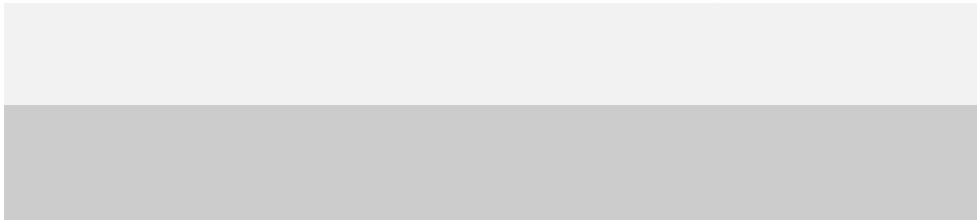




State of New Jersey



FINAL REPORT

relating to

THE FEDERAL ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL
COMMERCE ACT AND THE UNIFORM ELECTRONIC TRANSACTIONS ACT

AUGUST 2000

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I. Introduction - Federal E-Sign and State Law

On June 30 of this year President Clinton signed into law the "Electronic Signatures in Global and National Commerce Act," popularly referred to as the federal "E-Sign" legislation.¹ The federal E-Sign legislation broadly validates the use of electronic records and signatures in transactions in interstate and foreign commerce, and preempts virtually all State and federal statutes and regulations which require traditional paper documents and traditional signatures in transactions in interstate commerce.

As this legislation proceeded through the Congress over the last year, it was promoted as a temporary measure, designed to create a uniform national legal infrastructure for electronic commerce until such time as the States had a chance to consider and enact the Uniform Electronic Transactions Act (UETA). The UETA is a law reform proposal adopted by National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999; it contains principles similar to that in the federal legislation; in fact, the federal legislation appropriates many of its provisions. UETA gives electronic records and electronic signatures the same legal status as that afforded to ordinary writings and signatures under existing laws. UETA accomplishes this by redefining the terms "writing" and "signature" as they occur in State statutes and regulations to include "electronic records" and "electronic signatures." Federal E-Sign provides that if a State enacts the UETA, the enacting State's laws will no longer be preempted (with some exceptions) by the legal rules set out in the federal legislation.

In November 1998 this Commission recommended against the global re-definition approach to the revision of the New Jersey Statutes, on the ground that a universal change in the meaning of the terms "writing" and "signature" was both overbroad and unnecessary, and could raise more questions than it would answer so far as the validity of electronic transactions is concerned. The Commission expressed the view that relatively few, targeted changes to specific statutes were sufficient to validate the use of electronic records and signatures in those situations in which it was desirable to do so. The UETA, which was in its final drafting stages at the time of the Commission's recommendation, was precisely the kind of legislation which the Commission believed to be unnecessary and overbroad.

The enactment of the federal E-Sign legislation has caused this Commission to reconsider its previous position and recommend the enactment of the official version UETA with certain amendments that would be consistent with the federal legislation.² Federal E-Sign effectively forces a State to choose between its provisions and those of UETA. If UETA is not enacted in this State prior to October 1, the federal E-Sign legislation will become the primary authority governing the validity and enforceability of

¹ Electronic Signatures in Global and National Commerce Act (Federal E-Sign), Pub. L. No. 106-229, 114 Stat. 464 (2000), codified at 15 U.S.C. 7001-7031, referred to throughout this Report as "federal E-Sign."

² Although federal E-Sign 102(a) specifies that a State must enact the official version of UETA as proposed by NCCUSL in July 1999, there are some amendments which may be added to it that are both consistent with the official version of UETA and are not inconsistent with E-Sign.

ordinary commercial transactions which are undertaken electronically. The federal E-Sign legislation also intrudes on State sovereignty, in provisions that can be interpreted to limit the authority of States over the use of electronic technologies in governmental operations. The adoption of UETA will invoke the "anti-preemption" provisions of federal E-Sign 102(a), restore the authority of the State over the operation of its agencies and instrumentalities to the fullest extent possible under the federal legislation, and thus avoid at least some of the constitutional questions which are raised by the provisions of the federal legislation which apply to the operations of State agencies.

This Commission believes that extremely rapid action on UETA is necessary to avoid inconsistencies in the applicability of State laws and regulations under the preemption provisions of the federal legislation. The general effective date of the federal legislation is October 1, 2000, and there is a specific, delayed effective date of March 1, 2001, for certain provisions concerning State records retention statutes and regulations.

In support of the Commission's recommendation, this Report details the provisions of the federal legislation and UETA. It concludes with an analysis of the effect of enacting UETA, including recommended amendments, as well as recommendations for the consideration of additional legislation to address problems which may arise with respect to electronic transactions under either the federal E-Sign legislation or UETA.

II. The Electronic Signatures in Global and National Commerce Act - Federal E-Sign³

A. Summary of federal E-Sign

The federal E-Sign legislation consists of four Titles, only the first two of which have effects on State law and State agencies. Title I contains provisions concerned with the use of electronic records and signatures in "transactions" in interstate or foreign commerce. Title II, "Transferable records," contains two sections which establish a legal framework for the development of electronic bills and notes which relate to "a loan

³ The federal E-Sign legislation is the product of two contending bills, S.761 and H.R.1714. S.761 was a relatively simple bill which would have merely validated the use of electronic records and signatures in transactions between private parties in interstate commerce; it contained no provisions applicable specifically to State governmental authorities. H.R. 1714, sought to preempt a broader category of State and federal rules and statutes, including those which require the parties to transactions to retain records of transactions. Because of its much broader agenda, the House version of the legislation included much more complex provisions than the Senate version, such as provisions limiting the extent to which to State regulatory authorities could require parties to use and retain paper records. The lengthy Conference Committee process which resolved the dramatically different approaches of these two bills produced an exceedingly complex piece of legislation, the effect of which remains the subject of debate among the Conference Committee participants. See, e.g., Statement of Senator Leahy, Cong. Rec. S5218-5221 (June 15, 2000)(disagreeing with statements by Rep. Bliley on the floor of the House, and pointing out that the lack of consensus regarding the meaning of many of the provisions among Conference Committee members resulted in the decision to dispense with adoption of the usual form of Conference Report).

secured by real property." The remaining two Titles are of concern only to federal regulatory authorities.⁴

The first section in Title I broadly validates the use of electronic records and electronic signatures in "transactions" in interstate and foreign commerce, and specifically preempts any federal and State laws which would invalidate such transactions. (E-Sign 101.) The second section in Title I modifies the broad rules in the first section by setting forth the manner in which a State may escape the preemption provisions set out in the first section. (E-Sign 102.) The primary method of "escape" is the enactment of the official version of the Uniform Electronic Transactions Act (UETA), although a standard is also provided to evaluate the acceptability of other State legislation that would validate the use of electronic records and signatures. The third section of Title I contains specific exemptions from the operation of the validating rules in E-Sign 101. (E-Sign 103.) The fourth section sets forth rules which limit the manner in which federal and State agencies may interpret E-Sign 101 under their existing rule-making powers. (E-Sign 104.) The fifth section (E-Sign 105) directs the Secretary of Commerce and the Federal Trade Commission to complete certain studies of the operation of the legislation; the sixth section (E-Sign 105) contains definitional provisions and the seventh section (E-Sign 107) is the effective date provision.

Title II consists of just two provisions, E-Sign 201, which provides a legal infrastructure for electronic bills and notes relating to a "loan secured by real property" and E-Sign 202, the effective date provision for this Title.

B. Constitutional issues raised by the federal E-Sign legislation

Title I of the federal E-Sign legislation applies to "transactions in interstate or foreign commerce," E-Sign 101(a). Therefore, the scope of the legislation is dependent upon the scope of the Commerce Clause, U.S. Const. Art. I, Sec. VIII, cl. 3. Congress has the power to regulate commercial and business transactions between non-governmental parties that are in or affecting interstate or foreign commerce, and thus the provisions of the federal legislation which validate electronic transactions between non-governmental parties are on quite firm constitutional ground.

What is less clear is the extent to which Congress can, under the guise of regulating interstate commerce under the Commerce Clause, proscribe the workings of State government agencies by requiring them to "accept or use" electronic documents and signatures.⁵ Decisions by the United States Supreme Court in the last several decades

⁴ Title III of federal E-Sign contains provisions directing the Secretary of Commerce to undertake various activities to promote international electronic commerce; Title IV contains one minor provision amending the federal Child Online Protection Act.

⁵ One of the more objectionable features of federal E-Sign as it applies to State agencies is the suggestion that States need to be coerced into using, and permitting the use of, modern technologies. To the extent that it is a unfunded federal mandate, it fails to take into account on a purely practical level the effect that its directives might have on State government efforts to transition to the use of electronic technologies. In this State, the comprehensive initiative currently under way to utilize electronic technologies in governmental operations is exhaustively detailed in the Report recently issued by the State's Chief Information Officer

have invoked the Tenth Amendment as a limitation on the ability of Congress to impose certain kinds of requirements on the States, their agencies and their officers. See, e.g., *Printz v. United States*, 521 U.S. 98 (1997) (holding unconstitutional the provisions of the Brady handgun control law which required local law enforcement officers to conduct background checks and accept federal handgun permit applications). However, the difficult interpretive and constitutional questions raised by federal E-Sign as it might be applied to State officers and agencies are largely avoided by a State enactment of UETA.

C. Summary of the individual provisions of federal E-Sign

Set forth below is a general summary of the provisions of the federal legislation that are relevant to State law.

(1) E-Sign 101. General rule of validity

Subsection (a) of E-Sign 101 states a general rule of validity for electronic signatures and electronic records used in any "transaction" which is "in or affecting interstate or foreign commerce." Note that the requirement that the "transaction" be in interstate or foreign commerce is a jurisdictional prerequisite to the applicability of federal law under the Commerce Clause, U.S. Const. Art. I, Sec. VIII, cl. 3.

"Transaction" is a defined term. See E-Sign Section 106 ("an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons..."). Note that the E-Sign definition of "transaction" differs significantly from the the definition in UETA 2(16) ("an action ... relating to the conduct of business, commercial and governmental affairs").⁶

The rule of electronic validity stated in subsection (a) of E-Sign 101 applies, "notwithstanding any statute, regulation, or other rule of law." This last phrase is intended to be inclusive of all sources of law, including the common law, in both the federal and state systems. This general rule is both qualified and made more specific in the other subsections in this section; a subsequent section (E-Sign 103) also contains categorical exemptions from this general rule (e.g., for wills, family law transactions, among others).

Subsection (b) of E-Sign 101 is entitled "preservation of rights and obligations." Sub-subsection (b)(1) qualifies the general rule of subsection (a) of E-Sign 101 by providing that "this title" does not "limit, alter, or otherwise affect any requirement" imposed by a law "relating to the rights and obligations of persons" under such laws, "other than a requirement that contracts or other records be written, signed, or in

entitled "Information Technology Strategic Plan," available for review at <http://www.state.nj.us/cio/stratplan>. The considerable efforts being made in this and other States toward "on-line government" can only be hampered by the distraction of determining the extent to which federal law might be read to limit the authority of States in those efforts. See E-Sign 104(c).

⁶ The omission of the phrase "governmental affairs" excludes from the scope of federal E-Sign those transactions which are purely governmental in character, such as transactions within and between governmental agencies. Certain governmental transactions are also excluded from the scope of E-Sign 101 because they are not transactions in interstate or foreign commerce. See further discussion of this issue under heading (6)*E-Sign 106 Definitions*.

nonelectronic form." In other words, if an existing law states that a contract must be made "in writing" in order to be binding, the federal legislation mandates that an electronic record is a "writing" for purposes of the existing State law; but the federal legislation does not override any other legal requirement for a binding contract, such as the requirement that the parties come to an agreement on the terms, or a requirement that a contract include certain specific terms, or any other such kinds of requirements for contracts in general or specific kinds of contracts in particular.

Sub-subsection (b)(2) of E-Sign 101 also clarifies the effect of the legislation, stating that it does not "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."⁷

Subsection (c) of E-Sign 101 contains very detailed qualifications of the general rule of subsection (a) which apply to consumers. The manner in which a consumer may consent to transact electronically is delineated, and parties who wish to bind a consumer to an agreement to transact electronically must have some basis for concluding that the consumer has the means to transact electronically (in other words, if a computer is required to undertake a particular transaction electronically, the other party must have reason to believe that the consumer has access to the necessary hardware and software).

Subsection (d) of E-Sign 101 specifically overrides any statute, regulation or other rule of law [hereinafter "law"] which requires an original record, a copy of a record or a check be retained. Under this subsection, an electronic record containing the same information satisfies such a provision.

Subsection (e) of E-Sign 101 qualifies the general rule of subsection (a) by providing that it applies only if the electronic record is "in a form 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."

Subsection (f) of E-Sign 101 qualifies the rules in the entire Title by preserving any law which requires a particular "proximity" with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed."

Subsection (g) of E-Sign 101 deals specifically with 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 officer authorized to perform the act affixes to the electronic document an electronic signature along with all other information required by law.

⁷ The negative implication of this convoluted passage appears to be that a State governmental agency can be required to "use or accept" electronic records and signatures except when it is contracting like a private party (in procurement activities, for example). Other provisions of federal E-Sign, in contrast to this provision, contains provisions which appear to reserve to State agencies the authority to refuse to "use or accept" electronic records and signatures. See, e.g., E-Sign 104(a)(...nothing in this Title limits or supersedes any requirement by a ... State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats."

Subsection (h) of E-Sign 101 validates contracts and records involving the use of so-called electronic agents (a defined term) "so long as the action of any such electronic agent is legally attributable to the person to be bound."

Subsections (i) and (j) of E-Sign 101 concern the insurance industry, the first of them expressly including the business of insurance within the scope of the legislation, the second concerning liability of insurance agents and brokers for the use of electronic records and signatures.

(2) E-Sign 102. Exemptions from preemption

This section contains qualified exemptions from the broad preemption effect of the federal act. It is this section which specifies the circumstances under which a State can avoid the application of the federal legislation by the enactment of UETA.

Subsection (a) of E-Sign 102 states the general rule that a State law may "modify, limit, or supersede the provisions of E-Sign 101 with respect to State law only if" the law either constitutes an adoption of the official version of the Uniform Electronic Transactions Act or if the law otherwise specifies alternative procedures or requirements for the use and acceptance of electronic records and signatures. The latter of these two conditions is included to cover States which either have adopted a version of UETA or some other electronic signature law already, or wish to adopt a non-UETA law or a version of UETA which differs from the official version in the future.

Subsection (a) of E-Sign 102 is extremely important because it permits a State, by enacting the official version of UETA, to escape almost entirely the preemption effect of the federal legislation. There are two exceptions to the ability to escape the preemption effect, one of which concerns UETA 3(b)(4) and the other which concerns UETA 8(b)(2).

UETA 3(b)(4) was included in UETA to permit enacting States to list additional categorical or specific exemptions from UETA's operative provisions. For example, a State which wished to continue existing writing and signature requirements for transactions in land could add a reference in this subsection of UETA, either a categorical reference or a reference to specific statutory or regulatory provisions to which UETA would not apply. Under E-Sign 102(a) of the federal legislation, however, any such exception added by a State under UETA 3(b)(4) is preempted "to the extent such exception is inconsistent with this title or title II, or would not be permitted under" the limitations applicable to the alternative legislation mentioned above. The obvious purpose of this limitation on a State enactment of UETA is to prohibit states from evading the policy of UETA by adding wholesale exceptions which would swallow its rules.

The other provision of UETA which is specifically referenced in the federal legislation is UETA 8(b)(2). Subsection 102(c) of federal E-Sign, entitled "Prevention of circumvention," provides that the "anti-preemption" effect of the adoption of UETA does

not "permit a State to circumvent" the effect of the federal legislation "through the imposition of nonelectronic delivery methods" under UETA 8(b)(2). UETA 8(b)(2) contains language preserving from the effect of UETA, State laws which specify a particular method of communication or transmission, such as a requirement that information be mailed, or sent by certified mail. Thus, federal E-Sign 102(c) prohibits a State from "circumventing" its provisions which validate the use of electronic records and signatures in transaction by enacting, under UETA 8(b)(2), requirements that a transaction be in some way effectuated by mailing a letter or sending a telegram.⁸

(3) E-Sign 103. Specific exemptions

This section contains the categorical exceptions to the operation of the general rule of E-Sign 101. Note that the first two exceptions listed below are already embodied in the official version of UETA 3(b).⁹ The categories of exempt laws and transactions in E-Sign 103 are:

- the creation and execution of wills, codicils, or testamentary trusts.
- the UCC generally, but not UCC 1-107 and 1-206, and Articles 2 and 2A.
- laws governing adoption, divorce, or other matters of family law.
- court orders and notices, official court documents including briefs, pleadings, etc.
- utility shut-off notices.
- notices concerning default, acceleration, repossession or foreclosure under a credit or rental agreement secured by a primary residence of an individual
- cancellation or termination of health or life insurance benefits (excluding annuities).
- a product recall "that risks endangering health or safety."
- documents required to accompany "transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials."

(4) E-Sign 104. Applicability to federal and State governments

This section deals particularly with federal and to State regulatory authorities in those States which have not enacted UETA.¹⁰ This section of federal E-Sign has

⁸ See the discussion below of whether the use of the term "circumvention" suggests that what is being prohibited by federal E-Sign 102(c) is the addition of new laws that fall under UETA 8(b)(2), not the continued enforcement of existing laws that fall under UETA 8(b)(2).

⁹ See the discussion below of whether a State which enacts UETA can include these exceptions in its enactment. Note that the exclusion of insurance in E-Sign is for health and life insurance and does not mention automobile insurance. Note also that deeds and other real estate documents are not excluded (at least to the extent that they pertain to a "business, consumer or commercial" transaction), both by implication in the general language of E-Sign 101, the main operative provision of the legislation, as well as expressly in the definition of "transaction" in E-Sign 106.

¹⁰ One commentator interprets federal E-Sign 104, with its limitations on the authority of State regulatory agencies, to have continuing applicability even in those states which enact UETA. See Patricia B. Fry, A Preliminary Analysis of Federal and State Electronic Commerce Laws, <http://www.uetonline.com/docs/pfry700.html>, visited July 25, 2000. Professor Fry, who was the chair of NCCUSL's UETA drafting committee, assumes without analysis that the preemption-escape provisions of E-Sign 102 apply only to the operative provisions of E-Sign 101. This assumption does not take into account a textual analysis of E-Sign 104, which is concerned with placing limitation on the manner in

potentially important implications for the regulatory authority of State agencies in those jurisdictions, depending upon how the provision is interpreted.

Subsection (a) provides that nothing in the legislation "limits or supersedes any requirement" by a federal or State regulatory agency "that records be filed with such agency or organization in accordance with specified standards or formats." The extent of the authority left to the States pursuant to this section is a subject of controversy, with Senator Leahy taking the position that it leaves them with absolute authority over the acceptance of material for filing with State agencies¹¹, while Rep. Bliley interprets the provision as leaving State agencies subject to the constraints of E-Sign 104(c) in determining their filing requirements.¹²

Subsection (b) of Section 104 sets out the parameters within which State and federal agencies must remain in adopting regulations which interpret the operative provisions in Section 101. This section provides that such agencies may adopt regulations that interpret Section 101 of the federal legislation with respect to any law within a particular agency's jurisdiction. However, this rule-making authority is limited in sub-subsection (b)(2) which prohibits the adoption of a regulation interpreting Section 101 unless several specified requirements are met:

1. the regulation is "consistent with section 101".
2. the regulation "does not add to the requirements of Section 101."
3. the agency finds that there is "substantial justification" for the regulation.

which federal and State agencies "interpret section 101." See E-Sign 104(b)(1). In a State which has enacted UETA and thus, by virtue of E-Sign 102 is not governed by the operative principles of E-Sign 101, State agencies with rule-making or interpretive authority will be interpreting UETA, not E-Sign 101. This assumption also ignores the overall structure of Title I of the E-Sign legislation, which expresses its main operative principle in E-Sign 101, with the ensuing provisions either limiting or explaining the effect of the operative provisions. E-Sign 104 has no independent operative effect on State laws, it is merely ancillary to the preemption provision in E-Sign 101.

¹¹ Read broadly, the term "standards and formats" in subsection (a) of E-Sign 104 can be interpreted to leave State agencies absolute authority to determine whether they will accept electronic records for filing. This is the interpretation given this subsection by Senator Leahy, one of the Senate sponsors of the legislation. Senator Leahy expressed the view concerning the authority of State regulatory agencies in interpreting E-Sign 101, that "section 104(a) of the conference report expressly preserves governmental filing requirements ... Until they are technologically equipped to [fully accept electronic filings, State agencies] have an unqualified right under section 104(a) to continue to require records to be filed in a tangible printed or paper form. Cong. Rec. S5221 (June 15, 2000). In other words, according to Senator Leahy, E-Sign 104(a) is not qualified by the remainder of E-Sign 104.

¹² According to the Statement of Rep. Bliley, "Section 104(a) provides that subject to section 104(a)(2) a federal regulatory agency, a self-regulatory organization, or State regulatory agency may specify standards or formats for the filing of records with that agency organization, including requiring paper filings or records." Note that there is no sub-subsection (a)(2) in E-Sign 104, nor is E-Sign 104(b)(2) relevant to the point being made by Representative Bliley; this comment probably refers to sub-subsection (c)(2) of E-Sign 104, which limits the circumstances under which a federal or State regulatory agency may interpret E-Sign 101 to require traditional records or signatures to those implicating law enforcement or national security concerns.

4. the agency finds that the methods specified to carry out the purpose (of the regulation) are "substantially equivalent to the requirements imposed on records that are not electronic records."
5. the agency finds that the methods selected "will not impose unreasonable costs on the acceptance and use of electronic records."
6. the agency finds that the methods selected "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."

The list of prescriptions in sub-subsection (b)(2) is qualified in sub-subsection (b)(3) with a statement that a regulatory agency may interpret Section 101(d) (validating the retention of an electronic record of information) "to specify performance standards" which "assure accuracy, record integrity, and accessibility of records." In addition, those performance standards may impose a requirement which violates the proscription of sub-subsection (b)(2)(C)(iii) (item no. 6 in the list above) if there is a "compelling governmental interest relating to law enforcement or national security" and if "imposing such requirement is essential to attaining such interest." But, having so provided, the sub-subsection goes on to prohibit a regulatory agency from requiring the use "of a particular type of software or hardware in order to comply with" Section 101(d)(the provision regarding records retention).

Subsection (c) of Section 104 qualifies the effect of subsection (b) by prohibiting the imposition or re-imposition of "any requirement that a record be in tangible printed or paper form" except as provided in sub-subsection (b)(e)(B)(where a compelling governmental interest relating to law enforcement or national security is shown).

(5) E-Sign 106. Definitions

Section 106 contains a number of definitions, most of which have identical or virtually identical counterparts in UETA. The only definition of significance to States in particular is "Transaction," which is defined as follows in UETA 106:

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....¹³

Compare the definition of the term "transaction" in UETA 2(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." Because UETA was the source for the language of the definition in the federal legislation, the difference between

¹³ The E-Sign 106 definition goes on to provide that the term "transaction" includes "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 (ii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.

the text of the two provisions can fairly be viewed as purposeful and of interpretive significance.¹⁴

The absence of the term "governmental affairs" from the definition in federal E-Sign, as well as the requirement that a transaction be in interstate or foreign commerce, leaves transactions within and between government agencies outside the scope of federal E-Sign, and it may also preclude the application of federal E-Sign to filings by private parties with governmental agencies.¹⁵

(6) E-Sign 107. Effective date

The general effective date of the legislation is October 1, 2000. There is a specific, extended effective date of March 1, 2001, with respect to "a requirement that a record be retained" which is imposed by a regulatory agency.

(7) E-Sign 201 and 202 (Title II--Transferable records)

The purpose of the "transferable records" provisions in both federal E-Sign and the UETA is to provide the legal infrastructure needed to create an electronic analog to conventional, paper-based bills and notes. At present there are no such analogs, but the proponents of these provisions believe that the development of such analogs will follow from the creation of the legal infrastructure to support their use.

E-Sign 201 replicates the provisions of UETA 16, except that the scope of the E-Sign provisions is significantly narrower than the UETA provisions. E-Sign 201 applies only to "an electronic record that ... relates to a loan secured by real property." The scope of UETA 16 is not limited to this subject matter, therefore a "transferable record" under UETA could relate to any sort of transaction. Because E-Sign 201 is not subject to the "preemption opt-out" provided in E-Sign 102, a State adoption of UETA would establish a legal infrastructure for transferable records relating to all kinds of transactions, including those relating to a real property loan transaction which would continue to be covered under the federal legislation. Although in theory UETA 16 is preempted by E-Sign 201¹⁶, because the rules which UETA 16 applies to real property loan transactions replicate those of the federal legislation, no actual conflict between the two exists. The more broadly applicable rules in UETA 16 can coexist with those of E-Sign 201.

¹⁴ Supporting this interpretation of the term transaction in E-Sign is the statement of Senator Leahy on the floor that "The conferees specifically rejected including 'governmental' affairs in this definition. Thus, for example, the bill would not cover records generated purely for governmental purposes, such as regular monitoring reports on air or water quality that an agency may require pursuant to the Clean Air Act, Clean Water Act, Safe Drinking Act, or similar federal or State environmental laws." Cong. Rec. S5221 (June 15, 2000).

¹⁵ On this point, see also the discussion of E-Sign 104(a), which states that "nothing in this title limits or supersedes any requirement by ... a State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats."

¹⁶ Note that the preemption-escape provisions of E-Sign 102 specifically refer to the operative rules set out in E-Sign 101, and both provisions are in E-Sign Title I. E-Sign 201 is in E-Sign Title II.

III. The Uniform Electronic Transactions Act (UETA)

A. Summary of the individual provisions of UETA

Set forth below is a brief explanation of the operative provisions of UETA, along with some comments of this Commission, including a brief statement concerning the effect that the enactment of this particular provision of UETA would have on current New Jersey law.

(1) UETA 5, 7 and 8 - Legal recognition of electronic signatures, records and contracts and their equivalence with traditional writings and signatures

UETA 7 and 8 contain the central operative provisions of the Act. Both provisions contain broadly applicable rules that give the same legal effect to electronic records, electronic signatures and electronic contracts that their paper and ink equivalents are given under current law. Although stated in slightly different language from the equivalent provisions of federal E-Sign, their effect is the same: whenever a statute, regulation or other rule of law requires that a transaction be undertaken "in writing," an "electronic record" can be used for that purpose; similarly, whenever a "signature" is required, an "electronic signature" can be used. UETA 7 and 8 also provide that neither an electronic record nor an electronic signature nor an electronic contract can be denied legal effect solely because it is in electronic form.

UETA 5 provides an important rule of voluntariness that explains and qualifies the central operative provisions in the Act. Subsection (a) provides that the Act does not require a party to use electronic records or signatures, and subsection (b) provides that the Act is applicable only to transactions between parties who have "agreed to conduct transactions by electronic means."

Some of the work of equating the legal status of traditional and electronic records and signatures is accomplished in the definitions in UETA 2. A "record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." The first part of this definition ("inscribed on a tangible medium") is the language in which traditional paper documents are usually described; the additional language in the UETA definition encompasses information that may be stored in binary form on the fixed disk of a computer system or on a removable floppy, but that can be retrieved and displayed in "human readable form," as text displayed on a screen or printed out on paper. The definition of the term "electronic record" is simply an expansive list of the various ways in which a record which is in electronic form may be found. An "electronic record" is defined as "a record created, generated, sent, communicated, received, or stored by electronic means."

An "electronic signature" is defined in UETA 2 as "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." The definition parallels the definition of a traditional signature in the Uniform Commercial Code, but relates the traditional concept

of "marking with intent" to electronic records and signatures. See UCC 1-201(30) ("signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing").

Effect of UETA 5, 7 and 8 on current New Jersey law.

The important operative rules of UETA are those stated above, which give legal recognition to the use of electronic records and signatures if the parties to a transaction agree to use them. The drafters of UETA also considered and provided rules for ancillary issues that arise from the legal recognition and use of electronic records and signatures. For the most part, UETA 5, 7 and 8 replicate the legal rules that apply to transactions generally, but restates them in language that is specifically applicable to electronic transactions. Thus, for the most part these provisions do not change current New Jersey law applicable to electronic transactions and accordingly, no general negative implication regarding the validity of electronic transactions undertaken prior to the enactment of UETA should be taken from the enactment of UETA in this State.¹⁷

UETA 5, 7 and 8 do effect change in New Jersey law in those transactions where there is an explicit or implicit requirement that a paper "writing" or a holographic "signature" be utilized to effectuate the transaction. For example, to the extent that the defined term "writing" as used in Article 2 of the Uniform Commercial Code can be construed as referring to tangible documents, it is superseded by these provisions of UETA.¹⁸ Similarly, to the extent that the use of the term "signature" in current laws can be construed as requiring a mark on a tangible document, that construction is superseded by UETA, which affirmatively permits the use of an electronic signature on an electronic document. On this point, see also the discussion in this Commission's November 1998 Final Report on Electronic Records and Signatures (discussing the statutory requirements for filing title documents in the public land records).

(2) UETA 8 - Retention of information

An issue raised in electronic transactions, particularly those defined as "consumer" transactions, is whether both parties are able to retain a record of an electronic transaction. UETA 8 (a) provides that if a law requires a party to transaction to

¹⁷ On this general point see this Commission's Final Report on Electronic Records and Signatures (November 1998)(in the absence of a specific legal requirement for a paper writing or holographic signature, electronic transactions are valid under current New Jersey law.)

¹⁸ Article 1 of the U.C.C. provides that "'written' or 'writing' includes printing, typewriting or any other intentional reduction to tangible form"). The requirement of "intentional reduction to tangible form" in the U.C.C. definition has been interpreted by some commentators as not including electronic messages or other electronic and digital records. See, e.g., Joseph I. Rosenbaum, *Electronic Commerce: Key Legal & Contractual Issues*, http://businessstech.com/law/btlaw6_96.html (accessed May 7, 1998); Public Law Research Institute Report, John Whipple, *The Formation and Enforcement of Electronic Contracts*, <http://www.uchastings.edu/plri/fal194/whipple.html> (accessed May 7, 1998). To the contrary is Charles R. Merrill, *The Digital Notary(tm) Record Authentication System - A Practical Guide for Legal Counsel (1) On Mitigation of Risk From Electronic Records* (June 22, 1995), http://www.surety.com/in_news/legalgid.html (accessed May 7, 1998)(suggesting that questions regarding the status of electronic records as a "writing" within the meaning of the U.C.C. have been resolved affirmatively). To date, no New Jersey case appears to have addressed this issue.

provide or send particular information to another party to the transaction, that requirement is met only if the recipient of the information can retain the information in some fashion. In other words, if a law requires that a particular kind of written contract must be provided to a purchaser (e.g., in the case of a door-to-door sales solicitation), it is not sufficient to provide that information to the purchaser merely by displaying the information on a monitor; the information must be provided in a form that the purchaser can retain. This might include, by way of example, the ability to save a copy of an electronic record on a computer hard drive or removable disk, or to print out the information on paper.

UETA 8(b)(2) preserves existing laws which require information to be "posted or displayed" in a certain manner, to be "sent, communicated, or transmitted" by a certain method or to contain information "that is formatted" in a particular way, although it does permit the parties to a transaction to vary these provisions to the extent permitted in the law. Among the laws preserved by this provision are those which require delivery by a particular form of mail, for example, by certified mail or by registered mail.

Effect of UETA 8 on current New Jersey law.

UETA 8(a) does not appear to change existing New Jersey law but simply clarifies it in particular circumstances. If an existing law requires that one of the parties to a transaction is entitled by law to be shown or given a copy of information (a copy of a contract, for example), that requirement is not met unless the information is provided to the recipient in a form that can be retained. UETA 8(b) does not change existing law, on the contrary UETA 8(b) preserves it with respect to requirements for the sending or receipt of information.

(3) UETA 9 - Attribution of signatures

As noted above, a valid "signature" on an electronic document may consist merely of the typing of the name of the individual who is signing on an electronic message, or the use of some other kind of device which is not inherently associated with the individual, such as a string of numbers (e.g. a "PIN" number) or a password. While forgery is also an issue in non-electronic transactions, it can be relatively much easier to accomplish where the "signature" consists of simply entering a number of digits or characters on an electronic message. UETA 9 states the rule that an electronic record or signature is "attributable" to a particular person "if it was the act of the person." Subsection (a) provides that this may be shown by proof of the "efficacy" of a security procedure; subsection (b) provides that attribution is determined from the context of the entire transaction.

Effect of UETA 9 on current New Jersey law.

The principles articulated in UETA 9(b) for the attribution of a signature are similar to those applied to traditional signatures under current New Jersey law. See, e.g., J.D. Louzeaux Lumber Co. v. Davis, 41 N.J. Super. 231 (App. Div. 1956)(evaluating a requirement that a lien filing be "signed" in the context of the entire transaction). UETA

9(a) simply states a specific application of this general rule in electronic transactions, in which the existence of a security procedure is one of the circumstances to be evaluated.

(4) UETA (10) Electronic errors

A frequent question raised with respect to electronic transactions which are automated in whole or in part is how the contract law principle of "mistake" should be applied. UETA 10 provides a limited set of rules to address errors that may occur in the transmission of information in an electronic transaction, and provides that if those rules do not apply to the particular electronic error in question, then the general law of contract, "including the law of mistake," applies to the transaction.

Effect of UETA 10 on current New Jersey law.

To the extent that it sets forth a new rule governing particular kinds of mistakes in electronic transactions, UETA 10(a) changes current New Jersey law by addition. UETA 10(b) does not purport to effect change, it simply refers to the current law of mistake as the governing rule of law if the special rules in subsection (b) do not apply. See, e.g., Cataldo Construction Co. v. Essex County, 110 N.J. Super. 414 (Ch. 1970)(relief from contractual obligation on ground of unilateral mistake depends on circumstances of each case).

(5) UETA 11 - Notarization and acknowledgment

UETA 11 provides that if a law requires a notarial act, the requirement is satisfied if the information required by the law is "attached to or logically associated with" the electronic record or signature being notarized. According to the Comment to this section, it effectively supersedes any requirement that the officer performing the notarial act affix either a stamp or a seal, although no such language appears in the section itself.

Effect of UETA 11 on current New Jersey law.

To the extent that current New Jersey law may be construed to require a notary to affix a holographic signature to a paper document, this section of UETA would supersede any such requirement. Neither stamping nor sealing has been required for a notarial act in this State for some time, thus this section has no effect on New Jersey law in that regard. The official Comment to UETA 13 also notes, and it is worth emphasizing, that no other requirement for a notarial act is affected by UETA 13, including the requirement that the individual who is signing, acknowledging, swearing or attesting do so in the physical presence of the officer performing the notarial act. Accordingly, the requirement under current New Jersey law that the officer performing the notarial act be in the physical presence of the signer is not affected by UETA 11.¹⁹

¹⁹ The requirement of personal presence is well-recognized in case law as a fundamental requisite of a notarial act. See, e.g., Commercial Union Ins. Co. of New York v. Burt Thomas-Aitken Construction Co., 54 N.J. 76 (1969); State v. Merston, 39 N.J. Super. 599 (Passaic Cty. Ct. 1956).

(6) UETA 12 - Records retention

This section contains very broad language providing that if a law requires that a record be retained or that a record be presented or retained in its original form, the requirement is met by an electronic record of the information that "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 that "remains accessible for later reference." Subsection (e) qualifies this rule in the case of checks, by requiring that the electronic record include the information on both the front and the back of the check.

Effect of UETA 12 current on New Jersey law.

UETA 12 is one of the provisions of the Act, in addition to the general rules in UETA 7 and 8, that would effect change in New Jersey law. This section affects legal requirements for the retention of records, not only as they may concern transactions between private parties, but also legal requirements imposed by regulatory authorities. Thus, any current requirements by State regulatory authorities that original records of transactions be retained by regulated parties are effectively superseded by this provision (unless the transaction is one that is excluded from the scope of the Act).

Note that what is taken away in the general rules of this section is restored to a significant extent in subsections (f) and (g). Subsection (f) provides that records retention requirements imposed for "evidentiary, audit, or like purposes" can "specifically prohibit[] the use of an electronic record" if the law containing the requirement is enacted after the UETA is enacted. This permits States to re-enact any laws which require the retention of paper or original records should they be deemed of sufficient importance. Subsection g. also qualifies the general rule of UETA 12 by providing that an agency may specify "additional requirements for the retention of a record subject to the agency's jurisdiction." Read together with subsection (f), which requires laws prohibiting the use of electronic records to be reenacted, this section can be read to permit a State agency to impose "additional requirements" on electronic records retention. Other than reading subsection (g) in context with subsection (f)(and thus subsection (g) does not permit a State agency to prohibit the use of electronic records), the phrase "additional requirement" is extremely broad.

(7) UETA 13 - Admissibility in evidence

UETA 13 states a broad rule that evidence may not be excluded from a proceeding "solely because it is in electronic form."

Effect of UETA 13 on current New Jersey law.

This section of UETA should be regarded as merely precatory in the context of New Jersey evidence law, which contains no provisions which categorically exclude electronic evidence. On the contrary, the New Jersey Rules of Evidence generally track the Federal Rules of Evidence and the Uniform Rules of Evidence which have been adopted in 38 states. N.J. Evid. R. 401 and 402 provide the broad, general principle that any relevant evidence is admissible in a proceeding, relevancy being defined as "having a

tendency in reason to prove or disprove any fact of consequence to the determination of the action.” N.J. Evid. R. 401. As a preliminary matter, these rules permit the introduction of all forms of evidence, including testimony, documents, photographs, video and audio tapes and “electronic” evidence of all kinds, provided that it is relevant and otherwise satisfies applicable rules governing admissibility for a particular purpose. UETA 13 should be included in any UETA enactment in this State only because it is required to be included in order to satisfy the preemption avoidance provisions of federal E-Sign 102.²⁰

(8) *UETA 14 - Automated transactions*

Some commentators have raised questions concerning the validity of "automated" transactions, including those undertaken through the use of so-called electronic agents. Because an "electronic agent" is not capable of having the intent required for the formation of a contract under classical contract law, the argument goes, a contract which is effectuated by an "electronic agent" may be invalid because of the lack of "intent" on the part of the "electronic agent."

UETA addresses this issue of intent in automated transactions by expressly validating contracts formed by the use of automated technologies. Automated technologies are referred to in UETA as "electronic agents," defined very broadly in UETA 2 as "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." Under this definition, an "electronic agent" may simply consist of the programming interface on a merchant's web site that automatically accepts and processes orders according to pre-programmed criteria, without a human individual reviewing and accepting each and every order that is submitted. This broad language also encompasses other forms of automated ordering technology that have been in use for some time, such as the use of a telephone "touch-tone" ordering system.

²⁰ The evidence rules most likely to be at issue in the introduction of electronic records are N.J. Evid. R. 801(e) ("writing" broadly defined to include "data compilations" and all forms of information "set down or recorded by "magnetic impulse, mechanical or electronic recording, or by any other means, and preserved in perceptible form), 1002 and 1003 (requirement of an original, admissibility of duplicate) and 803(c)(6) (the business entry exception to the hearsay rule). Under these rules, electronic records are admissible pursuant to the business entry rule under the same test applicable to other business records. See Tomassini v. Saunders, 274 N.J. Super. 203 (Law Div. 1994) ("Computer printouts are admissible under the business entry rule as long as a proper foundation is laid."); see also State v. Swed, 255 N.J. Super. 228 (App. Div. 1992) (setting standard, under prior evidence rules, for admission of computer printout under business records exception, and eliminating requirement under earlier case law for witness testimony on the internal workings of the computer system as a predicate to admissibility).

While electronic records are generally admissible in evidence under current New Jersey law, it should be remembered that they must satisfy applicable requirements for admissibility as they may apply to the electronic evidence context. Thus, in some cases electronic evidence will not be admissible, just as is the case with other kinds of evidence. In Tomassini v. Saunders, the court excluded the proffered computer printout because the requirements of the business entry exception, as applicable to computer records, had not been met: "The information contained in the computer must be of the same worth as any other business record submitted as proofs of that which it asserts." 274 N.J. Super. at 208.

Effect of UETA 14 on New Jersey law.

There do not appear to be any unique questions raised under current New Jersey law concerning the validity of automated transactions. The explicit rule in UETA 14 is consistent with current New Jersey law, which analyzes the effectiveness of transactions according to general contract law principles such as offer and acceptance, intent and agency. See, e.g., *N. Rothenberg & Son, Inc. v. Nako*, 49 N.J. Super. 372 (App. Div. 1958)(principal bound by acts of agent with apparent authority which principal knowingly permits agent to assume).

(9) UETA 15 - Time and place of sending and receipt

Various statutes and other legal rules often impose time requirements on the sending or receipt of information or communications, such as a requirement that a confirmation of an order be "sent" within a particular period of time, or that a communication must be "received" by a particular date. UETA 15 provides a set of default rules for determining when an electronic communication has been either sent or received. The default rules may be varied by an agreement of the parties to a transaction.

(10) UETA 16 - Transferable records

Among the transactions expressly excluded from UETA are those which are included in Uniform Commercial Code Articles 3 and 4, that is, traditional bills and notes which are represented by paper documents. These transactions are excluded because the legal principles applicable to bills and notes are so thoroughly grounded in the possession, control and transfer of a tangible token, and no system has yet been put into place to provide an electronic equivalent. Even so, UETA 16 provides the basic legal framework to support the use of electronic bills and notes at such time as they come into use.

Effect of UETA 16 on current New Jersey law.

UETA 16 does change current New Jersey law in that it gives legal recognition to electronic bills and notes, which are not recognized under current New Jersey law (See, e.g., UCC Article 3 and 4). This change has no current effect, however, because no such system currently is in use.

(11) Electronic records and signatures - use and acceptance by State agencies under UETA

UETA 17, 18 and 19 provide rules for the use and acceptance of electronic records and signatures by State agencies. These provisions are bracketed in the official version of UETA because they are regarded as optional, that is, a particular State may or may not decide to include them in an enactment of the official version of UETA. It is emphasized in the Comment to these sections that they are intended to be very general and to empower rather than direct State agencies in the use and acceptance of electronic records and signatures, both within the agencies themselves (UETA 17) and in their dealings with other parties (UETA 18). Indeed, as noted in the official Comment to these sections, in many States these sections are unnecessary because existing law already

delegates authority to State agencies for this purpose. UETA 19 encourages the use of interoperable systems in these efforts.

Effect of UETA 16 on current New Jersey law.

To the extent that UETA 17, 18 and 19 explicitly empower State agencies to utilize electronic records and signatures in their operations, they represent a change in New Jersey law. Currently there is no equivalent, general statutory authority in this State that empowers State agencies in this fashion. However, just as in the case of transactions between and among private parties, neither is there any general proscription in the New Jersey statutes against the use of electronic technologies in the operations of State agencies. For example, there is no express statutory authorization for the use of telephones or computers in the operation of State government, yet their use is ubiquitous. There are, however, myriad statutes which require, or can be read to require, that State agencies use non-electronic technologies in particular circumstances which range from the mundane to the significant.²¹ Enactment of UETA 17, 18 and 19 would consign to each individual agency the authority to determine whether to adopt electronic technologies where current law requires a conventional writing or signature.²²

B. Should UETA Be Enacted in This State

Analyzing the effect of federal E-Sign and UETA on New Jersey law, and the desirability of enacting UETA, is an exercise in evaluating alternatives. When federal E-Sign becomes effective on October 1, any current New Jersey law which requires the use of paper-and-ink is superseded in a transaction in interstate commerce. The enactment of UETA would largely displace federal E-Sign, but in general it would simply replace the federal legislation with a very similar state enactment. If this is all that would be accomplished, there would probably be little reason for a State to bother to enact UETA, other than the general principle that State law ought to be the primary authority for the enforceability of ordinary business and commercial transactions. Federal E-Sign and UETA are not identical, however. UETA contains provisions which have no parallel in federal E-Sign, including provisions which restore important authority to State regulatory agencies, as compared to the authority which they would have under federal E-Sign.²³

That UETA contains provisions which vary from federal E-Sign is anticipated in the federal legislation. Section 102(a) expressly states that "A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with

²¹ See, e.g., See, e.g., N.J.S. 40:69A-186 (specifying signing requirements for certain petitions: "Each signer of any such petition paper shall sign his name in ink or indelible pencil and shall indicate"); N.J.S. 39:4-14.31 (requiring a written, signed notification to DMV of removal from state, destruction, theft, discontinued usage of auto); N.J.S. 40:69A-186 (specifying signing requirements for certain petitions: "Each signer of any such petition paper shall sign his name in ink or indelible pencil").

²² In its Final Report on Electronic Records and Signatures (November 1998) this Commission recommended the adoption of broadly worded legislation which would similarly empower State agencies to utilize electronic records and signatures through the adoption of administrative regulations.

²³ Assuming, of course, that the manner in which federal E-Sign limits the authority of State agencies is constitutionally valid. One of the virtues of enacting UETA is that doing so would avoid these issues to a large extent.

respect to State law...." It is anticipated by these words, therefore, that enactment of UETA will "modify, limit, or supersede" Section 101. The fact that UETA contains provisions which differ significantly from federal E-Sign is, of course, explicitly recognized in the E-Sign provisions which limit these differences in very specific ways as to certain specific UETA provisions.²⁴ Thus, unless a UETA provision which is different from federal E-Sign has been expressly limited in its effect, a difference in a UETA provision is a "permissible difference" under federal E-Sign.

The "permissible" differences in UETA which would "modify, limit or supersede" federal E-Sign appear in the language of the provisions which are common to both UETA and E-Sign, and in the provisions which are contained in UETA but not in E-Sign.²⁵

(1) Records retention provisions

The first major "permissible difference" between UETA and federal E-Sign is in their records retention provisions. Both UETA and federal E-Sign contain similarly worded provisions which broadly validate the practice of retaining electronic copies of traditional records, and permit parties to retain electronic copies of original documents if they meet certain reliability criteria. E-Sign 101(d)(1), (2), (3) and (4) correspond almost exactly to Subsections (a) through (e) of UETA 12.²⁶ Absent from the federal legislation, however, are UETA 12 (f) and (g) which provide:

(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.

²⁴ As noted above in the discussion of E-Sign 102, the federal legislation contains two specific limitations on the ability of a State to "modify, limit, or supersede" its provisions by enacting UETA. One limitation concerns the addition of exceptions in UETA 3(b)(4) and the other concerns UETA 8(b)(2). See discussion above under "E-Sign 102. Exemptions from preemption."

²⁵ There are also provisions in UETA which have no counterpart in federal E-Sign, but do not "modify, limit or supersede" E-Sign. For example, UETA 9, which concerns attribution of signatures, UETA 11, which provides for the notarization of electronic records, UETA 13, which contains provision concerning the admissibility of electronic records in evidence, have no counterpart in federal E-Sign and do not conflict with it.

²⁶ A relatively minor difference in the two is in UETA 12(c) which provides that a record retained in electronic form under the authority of this section must remain "accessible for later reference." E-Sign 101(d)(1) contains additional language that replaces the phrase "accessible for later reference" with the passage "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." The additional language of the federal E-Sign provision is probably fairly implied in the more succinct UETA provision.

Under UETA 12(f), State records retention laws which are superseded by the enactment of UETA can be re-enacted, and UETA 12(g) permits a State agency to impose "additional requirements" on the retention of records. Because neither this section of UETA nor these subsections in particular are expressly limited in the "anti-preemption" provision of the federal legislation (see E-Sign 102), they survive any preemptive effect such as that imposed on the UETA provisions that are mentioned expressly. Thus, although records retention provisions currently in place which preclude electronic records retention are superseded by the enactment of UETA 12 (a) through (e), any State law provisions of importance which limit or prohibit electronic records retention can be re-enacted under UETA 12(f). In addition, a State agency can specify "additional requirements for the retention of a record subject to the agency's jurisdiction" under UETA 12(g). The language "additional requirements" is extremely broad; the official Comment to this section states that "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." (Emphasis added.)

Subsections (f) and (g) of UETA restore significant authority to State government agencies to regulate records retention practices of regulated parties. State agencies should be alerted to this provision and prodded to present for legislative re-enactment any provisions of this type which they regard as vital to their regulatory functions. State agencies should also formulate, and adopt as regulations, any "additional requirements" that they regard as important.

(3) Use and acceptance of electronic records and signatures by State agencies

A second major "permissible difference" between federal E-Sign and UETA is in the provisions of UETA 18 and 19. These provisions have no counterparts in the federal legislation, and they are another important source of authority for State agencies if UETA is enacted. The provisions of federal E-Sign raise numerous difficult questions concerning the authority of State agencies. For example, it is unclear whether federal E-Sign purports to limit the ability of State agencies to refuse to accept electronic documents for filing.²⁷ The adoption of UETA 18 and 19 would avoid many if not most of the questions raised by the potential application of federal E-Sign to State government agencies.

UETA 18 is concerned with the use of electronic records in State agency transactions with other parties.²⁸ UETA 18(a) provides that, subject to Section 12(f)(the

²⁷ See the discussion above of federal E-Sign 104, and the difference of opinion on this point between two of its sponsors, Senator Leahy and Representative Bliley. To the extent that federal E-Sign can be read to impose requirements on the internal workings of State governments, it raises the constitutional issues noted elsewhere in this Report.

²⁸ UETA 17, discussed above, pertains to records used within government agencies, and provides that each State agency (or, alternatively, a designated State officer) shall determine whether, and the extent to which "the agency will create and retain electronic records and convert written records to electronic records." Note that the absolute authority of State agencies to refuse to accept electronic records for filing is also

records retention section discussed immediately above), State agencies "shall determine whether, and the extent to which" they "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." That this provision preserves absolutely the authority of State agencies to refuse to accept electronic records for filing if it chooses not to accept them, or to accept them under particular circumstances and not others, is expressly and unequivocally restated in UETA 18(c): "Except as otherwise provided in Section 12(f), this Act does not require a governmental agency of the State to use or permit the use of electronic records or electronic signatures."²⁹ UETA 18(b) delineates with particularity the matters which a government may specify, including the "manner and format" in which electronic records are stored, generated, received, etc., any requirements for electronic signatures, any processes for assuring records integrity and the similar matters.

The authority in UETA 18 is qualified in UETA 19 by a mildly-worded directive permitting State agencies (or, alternatively, as designated State officer) to take into account the promotion and encouragement of interoperability among electronic systems in adopting standards.

(3) Requirements for sending and receiving information

UETA 8(b)(2) is one of the UETA provisions which is expressly mentioned in the federal E-Sign legislation. UETA 8(b)(2) provides that the operative provisions of UETA do not affect laws which require a record to be "sent, communicated or transmitted" by a specified method, such as a requirement that information be sent by mail. The federal legislation states in a subsection entitled "Prevention of circumvention" that this section of UETA should not be used to "circumvent" the provisions of the federal legislation. E-Sign 102(c). Apparently this section of UETA was viewed as providing States an opportunity to enact laws that would defeat the use of electronic methods of transacting by requiring traditional methods of delivery.

Although the injunction in E-Sign 102(c) inhibits the enforceability of newly-enacted State laws which impose these kinds of requirements, it may not reach State laws already in existence. A State which already enacted laws or regulations which prescribe such requirements, well prior to the enactment of the federal Act, should not be regarded as "circumventing" the provisions of the federal legislation. Therefore, this provision of UETA should be regarded as preserving existing laws which fall within its ambit, while the federal legislation would preempt only those laws which a State might later add which would have the effect of inhibiting parties in transacting electronically.

implied in UETA 5(b), which provides that "This Act applies only to transactions between parties each of which has agreed to conduct transactions by electronic means."

²⁹ Compare the discussion above of E-Sign 104(a), the interpretation of which is the subject of disagreement between the Senate and House sponsors. While the Senate sponsor

B. Recommended amendments to UETA and recommended changes in other New Jersey Statutes

If UETA is enacted in New Jersey, there are a number of amendments that should be made to the official text to conform it to certain provisions in federal E-Sign. In addition, at least one change should be made in the New Jersey Statutes, to repeal the current definition of the term "writing" in Title 1. These recommended amendments and repeals are set forth below.

UNIFORM ELECTRONIC TRANSACTIONS ACT

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]~~

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

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

(5) 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.

COMMENT

Although UETA drafters anticipated that States would exempt certain transactions and specific State laws from its operative provisions (see UETA 3(b)(4)), the extent to which this can be done consistently with federal E-Sign is limited. E-Sign 102(a) provides that States may not add any exemptions under UETA 3(b)(4) if they are "inconsistent" with the federal legislation. The federal legislation itself contains a list of additional exemptions not included in UETA. Because the exemptions listed in federal E-Sign, are not, by definition, "inconsistent" with federal E-Sign they can be added to a State enactment of UETA.³⁰ The additional federal exemptions should be added, not only for consistency with the scope of the federal law, but also because each of the exemptions from the rules of electronic transacting is supported by policy reasons articulated during the passage of the bill through the federal legislative process.

SECTION 21. EFFECTIVE DATE.

This Act takes effect immediately.

COMMENT

In light of the October 1, 2000, effective date of federal E-Sign, UETA should be enacted with an immediate effective date.

[NEW SECTION] CONSUMER TRANSACTIONS

a. Notwithstanding any other provision of this Act, if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions 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

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

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

(A) 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

³⁰ That these exceptions in E-Sign 101(c) may be incorporated into a State's enactment of UETA, even though they are not part of the "official" version of UETA, is supported both by textual analysis of the provisions and by the legislative history of the federal E-Sign legislation. E-Sign 102(a)(1) invites the enactment of State laws which "modify, limit or supersede" its provisions, provided that the enactment "constitutes an enactment or adoption of" UETA as approved and recommended by NCCUSL. The "official" version of UETA is typical of many NCCUSL Uniform Law proposals in that it contains certain optional and bracketed provisions, including 3(b)(4), which are included in anticipation of individual State variations with respect to those provisions. The only constraint in E-Sign 102(a)(1) on UETA 3(b)(4) exceptions is that they not be "inconsistent" with the provisions of the E-Sign legislation and that they not run afoul of E-Sign 102(a)(2)(ii) by favoring any particular form of electronic technology. See, in that regard, the statement of Senator Leahy on the floor of the Senate at the time the Conference Committee Report was presented to the Senate. "By contrast, the conference report does not preempt the laws of those States that adopt UETA, so long as UETA is adopted in a uniform manner. Such exceptions to UETA as a State may adopt are preempted, but only to the extent that they violate the principle of technological neutrality or are otherwise inconsistent with the federal statute." See Cong Rec. S5221 (June 14, 2000):

(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;

(B) 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;

(C) describing the procedures the consumer must use to withdraw consent as provided in (a)(2)(A) of this Section and to update information needed to contact the consumer electronically; and

(D) 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;

(3) the consumer

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

(B) 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

(4) after the consent of a consumer in accordance with (a)(1) of this section, 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

(A) 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 (a)(2)(A) of this section; and

(B) again complies with (a)(3) of this section.

b. Nothing in this Act 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.

c. If a law that was enacted prior to this Act 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).

d. 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 (a)(3)(B) of this section.

e. 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 subsection (a) 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 (a)(4) of this section may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this subsection.

f. 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 Act to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

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

COMMENT

This amendment to UETA incorporates the consumer protection provisions which are included in E-Sign 101(c). Although it may be argued that the federal consumer provisions continue to be effective in a State which enacts UETA despite the anti-preemption provisions of E-Sign 101³¹, they should be affirmatively embraced in this State's enactment of UETA regardless. Their inclusion in UETA provides, to the fullest extent possible, a single State legislative source for the law applicable to electronic transactions and resolves any questions regarding the continued applicability of E-Sign 101(c) which might give rise to

³¹ Presumably, the argument that would be made on this point is that the official version of UETA does not contain any provisions which "modify, limit or supersede" the consumer provisions in E-Sign 101(c), thus these provisions of federal E-Sign survive a State enactment of UETA. Supporting the above textual analysis of E-Sign is the following Statement of Senators Hollings, Wyden and Sarbanes, all of whom were members of the Conference Committee:

Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law . . . in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points. A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supercede or displace the requirement of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in section 101(c).

litigation. In addition, these consumer protection provisions are metitorious in their own right as they remedy some of the concerns that arise in electronic consumer transactions. Most significantly, these provisions require a commercial party seeking a consumer's consent to future electronic transactions, to take steps to assure that the consumer is able to conduct electronic transactions.

Note that the same analysis of the acceptability of adding the federal E-Sign exceptions applies equally to the consumer provisions: they are not, by definition, inconsistent with federal E-Sign, therefore a State enactment of UETA may include them without losing the "preemption effect" of E-Sign 102(a). See the further discussion of this point above in the Comment to UETA 3. SCOPE.

[NEW SECTION]. LEGISLATIVE FINDINGS.

The Legislature finds and declares:

that the adoption of the "Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000), popularly known as "federal E-Sign," encourages States to enact the Uniform Electronic Transactions Act proposed for adoption by the National Conference of Commissioners on Uniform State Laws; and

that the adoption of the Uniform Electronic Transactions Act will invoke the provisions of Section 102 of Pub. L. No. 106-229 which state that the federal law will no longer preempt the laws of an enacting State; and

that Section 102 of Pub. L. No. 106-229 also provides that a State, in enacting the Uniform Electronic Transactions Act, may "modify, limit or supersede" the provisions of the federal law; and

that it is desirable for this State to take the fullest possible advantage of the ability to "modify, limit or supersede" Pub. L. 106-229; and

that it is the intention of the Legislature that the adoption of the Uniform Electronic Transaction Act in this State modify, limit and supersede the provisions of Pub. L. No. 106-229 to the fullest possible extent permitted under the federal law.

COMMENT

Section 101(a) of the federal E-Sign legislation provides that a State may "modify, limit or supersede" by enacting the Uniform Electronic Transactions Act. This legislative findings section makes it clear that UETA is being enacted with that express purpose, to the fullest extent that it is permitted under the federal law.

Recommendations for Repeal

N.J.S. 1:1-2.4 Writing; written instruments; typewriting³²

COMMENT

N.J.S. 1:1-1.4 , which contains the general statutory definition of the term "writing," should be repealed, as it can be interpreted to be inconsistent with the general provisions of UETA. Note that the definition is not comprehensive, it states only that the term writing "includes" duplicates and typewritten documents.

³² N.J.S. 1:1-2.4 provides "Except as to signatures, 'writing' includes typewriting and the product of any other method of duplication or reproduction and 'written instruments' includes typewritten instruments and instruments so duplicated or reproduced."

IV. Consideration of additional legislation

The adoption of UETA has consequences that may require the adoption of corrective legislation, in addition to the possible reenactment of records retention requirements under UETA 12(f)(see discussion above).

A. Notarization

The Commission has some concerns over the effect of UETA 11, which permits electronic records to be notarized by affixing to (or "logically associating" with) the electronic record being signed, the same information that is required to be affixed to a traditional document. In other words, in place of a notary's holographic signature on a paper document, the notary's typed name, along with the typed name of the signer, is sufficient. Whatever anti-fraud purpose is served by the current requirement of a holographic signature on paper is largely negated if signatures on an electronic document can be represented simply by typing the name of the signatory and the notary.

The Commission believes that the Legislature should give further consideration to legislation that would require officers undertaking notarial acts to obtain and keep records of additional information concerning the identity of signers.³³ The requirement of personal presence before a notary is probably a greater protection against fraud than the requirement of a holographic signature on paper.

B. Land title recordation

If there were no federal constraints placed upon the substantive exemptions from UETA, this Commission would recommend that conveyances of an interest in land be exempted from its provisions. One of the major consequences of the adoption of UETA without exempting conveyances of an interest in land is the validation of deeds and mortgages and other conveyances of an interest in land which are executed electronically. However, there is currently no provision in New Jersey, either by law or in practice, for the recordation of a deed or mortgage in electronic form. Electronic filing of documents of title raises many policy and practical issues, not the least of which is the cost of the equipment that would be required to implement such a system.

³³ Senator Gormley introduced legislation to that effect in the last legislative session. See S311 (108th Legislature 1998) (copy attached). The Commission also believes that the requirement under current law that the signing, acknowledging or oath-taking party be in the personal presence of the notary or other officer who is undertaking the notarial act be made explicit rather than implicit in the New Jersey Statutes. There is a good deal of rhetoric which infects the discussion of electronic transacting, including frequent references to transactions taking place "in cyberspace." It should be made clear that UETA does not change the requirement that notarial acts take place in real space inhabited by the notary and the signing, acknowledging or oath-taking party, in immediate proximity to one another. The Official Comment to UETA 11 recognizes the requirement of personal presence in the examples that are given of how the notarization of an electronic document would be accomplished, but the point is not strongly made.

The effects under New Jersey law of validating an electronic deed or mortgage that cannot be recorded in the land records in electronic form is highly problematic. For example, even though an unrecorded conveyance of property is valid between the parties, see N.J.S. 46:22-1, the Recording Act provides that a "deed or instrument" until it is "duly recorded or lodged for record" in the county recording office is "void and of no effect against subsequent judgment creditors without notice..." Id. It seems unlikely that a title company would insure a transaction which utilized an electronic deed or that a lender would finance it if the deed could not be recorded. Moreover, recognition of such transactions would be contrary to the policy expressed in the Recording Act, that favors publicity of land titles and reliance on the public land records. The existence of valid documents of title which are not included in the chain of title which is searchable in the land records is contrary both to the private interests of the parties to transactions as well as to the public interest in the stability of the land title recordation system. See N.J. Bank v. Azco Realty, 148 N.J. Super. 159, 166-67 (App. Div. 1977) where the court stated that the Recording Act "was designed to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title to lands within this state with confidence.

The drafters of UETA did not consider it a problem, that a State which enacts UETA would be validating electronically-executed deeds and mortgages without necessarily providing for their filing in the land records. See UETA 3 SCOPE, Comment 3. The Comment blithely assumes that a "paper deed" representing an electronically-executed transaction may be filed in the land records of any given State. Currently, however, there is no express provision in the law of the State of New Jersey for the filing of a paper copy of an electronically-executed deed or mortgage, and it is unclear whether such a document would be required to be accepted for filing. The law should be clarified to provide for such filings as it is highly undesirable to have open questions regarding the ability to record documents affecting title to real estate.

In the short run the proliferation of electronic deeds and mortgages which cannot be recorded is probably not a problem, as title companies are likely to be a practical constraint on the widespread use of electronic documents and signatures in conveyancing for the time being. Nevertheless, consideration should be given to the subject of title recordation and any changes that should be made in the statutes to accommodate the reality of such transactions, as they will surely become more prevalent in the future.