LRB-1536

2001 DRAFTING REQUEST

Bill

Received: **12/17/2000**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget-in 6-0777**

By/Representing: **Caucutt**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact: **Amy Moran - DOA**

Alt. Drafters: **rmarchan**
rkite
jkreye
nelsorp1

Subject: **Bus. Assn. - miscellaneous**
Counties - miscellaneous
Courts - civil procedure
Courts - miscellaneous
Fin. Inst. - banking inst.
Fin. Inst. - miscellaneous
Fin. Inst. - securities
Munis - miscellaneous
State Finance - miscellaneous
State Government - miscellaneous
Trade Regulation - other

Extra Copies:

Pre Topic:

DOA:.....Caucutt -

Topic:

Uniform Electronic Transactions Act

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required

LRB-1536

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 01/05/2001 rmarchan 01/08/2001 kuesejt 01/08/2001	csicilia 01/09/2001		_____ _____ _____ _____ _____ _____			
/1			jfrantzc 01/10/2001	_____ _____	lrb_docadmin 01/10/2001		
/2	kuesejt 02/05/2001	csicilia 02/05/2001	pgreensl 02/05/2001	_____ _____	lrb_docadmin 02/05/2001		
/3				_____ _____	lrb_docadmin 02/08/2001		

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/2	ijs	2/5 01	2/6 pg	2/5 pg/cmh			

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt 01/05/2001 rmarchan 01/08/2001 kucscjt 01/08/2001	csicilia 01/09/2001		_____ _____ _____ _____ _____ _____			
/1			jfrantze 01/10/2001	_____ _____	lrb_docadmin 01/10/2001		

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<END>

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Extra Copies:

Dan Caucutt

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DOA:.....Caucutt -

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			1/11/10	1/11/10			

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	kuesejt						

FE Sent For:

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Marchant, Robert

From: Kuesel, Jeffery
Sent: Friday, February 02, 2001 4:48 PM
To: Champagne, Rick; Kite, Robin; Kreye, Joseph; Marchant, Robert; Nelson, Robert P.
Subject: FW: Uniform Electronic Transactions Act

-----Original Message-----
From: Caucutt, Dan
Sent: Friday, February 02, 2001 4:21 PM
To: Kuesel, Jeffery
Subject: FW: Uniform Electronic Transactions Act

Comments

-----Original Message-----
From: Moran, Amy
Sent: Friday, February 02, 2001 4:19 PM
To: Caucutt, Dan
Cc: Reines, Bruce
Subject: RE: Uniform Electronic Transactions Act

Dan,

Attached are our comments on the first draft of Wisconsin UETA legislation LRB-1536/1dn. Please thank the drafting team for their excellent work on this complex piece of legislation.

As their document was in PDF format, I had to cut and paste their text into a Word document so I could respond, hence the formatting on the attached may look a bit different from the PDF format.

Please feel free to call or have the drafting team call with any questions.

Regards.

Amy

Final Reply to DRAFTER.doc

261-6616

-----Original Message-----
From: Caucutt, Dan
Sent: Wednesday, January 10, 2001 5:39 PM
To: Moran, Amy
Subject: Uniform Electronic Transactions Act

FYI

-----Original Message-----
From: Frantzen, Jean
Sent: Wednesday, January 10, 2001 1:05 PM
To: Caucutt, Dan
Cc: Currier, Dawn; Hanaman, Cathlene; Haugen, Caroline
Subject: LRB Draft: 01-1536/1 Uniform Electronic Transactions Act

Following is the PDF version of draft 01-1536/1.

<< File: 01-1536/1 >> << File: 01-1536/1dn >>

DEPARTMENT OF ADMINISTRATION REPLY TO DRAFTER'S NOTE FROM THE LEGISLATIVE REFERENCE BUREAU

LRB–1536/1dn
JTK/RM/RK/RC/RN/JK:cjs:jf

January 10, 2001

1. This draft represents the combined efforts of the LRB legal staff to engraft the Uniform Electronic Transactions Act (UETA) into Wisconsin law. This draft attempts to meet Wisconsin's drafting standards while also attempting to achieve the intent of UETA, which is to encourage uniformity in the law of electronic commerce. The draft also attempts to avoid preemption under the primary electronic commerce provisions of the federal Electronic Signatures in Global and National Commerce Act, commonly known as "E–sign." One of the ways of avoiding preemption under those provisions of E–sign is to enact a law that constitutes UETA. See p. 3 of the analysis for a discussion of the primary electronic commerce provisions of E–sign and p. 5 of the analysis for a discussion of preemption issues. We have limited our changes to the recommended version of UETA to minor and nonsubstantive changes, made for the purposes of effecting routine Wisconsin drafting protocol and better reflecting the obvious intent of UETA.

Incorporating UETA into Wisconsin law has been an extremely difficult task. Joint Rule 52 (6) requires the LRB, in drafting, to specifically refer to, and amend or repeal as necessary, all parts of the statutes that are intended to be superceded or repealed by a proposal, insofar as practicable. We have carried out this responsibility to the maximum extent possible. However, because certain provisions of UETA are susceptible to varying interpretations, the effect of these provisions on current statutes will, in some cases, depend upon which interpretation the courts eventually adopt. Sometimes, we were able to consult the prefatory note and official comments accompanying UETA, in order to ascertain the intent of these provisions and their potential effect on other statutes if the interpretation suggested by the prefatory note and comments is adopted. Although the prefatory note and comments have no legal effect, in the past, courts have often relied on the prefatory notes and comments to other uniform laws when interpreting ambiguous provisions of those laws. In many cases, though, it was not possible to ascertain the intent, even with reference to the prefatory note and comments. In these cases, in order to encourage uniformity in the law of electronic commerce and avoid federal preemption under E–sign, we have not clarified the provisions.

1. Reply: Thanks.

2. You requested a separate budget draft to make the definition of "electronic signature" in s. 137.04 (2), stats., consistent with that used in UETA and to provide DOA with rule–making authority relating to the use of electronic signatures by governmental units. In the instructions to that request, you referred to 1999 AB–267. This draft incorporates that request, using SSA–1 to 1999 AB–267 as a general guide to your intent. This draft also attempts to reconcile that request with the request to draft UETA. Under this draft, s. 137.05, stats., is renumbered to be part of UETA and amended consistent with the intent of UETA and s. 137.25 (2) is created consistent with your request concerning rule–making authority. Section 137.06, stats., is repealed

because it is covered by UETA, s. 137.04, stats., is repealed because the definitions established in that section are no longer needed under UETA, and s. 224.30 (2), stats., is repealed because the draft gives DOA primary rule–making authority.

2. 1 Reply : Decisions here in look good. Thanks.

Please note that UETA likely impacts the scope of DOA's and the secretary of state's potential rule–making authority. Although the vast majority of governmental activities and a significant number of notarizations may be subject to rules promulgated under your request, the rules would likely not regulate the transnational, market activities of governmental units and notaries public. Rather, these transnational, market activities would be governed by the core provisions of UETA that authorize electronic transactions and notarizations relating to transactions. See, for example, proposed ss. 137.12 (1), 137.16 (1), and 137.19. However, if you add rule–making authority into UETA's core provisions, you may risk triggering preemption under the federal E–sign law. Therefore, this draft does not take that approach

Add 137.25 (title) Add ref to 137.25(2)(6) in 137.19.

2. 2 Reply: We expect and intend the legislation to provide DOA and the Secretary of State rule-making authority over electronic notarization under 137.01(4)(a) (i.e. *every official act*) including transnational documents. Foreign countries often require documents to be notarized before they will accept them. Do we have this covered as the bill is currently structured? Do we need to reference the joint rule-making into 137.04(a)?

OK. But this is inconsistent w/ UETA + risks preemption

Also, please note that, unlike 1999 AB–267, this draft does not contain a delayed effective date. Please let us know if you desire a delayed effective date in order to avoid any potential problems that may otherwise arise after the bill is enacted but before emergency rules are in place.

2.3. Reply: Fine.

3. Current state law uses the term "record" as a noun about 4,000 times. Almost uniformly, the term "record" is currently used more narrowly than the word "record" in proposed s. 137.11 (12), the distinction being that "record" under current state law is generally used to describe something that is kept or required to be kept while "record" in UETA is apparently intended to cover anything other than an oral communication. In other words, the drafters of UETA apparently intended "record" to mean "document." The use of different meanings for the same term is contrary to normal drafting procedure and it may cause some confusion. This draft, however, maintains the usage of the word "record" in UETA (proposed subch. II of ch. 137), but generally retains other terminology outside UETA to avoid confusion in other statutes.

3. Reply: Can we refine the definition of "record" in 137.11(12) as applying to this subchapter?

4. The draft defines "electronic" in proposed s. 137.11 (5) and "record" (document) in proposed s. 137.11 (12). The draft then defines "electronic record" in proposed s. 137.11 (7) in a way that is inconsistent with the definition of "electronic" and "record." Under the draft, a "record" must be *inscribed* on a tangible medium or *stored* in an electronic or other medium and be *retrievable* in a perceivable form. An "electronic" record is a record having *electrical, digital, magnetic, wireless, optical, electromagnetic,* OR similar capabilities. However, an "electronic record" is a record that is *created,*

generated, sent communicated, received, or stored by electronic means. The resulting confusion could be mitigated by deleting the definition of "electronic" and building all of the operative characteristics into the definition of "electronic record."

Did nothing per Item 3 ✓

4. Reply : It would seem that the definition of electronic is applicable to both the definition of "electronic record" and the definition of "electronic signature." So, we would either have to alter both of these definitions as your suggest, by adding in the operative characteristics of "electronic," or live with the awkwardness implicit in UETA. Resolution of this issue is related to how we chose to resolve issues raised in your points under #31, para 1 and whether sec. 180 needs to define consistently with UETA.

5. This draft uses the term "governmental unit" rather than "governmental agency" because state authorities are included within the definition and, in Wisconsin, state authorities are not agencies. The draft also broadens the definition of "governmental unit" in proposed s. 137.11 (9) to include certain Wisconsin entities that might not otherwise be included in the definition, which appears to be consistent with the intent of the drafters of UETA. The only effect is on the optional provisions (in the draft, the proposed treatment of s. 137.05, stats., and proposed s. 137.26). We think this does not interfere with uniformity because the draft retains the substance of the UETA definition in full.

5. Reply : Fine.

6. Under proposed s. 137.11 (7) and (12), the definition of "electronic record" and "record" include voice mail communications. Currently, certain documents such as contracts, applications, deeds, licenses, or tax returns must be evidenced in paper form. Under these definitions, these documents may potentially be evidenced by voice mail communications instead. To address this issue, you may wish to consider at least limiting the application of the optional sections of UETA (the treatment of s. 137.05, stats., and proposed s. 137.26) to exclude voice mail documents.

Insert 10-3 DWOTE

6. Reply : The assumption is that s. 137.13(5) and s. 137.14 requirement for consistency with other law would take care of this. WRONG. **However, we propose adding exceptions for deeds and some other critical documents under s. 137.12 (1). We intend here that these areas are expected to keep their records in paper form and that they will not be authorized by this legislation to use electronic records and electronic signatures at this time. Most of these exceptions are lifted from the federal "E-Sign" legislation and although UETA attempts to address these issues indirectly by reference to requirements under other laws, we believe it will enhance clarity to make these areas explicit.**

DWOTE Treatment of 137.12(5)

Please add into the exceptions the following:
To 137.12(2)(a) add in "codicils" if they are permitted to be used under Wisconsin law
To 137.12 (2) add the following :

- **Deeds** — NOT in fed. laws. This is inconsistent w/ e-sign AND UETA DWOTE
- **Any law governing adoption, divorce or other matters of family law;**
- **Court orders or notices, or official court documents required to be executed in connection with court proceedings;**
- **Any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials**
- **Any notice of**
  - **Cancellation or termination of utility services (including heat, water, and**

But do we need to preserve notarization authority in these cases, per Item 2 above? No, DWOTE

These exceptions do more than require these things to be kept in paper form. They prohibit elec. dealings unless otherwise authorized

power)

- **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**
- **Cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or**
- **Recall of a product or material failure of a product that risks endangering health or safety; or**

7. Under proposed s. 137.12 (1), UETA applies to electronic records (documents) and electronic signatures relating to a "transaction." A "transaction" is defined in proposed s. 137.11 (15) to mean action between persons relating to the conduct of business, commercial, or governmental affairs. The prefatory note and comments suggest that the application of UETA to governmental affairs may be limited to activities where the government is a market participant (for example, governmental procurement). The text does not seem to explicitly reflect that interpretation. However, because the optional sections of UETA (the treatment of s. 137.05, stats., and proposed s. 137.26) clearly contemplate application beyond "transactions," this draft clarifies in proposed s. 137.12 (1) that the optional sections affect matters other than "transactions." Another issue that has been raised with respect to the definition of "transaction" is that the text does not clearly indicate that UETA applies to consumer–to–consumer transactions, even though the comments suggest that it does.

7. Reply : The primary focus of UETA is on enabling e-commerce hence the business emphasis and the frequent references to "parties." The definition of transaction refers to " persons" which we agree could include individuals contracting between themselves.

8. Because some Wisconsin case law suggests that regulatory statutes will not be applied to the state absent an express indication by the legislature that they should so apply (see, for example, *State ex rel. Dept. of Public Instruction v. ILHR Dept.* 68 Wis.2d 677, 681 (1975)), and because UETA is clearly intended to regulate state conduct, at least in part, this draft provides in proposed s. 137.12 (5) that UETA applies to this state, unless otherwise expressly provided. We think this does not interfere with uniformity because the text retains all of the substance of UETA and this clarification carries out the intent of UETA.

8. Reply : Fine

9. You may want to clarify the interaction of proposed ss. 137.13 (2) and 137.15 (1), in order to make the intended result of these statutes more apparent. Proposed s. 137.13 (2) states that the subchapter of the statutes that constitutes UETA only applies to transactions between parties who have agreed to conduct transactions electronically. Proposed s. 137.15 (1) states that a document or signature may not be denied legal effect solely because it is in electronic form. The manner in which these two statutes relate could be more clearly stated.
For example, a problem may arise if a person (A) makes a written offer to contract with another person (B), and if B then communicates its acceptance in electronic form. If A refuses to deal electronically, B may argue that the acceptance is enforceable under proposed s. 137.15 (1). According to B, the only reason the acceptance would not be enforceable is because it is in electronic form and, under proposed s. 137.15 (1), this

reason is insufficient to deny the enforce ability of the document. According to A, however, proposed s. 137.15 (1) does not apply to the transaction because A did not consent to deal electronically. This result is dictated by proposed s. 137.13 (2), which applies a consent requirement to the entire subchapter that constitutes UETA. To make this result more straightforward, you may want to clarify that proposed s. 137.15 applies only to transactions between consenting parties. This type of clarification is currently used in proposed s. 137.16.

9. Reply: We read 137.15 (1) as speaking to the document itself rather than the underlying transaction. (i.e. the document cannot be denied legal effect or enforce ability *solely* because it is in electronic form.) In the hypothetical, it is not the document that is being challenged, but rather a substantive area of law (i.e. the question of "acceptance"). UETA is not intended to override substantive areas of law, only to permit them to be conducted electronically where agreed to and appropriate. Construction is to be consistent with other applicable law (s. 137.14) The decision as to whether or not an agreement was reached, i.e. whether there was acceptance, would be judged from the context and behavior of the parties (s. 137.17) Requiring both parities to agree to deal electronically is critical to the legislation as ins. 137.13 (2) as reinforced by s. 137.13(3).

10. Proposed s. 137.13 (3) provides that a party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. In practice, this provision may be difficult to apply because it may be unclear when one transaction ends and another begins.

10. Reply: True, difficult, but not impossible. We trust the market, parties and adjudicators to figure it out and find acceptable ways of delineating.

11. Proposed s. 137.14 (3) provides that UETA shall be construed and applied to effectuate its general purpose to make uniform the law with respect to the subject of UETA among states enacting it. This draft provides that UETA shall be construed and applied to effectuate its general purpose among states enacting laws *substantially similar* to UETA. The reason that we loosened this a little is that this draft is not identical to UETA (although we believe it preserves the substance of it) and most states enacting UETA have not enacted verbatim versions. We think this is consistent with the intent of the drafters.

11. Reply: Fine.

12. Proposed s. 137.15 (4) provides that if a law requires a signature, an electronic signature satisfies that requirement in that law. Although the comments indicate this was not intended, under the text of proposed s. 137.11 (8), an "electronic signature" may be associated with a nonelectronic document. Therefore, the effect of proposed s. 137.15 (4) is to permit an electronic signature to be used to sign a nonelectronic document. In UETA **SECTION 18**, which is optional (see the treatment of s. 137.05, stats., by this draft), we have limited the use of electronic signatures to sign electronic documents, since this is consistent with the intent of UETA and no preemption issue arises under this optional provision.

12. Reply: Fine.

13. You may also want to clarify the interaction of proposed s. 137.16 (1) and (2). Proposed s. 137.16 (1) generally permits the parties to a transaction to satisfy any

writing requirement through the use of an electronic record. However, proposed s. 137.16 (2) (b), among other things, preserves the effect of any law that requires a record to be communicated by a specified method. To the extent that "in writing" is a specified method of communicating a record, this provision may be read to override proposed s. 137.16 (1). You may avoid this result by clarifying that proposed s. 137.16 (2) (b) does not apply to writing requirements covered by proposed s. 137.16 (1).

13. Reply: 137.16 (1) speaks to requirements for parties who have agreed to transact electronically – the primary subject of the subchapter. It addresses the requirements for these parties to "provide, send or deliver in writing" and requires that the "record be capable of retention by the recipient at the time of receipt" and then defines that capability. This capability-of-being-read requirement cannot be waived by agreement under this chapter, but can be varied by agreement to the extent allowed by law outside this chapter (s. 137.16(4)(a)).

s. 137.16(2) speaks to requirements of law *other than this subchapter* for a record to be *"posted or displayed, sent, communicated or transmitted* by a specified method, or formatted in a certain manner.
This section would seek to address writing requirements other than contracts between parties and provides public protection for those government functions such as posting meeting notices under open meeting laws, serving papers etc.

Renumbering this section consistently with e-sign might help clarify. We suggest we renumber
Proposed s. 137.16 (3) to proposed 137.16(2)(d)
Proposed s. 137.16(4) and (4)(a) and (4)(b) to proposed s. 137.16(2)(e) and (2) (e)(1) and (2)(e)(2)

14. Proposed s. 137.20 (1) provides that if a law requires that a document be retained, the requirement is satisfied by retaining the information set forth in the document as an electronic document which accurately reflects the information set forth in the document *after it was first generated in its final form* as an electronic document or otherwise. The comments indicate that this text is intended to ensure that content is retained when documents are reformatted. The text, however, may be interpreted to permit earlier versions of documents to be destroyed, notwithstanding retention requirements. Because it is not unusual to retain earlier versions of some documents for reference, you may want to clarify that this subsection is not intended to permit the disposal of these versions.

14. Reply: Please add into s. 137.20 clarification you suggest (e.g. " this subsection is not intended to permit the disposal of earlier version of final documents where these versions have reference value and retention requirements ."

15. Proposed s. 137.20 (2) provides that document retention requirements in proposed s. 137.20 (1) do not apply to any information the sole purpose of which is to enable a document to be sent, communicated, or received. The comments suggest that if ancillary information is not retained, an electronic document may still be used to satisfy a retention requirement. Ancillary information, such as a date, time, or address, may be significant in some cases, and you may not want to permit destruction of this information.

15. Reply: Clarification would be good here. Something like "that information important to understanding the record, such as date and time stamps, transmittal messages and other similar

contextual information should be retained where it is important to the meaning of a record required to be saved."

16. Proposed s. 137.20 (3) provides that a custodian of a document may utilize the services of another person to comply with electronic retention procedures. If the application of UETA extends beyond transactions, that is, beyond situations where a governmental unit is acting only as a market participant, this infers that a custodian of public records may transfer those records to private persons. However, if the application of UETA is interpreted consistently with the prefatory note and comments to UETA, this provision generally would not apply to a public records custodian's retention of most public records.

16. Reply: We've broadened the application beyond transactions in the optional section. Even if custodians may transfer the records (i.e. out source) one would think they still have their custodial obligations under state law.

17. Proposed s. 137.20 (1), (4), and (6) provide essentially that unless a law enacted after UETA provides otherwise, electronic retention is sufficient to satisfy an existing retention requirement. This may be interpreted to authorize any public or private custodian to destroy original records if an electronic copy is retained. Although the application of these subsections is limited if UETA applies only to transactions, this authority overlaps existing state law that already provides for electronic retention, but requires that it be done in certain ways to preserve the evidentiary value of records and to ensure quality control. See ss. 16.61 (7) and (8), 16.611, 16.612, and 19.21 (4) (c), stats.

17. Reply: Can we clarify by adding onto 137.20 a section (8), or wherever you feel it best fits, that as to public records, existing requirements are established to preserve the evidentiary value of records and provide for quality control and that this section acknowledges these requirements (as listed above, See ss. 16.61 (7) and (8), 16.611, 16.612, and 19.21 (4)(c), stats.)?

18. Proposed s. 137.20 (5) provides that if a law requires retention of a check, the requirement is satisfied by retention of an electronic document containing the information on the front and back of the check in the manner provided in the draft. The term "check" is not defined in the draft. It is unclear whether this provision applies to other kinds of negotiable instruments, such as share drafts and money orders. However, since proposed s. 137.20 (1) and (4) suggest the same thing as proposed s. 137.20 (5) in more general terms, it is possible that proposed s. 137.20 (5) may be interpreted to be redundant.

18. Reply : Stet. It isn't hurting anything and keeps us in synch with the Model Act.

19. Proposed s. 137.20 (6) provides that an electronic document satisfies a law requiring retention of a document for evidentiary, audit, or like purposes, unless a law enacted after UETA specifically prohibits the use of an electronic document for retention purposes. Insofar as this provision attempts to force future legislatures to express their intent in a particular way in order for their laws to have legal effect, this provision is unenforceable. *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 363–369 (1983). In addition, the qualifying language "for evidentiary, audit, or like purposes" appears to put this subsection in tension with proposed ss. 137.15 (3) and 137.20 (1) and (4), which contain similar statements but do not include the qualifying language.

19. Reply: Agreed that this section will likely carry little legal weight given your analysis. Nonetheless it has educative value and we'd like to leave it in as a directional statement. Do we need to add a severability clause to protect the statute?

20. Proposed s. 137.20 (7) provides that the retention provisions of UETA do not preclude a governmental unit of this state from specifying additional requirements for any document subject to the jurisdiction of the governmental unit. This subsection seems to contravene proposed s. 137.20 (1), (4), and (6), which provide that compliance with the retention requirements in those subsections is sufficient in some cases. In addition, it is unclear from the text whether this provision applies to governmental documents or to nongovernmental documents subject to a governmental unit's jurisdiction. The comments suggest that the latter interpretation was intended, but the authority of a particular governmental unit to exercise control over specific private documents may be unclear in some cases. Finally, it is unclear whether this subsection is intended to grant rule–making authority or merely to reference existing rule–making authority, if any.

20. Reply : If we add in an 137.20(8) or the like as suggested above (see question 17 reply), this should clear up this challenge. I would take the subsection as referencing existing rule making authority rather than granting new.

21. Proposed s. 137.23 (2) provides that an electronic document is received when it enters a recipient's designated information processing system and is in a form capable of being processed by that system, and proposed s. 137.15 (1) and (3) permit electronic documents to be substituted for nonelectronic documents and require that they be given the same legal effect. These provisions may have the result of altering laws under which the date of receipt of a document filed with a governmental unit is the date on which a hard copy is received or postmarked, so that electronic filing constitutes receipt instead. The application of this subsection depends upon whether UETA's application to governmental units is limited to transactions and whether the requirement for mutual consent in proposed s. 137.13 (2) overrides proposed s. 137.15 (1) and (3), which do not mention mutual consent.

21. Reply: Mutual consent should override all in the bill as to the legality of the transaction. I read 137.15 as applying to the legality of the form of the information (enabling documentation of the transaction to be electronic), rather than to the legality of the transaction itself. (See reply to question 9).

.22. Proposed s. 137.23 (4) (a) provides that, generally, an electronic document is deemed to be sent from the sender's place of business and, if the sender does business at more than one location, an electronic document is deemed to be sent from the location that has "the closest relationship to the underlying transaction." To the extent that an electronic document may evidence a sale, with the seller receiving payment electronically, a business could use proposed s. 137.23 (4) (a) to argue that a sale occurred at a location where the business is not subject to an income tax or franchise tax rather than at a location, such as this state, where the business is subject to such taxes. If a court accepted that argument, the business would receive income from such a sale but avoid paying any tax on that income. Although the comments to UETA seem to indicate that the above scenario is not an intended consequence of proposed s. 137.23 (4) (a), you should be aware that, under the proposed language of that paragraph, that

scenario is possible.

22. Reply: Thanks. Under your scenario, I think a basic choice of law/conflict of law analysis would seek to reach a similar conclusion as the statute proposes – seeking the closest nexus of the transaction. At this point in time, jurisdiction issues in the electronic age are alive and well as we carve out new business rules and laws to accommodate the new technologies.

23. Proposed s. 137.23 (7) treats the issue of what law applies when an electronic document is purportedly but not actually sent or received. Although the text of this subsection refers to "the legal effect of the sending or receipt," the provision actually seems to address the legal effect of a *failure* to send or receive an electronic document.

23. Reply: Agreed.

24. Unlike the primary electronic commerce provisions of E–sign, proposed s. 137.24, relating to transferable records (electronic versions of certain documents under the Uniform Commercial Code), may be preempted by E–sign because it is more expansive than current law under E–sign. However, because it is possible to comply with E–sign and proposed s. 137.24, it is also possible that these provisions may be interpreted to be consistent with one another, in which case proposed s. 137.24 would not be preempted by current law under E–sign. If you would like more information on this issue or would like to discuss the factors that a court may apply in analyzing this issue, please feel free to call.

24. Reply: As I reads the federal legislation, we can be exempt from e-sign preemption by making specific reference to E-sign (see E-sign s.102(a)(2)(B)). Please add the reference that this Wisconsin UETA is being passed in full awareness of the "Electronic Signatures in Global and National Commerce Act" or however you feel it is best phrased to assure the exemption.

25. **SECTIONS 17** to **19** of UETA are optional. **SECTION 17**, which directs governmental units to determine whether and to what extent they will create and retain electronic records and convert electronic records to written records, is deleted because it largely reflects current law. See, for example, ss. 16.61 (5) (a) and 19.21 (4) (c), stats. The coverage of these and other current statutes, while broad, is arguably not quite as broad as UETA **SECTION 17** because the operative term "state agency" is more narrowly defined in s. 16.61, stats., and the operative term "local governmental unit" is not defined in s. 19.21, stats. This draft, in contrast to current law but consistently with the intent of UETA, incorporates a broad definition of "governmental unit." However, since the legislature has addressed this issue in this state, we decided not to revisit the issue in this draft.

25 Reply: Please include Section 17 included in our act, using the term "governmental units" as earlier in this legislation.

26. **SECTION 18**, which directs governmental units to determine whether and to what extent they will send and accept electronic records and electronic signatures, is replaced by s. 137.05, stats., which is renumbered as proposed s. 137.25 (1) and amended by this draft to better conform to the substance of **SECTION 18**.

26 Reply : Fine. Please add to section 137.25(2) a third section that " If another bill transfers

enterprise technology management responsibility from the Department of Administration to another Department, the responsibility for establishing standards will move with the responsibility for enterprise information technology" unless you can find a better way to insert this thought into both this section and the standards section (s. 137.26) where we need to repeat the same caveat.

27. **SECTION 19**, which permits governmental units to encourage interoperability between jurisdictions, is retained as proposed s. 137.26 but is significantly clarified. This draft also broadens the definition of "governmental unit" to employ Wisconsin terminology and ensure that all Wisconsin governmental units are covered, which appears to be consistent with the drafters' intent.

27. Reply: Please amend 137.26 to read

(1) "The Department of Administration shall adopt standards regarding the receipt of electronic records or electronic signature under s. 137.25, that promote consistency and interoperability with other requirements of other governmental units of this state, other states, the federal government and non-governmental persons interacting with governmental units of this state. Any standards so adopted may include alternative provisions if warranted to meet particular applications.

Also please add something like (2) "If any governmental unit, prior to the adoption of standards by the Department of Administration, adopts standards regarding the receipt of electronic records or signatures, these standards must also promote consistency and interoperability with other requirements of other governmental units of this state, other states, the federal government and non-governmental persons interacting with governmental units of this state.

Also, please add something like (3) " If another bill transfers enterprise technology management responsibility from the Department of Administration to another Department, the responsibility for establishing standards will move with the responsibility for enterprise information technology."

28. **SECTION 22** of the original draft provides for the state to insert its desired effective date. Since we have no instruction on this point, we have not inserted any effective date. Under this draft, the act takes effect on the day after publication.

28. Reply: Fine. We are not seeking a delayed implementation date for the statute.

29. **SECTION 3** (b) (4) of UETA allows states to insert exemptions for certain transactions from the application of UETA. This draft does not insert any exemptions under this **SECTION** of UETA. Under sec. 102 (a) (1) of E–sign, any exemption enacted under this **SECTION** of UETA is preempted to the extent that the exemption is inconsistent with E–sign. If you desire to insert any additional exemptions, please let us know. However, you should be aware that, in most cases, it will likely be difficult to predict whether an exemption is preempted by E–sign.

29 Reply: Please see request for added exemptions (reply to question 6). These exemptions are same as carried in e-sign. We should be out from under preemption by virtue of passing UETA and acknowledging the existence of e-sign (see reply to question 24 above).

30. There are numerous provisions in current law that require that a notice, request, statement, application, document, or other information (notice) be provided to a governmental unit in writing or that the notice be sent or mailed, suggesting that it

be provided in written form. Under current law in s. 137.05, stats., and under this draft in proposed s. 137.25, most of those notices may be provided in electronic form if the governmental unit consents to receiving the notice in electronic form. Without an examination of each of those notice provisions, it is not possible to determine whether any particular provision should be amended to specify that the notice may only be furnished in written form and not in electronic form because, for example, electronic notice was not intended or contemplated by the provision when it was enacted. Because this issue arises under current law, because the application of UETA to each of these provisions is not completely clear, and because it is impractical to examine each of these provisions, the draft does not treat any of these provisions. Consequently, under this draft, as under current law, most of the provisions in current law requiring a notice to be given to a governmental unit in writing or to be sent or mailed to a governmental unit, may be satisfied by furnishing the notice in electronic form if the governmental unit consents to receive it in that form.

30 Reply : Agreed. Most problematic is the provision of notice *by* government (see reply to question 13).

31. This bill raises two issues relating to ch. 180, stats., regarding corporations. Chapter 180, stats., currently permits the use of electronic transmissions and electronic notices. However, the definition of "electronic transmission" in s. 180.0103 (7m), stats., relies upon an understanding of the term "electronic" that may be different from the meaning of "electronic" under UETA (proposed s. 137.11 (5)). You may want to harmonize s. 180.0103 (7m), stats., with the definition of "electronic" under UETA.

30. Reply: Good idea. DFI advises us that we need input from the State Bar on this, let's let it go as is now.

Second, s. 180.0141, stats., permits the use of an electronic notice under ch. 180, stats., but, unlike UETA, does not require the receiving party to consent to receive the notice in an electronic format. It is unclear how this provision would work in conjunction with UETA. The application of UETA may depend upon whether the receiving party consents to receive the electronic notice. Under this interpretation, UETA would apply if the electronic notice is sent with the consent of the receiving party but would not apply if the electronic notice, consistent with s. 180.0141, stats., is sent notwithstanding the receiving party's failure to consent. It may be difficult to determine in a specific case whether a party has consented to receive the electronic notice or has received the electronic notice as a result of the unilateral action of the sender. If you would like to clarify the interaction of UETA and s. 180.0141, stats., please let us know.

31. 2 Reply: As above, DFI advises this needs to be worked out with the State Bar, let's let it go as drafted for now.

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Miller, Steve

From: Caucutt, Dan
Sent: Friday, December 15, 2000 3:16 PM
To: Miller, Steve
Subject: E-Government Budget Drafts

Steve: a couple of drafts for the budget related to e-gov. Drafters should feel free to contact the requester(s) below, if needed.

-----Original Message-----
From: Reines, Bruce
Sent: Friday, December 15, 2000 3:14 PM
To: Caucutt, Dan
Cc: Moran, Amy; Puntillo, Susan - DOA
Subject: FW: E-Government Related Legislative Issues

Dan:

Could you please ask the LRB to begin drafting these suggestions for the E-gov initiative in the biennial budget. I would suggest that they be created as separate drafts. If you or LRB has questions, please feel free to contact Amy. Thanks.

-----Original Message-----
From: Moran, Amy
Sent: Friday, December 15, 2000 2:32 PM
To: Reines, Bruce
Cc: Puntillo, Susan - DOA
Subject: E-Government Related Legislative Issues

Bruce,

There are a couple of legislative issues critical to the e-government initiative. These both relate to electronic signatures. Can we arrange to have the governor's office request drafting on the following signature-related matters?

1. ***Wisconsin Electronic Signature Legislation*** (1997 Act 306) Modify existing electronic signature legislation to (1) bring definition of electronic signature in line with states' efforts at uniformity as expressed in the Uniform Electronic Transactions Act and (2) move the rule making authority for government related signatures from DFI to DOA.

Background: These changes were captured in the last legislative session in AB 267 as restated in AB 953. They are consistent with the desire of the Governor's Commission on Electronic Signatures (www.esignatures.org) and with the interest of Department of Financial Institutions who supported these changes in the last session. The Wisconsin statute goes beyond the issue
commercial transactions and covers as well issues such as filings, certifications etc.

Not addressed in our current legislation is the question of Certification Authorities and whether or not the state wishes to license them. These authorities are necessary to the provision of digital signatures, the most secure of signature techniques. Many other states have put in place licensing provisions and encouraged licensing by providing reduced liability to those authorities licensed.
There was some discussion about this being addressed in Adminsitrative Rules, but reduced liabilities seem to be beyond the scope of rule making and most appropriately addressed by statute.

2. ***Uniform Electronic Transactions Act (UETA)*** Introduction of the Uniform Electronic Transactions Act (UETA) as recommended by the National Conference of Commissioners on Uniform State Law (NCCUSL).

Background: UETA is a model act designed to enable electronic commerce. Adoption of UETA will enable Wisconsin
to join the 23 other states that have passed the act to date. Passage will remove us from federal preemption of the e-sign bill. Governor Thompson supported UETA in his State of the State address last year as a cornerstone to electronic commerce. The bill requires sponsorship. for more information see
http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ueta.htm et seq.

Please let me know if you need any further information.

Regards.

Amy

SENATE SUBSTITUTE AMENDMENT 1,
TO 1999 ASSEMBLY BILL 267

March 14, 2000 – Offered by COMMITTEE ON PRIVACY, ELECTRONIC COMMERCE AND FINANCIAL INSTITUTIONS.

AN ACT ***to repeal*** 137.04 (1), 137.06 (1) (e) and 224.30; ***to renumber and amend*** 137.05; ***to amend*** 137.05 (title); ***to repeal and recreate*** 137.04 (2); and ***to create*** 137.01 (6e), 137.04 (1m) and 137.05 (2) of the statutes; **relating to:** the use and regulation of electronic signatures, providing an exemption from emergency rule procedures and granting rule–making authority.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 137.01 (6e) of the statutes is created to read:

137.01 **(6e)** ELECTRONIC SIGNATURES. The secretary of state and department of administration shall jointly promulgate rules establishing requirements that a notary public must satisfy in order to use an electronic signature, as defined in s. 137.04 (2), for any attestation. The joint rules shall be numbered as rules of each agency in the Wisconsin Administrative Code. The electronic signature of a notary

public is not valid for official acts unless the signature is used in compliance with those requirements.

SECTION 2. 137.04 (1) of the statutes is repealed.

SECTION 3. 137.04 (1m) of the statutes is created to read:

137.04 **(1m)** "Document" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and that is retrievable in a perceivable form.

SECTION 4. 137.04 (2) of the statutes is repealed and recreated to read:

137.04 **(2)** "Electronic signature" means an electronic sound, symbol or process that is attached to or logically associated with a document and that is executed or adopted by a person with intent to sign the document.

SECTION 5. 137.05 (title) of the statutes is amended to read:

137.05 (title) **Submission of ~~written~~ documents to governmental units.**

SECTION 6. 137.05 of the statutes is renumbered 137.05 (1) and amended to read:

137.05 **(1)** ~~Unless otherwise prohibited by law, any document that is required by law to be submitted in writing to a governmental unit and that requires a written signature may be submitted by transforming the document into electronic format, but~~ A document that is signed or given effect with an electronic signature may be submitted to a governmental unit only with the consent of the governmental unit that is to receive the document.

SECTION 7. 137.05 (2) of the statutes is created to read:

137.05 **(2)** The department of administration shall promulgate rules concerning the use of electronic signatures by governmental units. With respect to

use of electronic signatures by notaries public, the rules shall be consistent with rules promulgated under s. 137.01 (6e).

SECTION 8. 137.06 (1) (e) of the statutes is repealed.

SECTION 9. 224.30 of the statutes is repealed.

SECTION 10. Nonstatutory provisions.

(1) USE OF ELECTRONIC SIGNATURES BY GOVERNMENTAL UNITS. Using the procedure under section 227.24 of the statutes, the department of administration may promulgate emergency rules under section 137.05 (2) of the statutes, as created by this act, for the period before the effective date of permanent rules initially promulgated under section 137.05 (2) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b) and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

(2) USE OF ELECTRONIC SIGNATURES BY NOTARIES PUBLIC. The secretary of state and department of administration shall promulgate initial rules under section 137.01 (6e) of the statutes, as created by this act, to become effective no later than January 1, 2002.

SECTION 11. Effective date.

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)