section 663, nonrenewal of auto insurance (electronic delivery to the lienholder, but not to the consumer, is specifically permitted by the Insurance Code for this notice.)

Insurance Code sections 663 and 664, 667.5, notice of policy expiration and proof of mailing.

Insurance Code section 673 and Financial Code section 18608(b), notice by lender to insured of intent to cancel auto insurance for nonpayment of financed premium.

Insurance Code section 677, cancellation of homeowners insurance and certain other types of insurance.

Insurance Code section 678, nonrenewal of homeowners insurance.

Insurance Code sections 786, 10127.9, 10127.7, and 10127.10, notices of right to cancel insurance policy. The Insurance Code contains a host of right to cancel provisions. They are not proposed for exemption only because we have made a more general proposal on the treatment of right to cancel provisions. See, e.g., Insurance Code sections 786, disability insurance; 10127.9, individual life insurance; 10127.7, small dollar life insurance policies, and 10127.10, life insurance and annuities.

4. Special Notice rules

Civil Code section 2937, notice of transfer of mortgage servicing. This section mandates that a borrower be given written notice on transfer of the servicing of a mortgage or deed of trust for one to four residential units. The statement of purposes to this section states that borrowers have a right to know when servicing has been transferred and that notification may protect the borrower from fraud and ensure timely payments. Given the present inconsistencies in the reliability of email notice, and the possibility of a transfer of servicing some years after the mortgage was first originated, this statutory purpose may not be satisfied by substituting electronic notice.

Civil Code section 56.11, authorization to release medical information.

Civil Code section 56.17, written and signed authorization for disclosure of genetic test results to third parties.

Civil Code section 798.14, mobile home park notices. This section requires that notices required under the mobile home chapter of Civil Code need to be delivered personally to the homeowner or deposited in the U.S. mail at the address of the site within the mobile home park. The types of notices that must be given include notice of a meeting to discuss proposed changes in park rules, notice of change in zoning, advance notice of interruption in utility service, notice of proposed changes in fees, and a letter of intention to sell the park.

Civil Code section 1133, notice of blanket encumbrance to be signed by the buyer.

Civil Code section 1134, written statement of substantial defects in condominium or cooperative. Delivery by mail triggers a five day right to terminate agreement to purchase.

Civil Code sections 1350-1376, the condominium law. These sections contain extensive requirements for specific written notices of various types under the Davis-Stirling Common Development Act.

Vehicle Code section 9975, correction of safety defects. The maker of a car is not liable under this section for the cost of correcting defects if correction is not sought within 45 days after receipt of notification or the end of the warranty. Because failure to act in after receipt of notice has legal consequences, this section was exempted.

Civil Code section 1793.23, notice of lemon law buyback or voluntary repurchase of problem vehicle. This section requires that any person who sells a lemon law buyback car to a new buyer must obtain a signed disclosure statement from the potential buyer before the sale. This is the kind of signature requirement where a real (handwritten) signature should be required.

Civil Code sections 1917.712 and 1917.713, disclosures about shared appreciation loans for seniors.

Health and Safety Code section 1368.01, health care grievance. Plan must resolve a grievance within 30 days of receipt of the grievance, or respond to subscribers and enrollees with a written statement on the disposition or pending status of a grievance within 30 days of receipt of the grievance.

Health and Safety Code section 1371, health care denial. Health plan must reimburse within 30 days of receipt of a claim (45 days for HMOs), or interest accrues. If the claim is contested, the subscriber must be notified in writing that the claim is contested or denied within 30 days of receipt of the claim (45 days for HMOs).

5. Additional statutes

Unruh Retail Credit Act and Rees-Levering Conditional Auto Sales Act

Civil Code section 1720, If an obligor sends an inquiry via certified mail to an obligee concerning any debit or credit applicable to a retail installment account obligation, the obligee must respond in a writing sent to the last known address of the obligor within 60 days from the date the inquiry was mailed.

Civil Code section 1785.15(b)(2), A consumer has the right to make a written request for information from a consumer credit reporting agency, and the agency has to send the information within 5 days after the request has been received.

Civil Code section 1806.2, Upon the written request of the buyer, the holder of a contract shall "give or forward" a written statement of the unpaid balance.

Civil Code section 1806.4, Upon the written request of the buyer, the holder of a contract shall deliver, or mail acknowledgment of payment in full.

Civil Code Section 1810.11, If the buyer makes a written request for a statement of finance charges assessed on the account in the preceding year, the seller shall provide the information in writing.

Civil Code Section 1861.24, If judgment isn't paid 30 days after it becomes final, a tenant's or guest's baggage and property may be sold. The notice of sale shall be posted and mailed to the tenant or guest at least 15 days prior to the date of the sale.

Civil Code Section 1862.5, Unclaimed property left in a hospital may sold four weeks from the time that written notice of the sale is given to the last known owner.

Civil Code Section 1983, A former tenant's or owner's personal property may be disposed of not less than 18 days after notice is mailed.

Civil Code Section 2941, After a mortgage has been satisfied, and upon the written request of the consumer, the lender shall deliver the original note and mortgage or deed of trust.

Health & Safety Code Section 18035.5(a), Upon the written demand of the registered owner of a manufactured home, mobilehome, or commercial coach, the secured party shall deliver a copy of the conditional sale contract or the promissory note and security agreement, and a written statement indicating the amount of the unpaid balance, among other things.

Insurance Code Section 657, Upon a consumer's written request, an insurance agent who refuses to accept or to issue a policy shall furnish the applicant with a written statement explaining the reason for refusal within 30 days of receipt of the request.

Insurance Code Section 658, An insurer who refuses to accept or to issue a good driver discount policy when a written application has been made by a qualified applicant shall furnish the applicant with a written statement explaining the reason for refusal within ten days of the refusal.

Insurance Code Section 664, Proof of mailing is sufficient proof of notification of cancellation or of intention not to renew an insurance policy.

Insurance Code Section 666, Where notification of cancellation does not include the reason for cancellation, upon a consumer's written request, the insurer shall mail or deliver the reason for cancellation within five days of receipt of the request.

Insurance Code Section 678.1(g), Upon the written request of an insured who has received a notice of nonrenewal, the insurer shall provide a report on the account within 15 days of receiving the request.

Insurance Code Section 10102, Upon issuance or renewal of a residential property insurance policy, the insured must be provided with a disclosure statement. The statement can be mailed, with first-class mail as adequate proof of mailing. If the applicant does not return a signed acknowledgement of receipt of the disclosure within 60 days of the date it was provided, then there is a conclusive presumption that the insurer complied with the disclosure requirement.

Insurance Code Section 10113.7, The insurer must deliver or mail written notice of an increase in the premium of a life insurance policy to the policyholder 20 days before the increase becomes effective.

Insurance Code Section 10235.16, The insured shall be furnished with a notice of replacement of accident and sickness or long-term care coverage.

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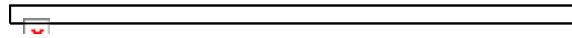
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Additional documents and corresponding links:

"Uniform Electronic Transactions Act: Consumer Nightmare or Opportunity?"
[Http://www.consumersunion.org/finance/899nclews.htm](http://www.consumersunion.org/finance/899nclews.htm)

"Uniform Electronic Transactions Act: Proposed amendments to protect consumers"
[Http://www.consumersunion.org/finance/uetaws899.htm](http://www.consumersunion.org/finance/uetaws899.htm)



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