



**House
Legislative
Analysis
Section**

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**UNIFORM ELECTRONIC
TRANSACTIONS ACT**

**House Bill 5537 as enrolled
Public Act 305 of 2000
Second Analysis (11-6-00)**

**Sponsor: Rep. Andrew Richner
House Committee: Insurance and Financial
Services
Senate Committee: Financial Services**

THE APPARENT PROBLEM:

In 1999, after many years of work, the Uniform Law Commissioners produced a model act that they describe as “the first comprehensive effort to prepare state law for the electronic commerce era.” By electronic commerce the commissioners mean doing business by means of computer and over telephone and television cable lines. The Internet marketplace is expanding rapidly, to cite the most obvious example. The Uniform Electronic Transactions Act (UETA), say the commissioners, “represents the first national effort at providing some uniform rules to govern transactions in electronic commerce that should serve in every state.” The UETA is intended only to apply to transactions where the parties have agreed to conduct business electronically and does not apply to most transactions subject to the Uniform Commercial Code. It is described as a procedural statute: it does not mandate the use of electronic signatures or records, but seeks to cover the occasions when they are voluntarily used. The law commissioners say the act’s “primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures,” and they describe the fundamental purpose as removing perceived barriers to electronic commerce. The UETA has been adopted in 22 states, according to National Conference of Commissioners on Uniform State Laws, and is before the legislatures of about a half dozen others. Legislation has been introduced that would put the model law into Michigan’s statute books.

THE CONTENT OF THE BILL:

The bill would create a new act, the Uniform Electronic Transactions Act, which would apply to electronic records and signatures in transactions between parties each of whom had agreed to conduct transactions by electronic means. (The term “transaction” would mean an action or set of actions occurring between two or

more persons relating to the conduct of business, commercial, or governmental affairs.) The bill would not apply to a transaction to the extent it was governed by either 1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or 2) the Uniform Commercial Code, with some exceptions (described later). The bill would specify that a transaction subject to the new act would also be subject to other applicable substantive law.

The bill would specify that:

- A record or signature could not be denied legal effect or enforceability solely because it was in electronic form.
- A contract could not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- If a law required a record to be in writing, an electronic record would satisfy the law.
- If a law required a signature, an electronic signature would satisfy the law.

The act would 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. A party that agreed to conduct a transaction by electronic means could refuse to conduct other transactions by electronic means. Unless otherwise prohibited by the act, a provision of the act could be varied by agreement.

Application to Uniform Commercial Code. The bill says the UETA would apply to certain specified sections of the Uniform Commercial Code, including Article 2, which deals with sales, and Article 2A,

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which deals with leases. It would also apply to sections 1107 and 1206. Section 1107 says, “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.” Section 1206 says, generally, that 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 or her authorized agent.

Sending and receiving electronic records. Unless otherwise agreed to between the sender and recipient, an electronic record would be considered sent when it complied with all of the following: 1) it was addressed properly or otherwise directed properly to an information processing system that the recipient used for the purpose of receiving electronic records or information of the type sent and from which the recipient was able to retrieve the electronic record; 2) it was in a form capable of being processed by that system; and 3) the record entered 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 entered a region of the information processing system used by the recipient that was under the control of the recipient. An electronic record would be considered received when it complied with the first two conditions described above. A record would be considered received even if no individual was aware of its receipt.

Receipt of an electronic acknowledgment from an information processing system would establish that a record was received but, by itself, would not establish that the content sent corresponded to the content received. If a person was aware that an electronic record purportedly sent or purportedly received was not actually sent or received, the legal effect of the sending or receipt would be determined by other applicable law. (Except to the extent permitted by the other law, that provision could not be varied by agreement.)

Unless otherwise expressly provided for in the record or agreed between sender and recipient, an electronic record would be considered to be sent from the sender’s place of business and to be received at the recipient’s place of business. If the sender or recipient had more than one place of business, the place of business of that person would be the place having the closest relationship to the underlying transaction. If the

sender or recipient did not have a place of business, the place of business would be that person’s residence.

Attribution. An electronic record would be attributable to a person if it was the act of the person. The act of the person could 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 signature was attributable. The effect of a record or signature attributed to a person would be determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including any agreements of the parties and otherwise as provided by law.

Transmitting information. If parties had agreed to conduct a transaction by electronic means and a law required a person to provide, send, or deliver information in writing to another person, the requirement would be satisfied if the information was provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. An electronic record would not be capable of retention if the sender or its information processing system inhibited the ability of the recipient to print or store the electronic record. If a law required a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specific method, or to contain information that is formatted in a certain manner, then 1) the record would have to be posted or displayed in the manner required by law; 2) except as otherwise provided, the record would have to be sent, communicated, or transmitted by the method specified by law; and 3) the record would have to contain the information formatted by law.

If a sender inhibited the ability of a recipient to store or print an electronic record or print an electronic record, the electronic record would not be enforceable against the recipient.

Retention of records. If a law required that a record be retained, the requirement would be satisfied by retaining an electronic record of the information, if the record 1) accurately reflected the information set forth in the record after it was first generated in its final form as an electronic record or otherwise and 2) remained accessible for later reference. A person could satisfy this requirement by using the services of another person if the requirements were satisfied. If a law required a record to be presented or retained in its original form, or provided consequences if the record was not presented or retained in its original form, the law would be satisfied by an electronic record retained in accordance with the provision above. If a law

required retention of a check, that requirement would be satisfied by retention of an electronic record on the front and back of the check in accordance with that provision. A record retained as an electronic record in accordance with that provision would satisfy a law requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a law enacted after the effective date of this new act specifically prohibited the use of an electronic record for the specified purpose. This would not preclude a governmental agency of the state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction. A requirement to retain a record would not apply to any information the sole purpose of which was to enable the record to be sent, communicated, or received.

Changes and errors. If a change or error in an electronic record occurred in a transmission between parties to a transaction, the following rules would apply: 1) if the parties had agreed to use a security procedure to detect changes or errors and one party had conformed to the procedure but the other party had not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party could void the effect of the changed or erroneous electronic record; 2) in an automated transaction involving an individual, the individual could void the effect of an electronic record that resulted in an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide for the prevention or correction of the error and, at the time the individual learned of the error, he or she promptly notified the other person of the error and that he or she did not intend to be bound by the record, the individual took reasonable steps to return to the other person or to destroy any consideration received as a result of the erroneous record, and the individual had not used or received any benefit or value from any consideration received from the other person; and 3) if neither of the first two circumstances applied, the error would have the same effect as provided by law. Items 2) and 3) listed above could not be varied by agreement.

Notarization, verification, etc. If a law required a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement would be 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, was attached to or logically associated with the signature or record.

Electronic agents. In an automated transaction, all of the following rules would apply: 1) a contract could 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 could 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 performed actions that the individual was free to refuse to perform and that the individual knew or had reason to know would cause the electronic agent to complete the transaction or performance; and 3) the terms of the contract were determined by substantive law applicable to the contract. The term "electronic agent" refers to a computer program or an electronic means 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. An "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.

Evidence of a signature. In a criminal or civil proceeding, evidence of a record or signature could not be excluded solely because it was in electronic form.

Transferable records. The term "transferable record" in the following provisions means an electronic record that is both 1) a note under Sections 3101 to 3801 of the Uniform Commercial Code or a document under Sections 7101 to 7603 of the Uniform Commercial Code if the electronic record were in writing and 2) that the issuer of the electronic record expressly agreed is a transferable record. (According to a commentary by the Uniform Law Commissioners, notes and documents are negotiable instruments whereby 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. A transferable record exists when there is a single authoritative copy of that record existing and in the control of a person.)

A person would have control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably established that person as the person to which the transferable record was issued or transferred. A system would satisfy this requirement and a person would be considered to have control of a transferable record, if

the transferable record was created, stored, and assigned in such a manner that all of the following applied: 1) a single authoritative copy of the transferable record existed that was unique, identifiable, and, with certain specified exceptions, unalterable; 2) the authoritative copy identified the person asserting control as the person to which the transferable record was issued or, if the authoritative copy indicated that the transferable record had been transferred, the person to which the record was most recently transferred; 3) the authoritative copy was communicated to and maintained by the person asserting control or its designated custodian; 4) copies and revisions that added or changed an identified assignee of the authoritative copy could be made only with the consent of the person asserting control; 5) each copy of the authoritative copy and any copy of a copy was readily identifiable as a copy that was not the authoritative copy; and 6) any revision of the authoritative copy was readily identified as authorized or unauthorized.

Except as otherwise agreed, a person having control of a transferable record would be the “holder” of the transferable record under the Uniform Commercial Code and would have the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code. Except as otherwise agreed, an obligor under a transferable record would have the same rights and defenses as an equivalent obligor under the Uniform Commercial Code. If requested by a person against which enforcement was sought, the person seeking to enforce the transferable record would have to provide reasonable proof that the person was in control of the transferable record. Proof could 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. The Department of Management and Budget would have to determine for each state department whether, and the extent to which, the department would create and retain electronic records and convert written records to electronic records.

Government agencies. The Department of Management and Budget would have to determine whether, and the extent to which, each state department would 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. To the extent that a governmental agency was to use electronic records and signatures, the DMB, giving due

consideration to security, could specify any or all of the following: 1) the manner and format in which the electronic records would have to be created, generated, sent, communicated, received, and stored, and the systems established for those purposes; 2) if an electronic record was required to be signed by electronic means, the type of electronic signature required, the manner and format in which the signature was to be affixed to the record, and the identity of or criteria that was to be met by any third party used by a person filing a document; 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 that were specified for corresponding non-electronic records or reasonably necessary under the circumstances. The new act would not require a governmental agency or state official to use or permit the use of electronic records or electronic signatures (except where required under other laws).

BACKGROUND INFORMATION:

The National Conference of Commissioners on Uniform State Laws. The NCCUSL maintains a web site at www.nccusl.org. Information on uniform acts, including the Uniform Electronic Transactions Act, can be found there. The NCCUSL describes itself as an organization made up of law commissioners appointed by the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands to study the need for uniform state laws; that is, to determine when uniformity between state laws is desirable. The uniform laws drafted by the commissioners have no force unless adopted by a state legislature. The organization is mostly funded by state appropriations.

E-Sign. A new federal act, the Electronic Signatures in Global and National Commerce Act, known as E-Sign, was signed into law on June 30, 2000 and took effect October 1. The federal act, however, does not automatically preempt state law. Indeed, E-Sign specifies that if a state has enacted UETA as approved and recommended by the NCCUSL, the state law will govern. According to a principal drafter of UETA, the federal and state laws “overlap significantly . . . [but] are not identical, in scope or in substance.” The NCCUSL web site contains information on E-Sign in an article entitled, “A Preliminary Analysis of Federal and State Electronic Commerce Laws”, written by Patricia Brumfield Fry.

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has noted that because participation in electronic transactions is voluntary, the cost or savings associated with the bill are indeterminate. The SFA says that the Department of Management and Budget does not expect state departments to incur significant technology costs if they conduct electronic transactions thanks to the use of a third-party intermediary. The SFA notes there could be savings for state and local government in the form of reduced costs for application processing and record storage. (SFA analysis dated 9-25-00)

ARGUMENTS:

For:

The bill would put into state law the Uniform Electronic Transactions Act developed by the Uniform Law Commissioners of the National Conference of Commissioners on Uniform State Laws. It is described as a procedural statute: it does not change the substantive laws that cover the various transactions. It does not mandate the use of electronic signatures or records, but seeks to cover the occasions when they are voluntarily used. The law commissioners say the act's "primary objective is to establish the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures," and they describe the fundamental purpose as removing perceived barriers to electronic commerce. The NCCUSL says the model act should be adopted because it:

- defines and validates electronic signatures;
- removes writing and signature requirements that create barriers to electronic transactions;
- ensures that contracts and transactions are not denied enforcement because electronic media are used;
- ensures that courts accept electronic records into evidence;
- protects against errors by providing appropriate standards for the use of technology to assure party identification;
- avoids having the selection of medium (paper vs. electronic) govern the outcome of any disputes or disagreements, and assures that parties have the freedom to select the media for their transactions by agreement; and
- authorizes state government entities to create, communicate, receive, and store records electronically,

and encourages state governmental agencies to move to electronic media.

Against:

Some people believe that UETA's treatment of consumer protection issues needs strengthening, either by exempting some consumer protection laws from its scope or by amending the act to provide additional protections, or both. Consumer protection statutes often require information to be in writing or require consumers to separately sign or initial provisions in agreements, to ensure that the consumer is aware of it. Sometimes statutes require information to be presented in a particular manner or format. There are concerns about how such requirements fit under UETA. In addition, UETA does not require disclosures of the types of needed hardware and software, of how a person can request a paper copy, or of how a person can withdraw consent to an electronic transaction. Although a party's consent is required, it may be inferred from conduct.

One of the acknowledged differences between the federal E-Sign law and the state UETA law is their treatment of consumer protection issues. For example, E-Sign exempts various cancellation notices, such as termination of utility services, of health insurance or benefits, or life insurance benefits, and also exempts notices of default, acceleration, repossession, foreclosure, eviction, and product recalls. Reportedly, these exemptions came at the urging of consumer advocates concerned that consumers might not actually receive such notices if they only needed to be sent electronically (e.g. to an E-mail address). Some people believe UETA should also exempt such notices.

Response:

A commentary from a principal drafter of the uniform act suggests that the idea of excluding consumer protection laws was considered and rejected, at least in part because it would result in "excluding 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." Defenders of UETA say it preserves consumer protections in a number of ways. For example, if a law requires information to be delivered in writing, it must be in an electronic record that is capable of being retained by the recipient. If a law requires a separate signature or initials, UETA maintains that requirement but simply allows the signature or initials to be electronic. Also, if a law requires a record to be posted, displayed, or formatted in a certain manner, that requirement must still be met under UETA.

Further, according to the commentary on the act, other bodies of substantive law continue to operate to allow the courts to police any bad conduct or overreaching, such as unconscionability, fraud, duress, etc. These laws apply regardless of the medium involved. The commentator says, "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 [the] act", adding that "Consumers and others will not be well served by restrictions which preclude the employment of electronic technologies sought and desired by consumers."

Analyst: C. Couch

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