

Approved Feb 10, 2000
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Acting Chairperson Vratil at 10:12 a.m. on February 9, 2000 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

John McCabe, Uniform Law Commission
Patricia Michaelis, State Archivist, Kansas State Historical Society

Others attending: see attached list

The minutes of the February 8th regular meeting were approved on a motion by Senator Bond, seconded by Senator Donovan. Carried.

SB 559—Uniform Electronic Transfer Act

Conferee McCabe testified in support of **SB 559**, a bill designed “to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce.” He presented an overview of the Uniform Electronic Transactions Act (UETA), a non-mandatory procedural statute which he stated sets a solid legal foundation for the use of electronic communications in transactions and stated it’s goal is to “facilitate and support the development of the information economy, and in particular its place in commercial transactions, throughout the States.” He discussed the scope and provisions of the UETA covering the following issues: security procedures; electronic agents; automated transactions; time and place of sending and receipt; transferable records; and government records. (attachment 1) Lengthy discussion regarding consumer concerns followed.

Conferee Michaelis presented informational testimony on **SB 559** discussing Section 17 and 18 of the bill which speaks about creation and retention of records and delineates new responsibilities for the Secretary of Administration. She reviewed existing legislation that governs the retention, management and preservation of records, including electronic records and she expressed a desire that the definition of records in the current statutes be a part of **SB 559**. (attachment 2)

Written testimony opposing **SB 559** was submitted by State Treasurer, Tim Shallenburger. (attachment 3)

Senator Emert stated he would Chair a subcommittee to hear further testimony on **SB 559**.

The meeting adjourned at 11:02 a.m. The next scheduled meeting is February 10.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 9, 2000

NAME	REPRESENTING
Gail Bright	A.G.
Steve Rarick	A.G.
Nancy Lindberg	A.G.
Jerrit Roberts	KSWA
Bruce Smoot	AIA
Jerry Bonnard	SOS
Chris Jones	KST
J. G. Chubb	SOS
Crain Hooper Beaus	KST
Terry Dickson	KST
Kevin Davis	Am Family Ins
Paul Bicknell	KDHR
Cal Lee	KSHS
Pat Michaelis	KSHS
Debra Kuyling	INK
Debbi [unclear]	Kansas Ins
Jay Bussell	DPS/DofA
Doug Quinn	DofA/DISC
LORNE PHILLIPS	KDHR

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 9

NAME	REPRESENTING
Mark S. Braun	Dept of Admin
Gerry Guff	KNOCHA
Norma Jean Schaefer	KBI
John Reinhart	KCCI
Chuck Henry	United Government

5-27-00
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A Few Facts About

UNIFORM ELECTRONIC TRANSACTIONS ACT

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

ORIGIN: Completed by the Uniform Law Commissioners in 1999.

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

STATE ADOPTIONS: California
Pennsylvania

2000 INTRODUCTIONS: Arizona
Colorado
Hawaii
Idaho
Indiana
Kansas
Maryland
Nebraska
Ohio
Oklahoma
Tennessee
Utah
Vermont
Virginia

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

(2/4/00)

(Please note: this information can also be found on our Web Site at www.nccusl.org)

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LAYING FOUNDATIONS
FOR ELECTRONIC COMMERCE

THE UNIFORM ELECTRONIC TRANSACTIONS ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

issues which are being debated on local, national and international venues. There is plenty of noise, but precious little consensus..

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

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

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

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

WHY STATES SHOULD ADOPT THE UNIFORM ELECTRONIC TRANSACTIONS ACT

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

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

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

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

UNIFORM ELECTRONIC TRANSACTIONS ACT

- A Summary -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

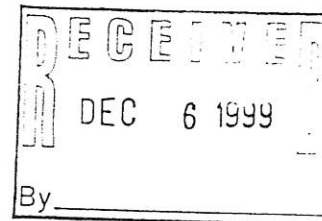
Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership comprises more than 300 attorneys, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and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

ELA

Equipment
Leasing
Association
of America

December 1, 1999

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



Re: Uniform Electronic Transactions Act

Dear Commissioners:

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

I. Overview of the UETA Statute

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

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

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

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

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

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

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

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

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

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

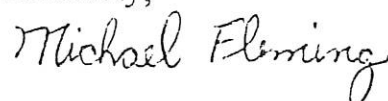
C. Other provisions. To come to grips with consumer protection writing requirements, UETA section 8(a) provides that, if a state law “requires a person to provide, send, or deliver information in writing to another person,” that requirement is satisfied if the information is provided “in an electronic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

CONCLUSION

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

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

Sincerely,



Michael Fleming
President

**American Council of Life Insurance**

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

November 24, 1999

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

Re: The Uniform Electronic Transactions Act

Dear Mr. McClaugherty:

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

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

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

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

Sincerely,

Carroll A. Campbell, Jr.

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Testimony on Sentate Bill No. 559
February 9, 2000

My name is Patricia Michaelis. I am the State Archivist and I am employed by the Kansas State Historical Society. I would like to present some informational testimony on Senate Bill No. 559, relating to electronic transactions. We are aware that another bill relating to the use of digital signatures, House Bill No. 2879, has been introduced. If SB 559 is the version that is being considered, I would like to call the committee's attention to two specific sections of the bill.

Section 17 states that *"the secretary of administration shall determine whether, and the extent to which, governmental agencies will create and retain electronic records and convert written records to electronic records."* Currently, there are no laws that require state agencies to get approval to create records except in a few isolated circumstances. State recordkeeping requirements are in place to ensure appropriate documentation of the work of our government, but they do not dictate what sort of records state agencies should create.

Section 18 delineates an extensive set of new responsibilities for the Secretary of Administration related not just to electronic signatures but also to all electronic records. These include determining

"whether, and the extent to which, a governmental agency will send and accept electronic records...to and from other persons and otherwise create, generate, communicate, store, process, use and rely upon electronic records," "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," "control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality and auditability of electronic records; and any other attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances."

We would like to remind this committee that a well-established body of state legislation already governs the retention, management and preservation of records, through the activities of the Historical Society's State Archives and Records Management staff, State Records Board and agency records officers. The Government Records Preservation Act and the Public Records Act establish procedures through which the State Records Board determines how long government records should be kept. The board also determines what format (paper, microfilm, or electronic) is acceptable for the "record copy," given legal parameters. The State Board is chaired by a representative from the Attorney General's office and other members include the State Archivist and representatives of the State Library, the Secretary of Administration, and the Kansas State Historical Society. The Board meets quarterly to review retention and disposition

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schedules submitted for their approval. Its mission is to ensure that state and local government records are authentic, reliable and trustworthy for both the short and long terms and will be monitored in an environment where these essential qualities of records will be preserved for the period of time required by the retention and disposition schedule.

The scope of existing legislation is inclusive of electronic records. The definition of "government records" under the Government Records Preservation Act, 45-402(d) is "all volumes, documents, reports, maps, drawings, charts, indexes, plans, memoranda, sound recordings, microfilms, photographic records and other data, information or documentary material, regardless of physical form or characteristics, storage media or condition of use, made or received by an agency in pursuance of law or in connection with the transaction of official business or bearing upon the official activities and functions of any governmental agency." This is the definition of records that we would recommend for this bill.

We would like to point out that authentic and reliable electronic records are not created or maintained by chance. In order to insure long-term access that allows government employees and citizens to be confident that the electronic record is an accurate representation of the transaction that occurred, electronic records must be maintained in a well-planned record keeping system that documents the context of who created the record, how it was created, if and how the record had been revised or altered, the structural elements of the record and how it can be accessed. Other metadata must be captured, along with the record itself,

For the last several years, the Kansas State Historical Society has been developing, distributing and revising the Kansas Electronic Records Management Guidelines. This project has been made possible with funding from the National Historical Publication and Records Commission, the grant making arm of the National Archives. These guidelines include provisions for the creation, management and preserving the accessibility of reliable and authentic records. Since electronic records are more fragile and technology dependant than those stored on other media, the Guidelines include methods for dealing with frequent hardware and software obsolescence. Given the frequency of change in the use of electronic systems and the existing body of legislative and regulatory guidance related to records, we would recommend that any legislation about electronic signatures focus as specifically as possible on concerns related to the signatures themselves and the specific records to which they are associated, rather than encompassing other forms of electronic records created and maintained by government agencies.

The Kansas State Historical Society has been entrusted with the State Archives, and we face new challenges with continually changing technology to protect the rights of citizens and the state, while also providing ready access to records that are open to the public. We look forward to an ongoing partnership with all branches of government in addressing these issues.



STATE OF KANSAS

Tim Shallenburger

TREASURER

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TOPEKA, KANSAS 66612-1235

TELEPHONE
(785) 296-3171

February 9, 2000

Senator Tim Emert, Chairman and Members
of the Senate Judiciary Committee

Thank you for the opportunity to voice our opposition to Senate Bill 559.

If certain sections of Senate Bill 559 were passed, our agency's ability to conduct business would be profoundly affected. Over the past nine years, the Treasurer's Office has been a leader within Kansas government in electronic processing. We were one of the first to switch to a completely PC based environment, doing so in 1994. In addition, the Treasurer's Office has been a pioneer in Internet technology, bringing up one of the first interactive state websites in April of 1997. In excess of \$324 million in state Interfund Transfer traffic was processed in the last half of calendar year 1999 by the first-of-its-kind, totally Internet based, on-line system (SOKI³) --conceptualized, realized, and constructed completely in-house by Treasurer's Office DP staff. That system is now maintained by the Treasurer's office for the Department of Administration's Division of Accounts and Reports.

We have maintained, over the years, this high level of processing excellence by remaining able to react to emerging technologies and ideas quickly and efficiently. The **added bureaucracy** contained in sections 17, 18, and 19 of this bill could encumber our efforts to the point of near inaction. The added steps necessary to keep the Secretary of Administration notified of all electronic processing would cripple our data processing staff, cutting the possible level of work flow dramatically. Any state agency, but especially an elective office, should have the flexibility to react to situations promptly using whatever tools necessary to get the job done.

We believe that our agency is the best judge of how we can carry out our responsibilities efficiently. It would be extremely difficult, if not impossible, for the Department of Administration to thoroughly grasp and react quickly to the day-to-day electronic needs of our agency. **This bill will virtually stop the communication and data sharing** between the many departments of our state government. We could become stalled in a mountain of red-tape and paperwork.

The fiscal basis of the state system is protected by the checks and balances provided by our office and the Department of Administration's Division of Accounts and Reports. **This bill removes these safeguards** with respect to our electronic systems. Maintaining the integrity of the state accounting system involves a separation of responsibilities, processing, and oversight. The current separation assures this.

We respectfully ask that Senate Bill 559 not be passed out of committee as it is currently written.

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