

## PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 AN ACT *to repeal* 137.04 and 137.06; *to renumber and amend* 137.05; *to*  
2 *amend* chapter 137 (title), subchapter I (title) of chapter 137 [precedes s.  
3 137.01], 137.01 (3) (a), 137.01 (4) (a), 137.01 (4) (b), subchapter II (title) of  
4 chapter 137 [precedes 137.04], 224.30 (2), 228.01, 228.03 (2), 889.29 (1), 910.01  
5 (1), 910.02 and 910.03; and *to create* 16.61 (7) (d), 16.611 (2) (e), 16.612 (2) (c)  
6 and 137.11 to 137.24 of the statutes; **relating to:** electronic transactions and  
7 records.

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*Analysis by the Legislative Reference Bureau*

THIS IS A PRELIMINARY MOCK UP. It is not in bill draft form.

Within proposed subch. II of ch. 137, this draft displays the changes to the original text of U.E.T.A. except that the term "governmental unit" has been substituted for the term "governmental agency" (which is explained in the NOTE to proposed s. 137.11 (9)) and the appropriate Wisconsin references have been substituted in cross-references and bracketed material. Subunits that are moved or deleted entirely are discussed in the NOTES. The following is the text of the proposed analysis:

In 1999, the National Conference of Commissioners on Uniform State Laws approved the Uniform Electronic Transactions Act (UETA) and recommended it for enactment in all the states. Generally, UETA establishes a legal framework that

facilitates and validates certain electronic transactions. This bill enacts UETA in Wisconsin, with minor, nonsubstantive changes necessary to incorporate the act into the existing statutes.

### **CURRENT LAW REGARDING ELECTRONIC DOCUMENTS, TRANSACTIONS, AND SIGNATURES**

Currently, a combination of state and federal laws govern the use of electronic records, transactions, and signatures in this state. The most significant federal law in this regard is the Electronic Signatures in Global and National Commerce Act, commonly known as "E-sign," which was enacted after UETA was recommended for enactment in all of the states. With certain exceptions relating to existing or pending document retention requirements, E-sign took effect on October 1, 2000. Although much of E-sign represents new law in this state, some of the issues addressed in E-sign were addressed under state law previous to E-sign. With certain exceptions, E-sign preempts the state law to the extent that the treatment is inconsistent with the treatment under E-sign.

### **PUBLIC RECORDS**

Under E-sign, any law that requires retention of a contract or document relating to a transaction in or affecting interstate or foreign commerce may be satisfied by retaining an electronic document, as long as the retained information satisfies certain requirements relating to accuracy and accessibility. Thus, under E-sign, a custodian of a public record relating to a covered transaction is likely permitted to destroy the original record if a proper electronic copy is retained. This authority is consistent with current provisions in state law that, in most cases, permit electronic retention of public records; however, the state law in certain cases imposes additional quality control and evidentiary preservation requirements that must be followed if a public record is to be retained electronically. It is unclear whether these additional requirements continue to apply or would be preempted as inconsistent with these provisions of E-sign.

### **ACCEPTANCE OF ELECTRONIC DOCUMENTS BY GOVERNMENTAL UNITS**

Current law relating to the acceptance of electronic documents by governmental units in this state is ambiguous. Under current state 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 in an electronic format, as long as the governmental unit consents. Current state law does not require any governmental unit to accept documents in an electronic format, but provides that an electronic signature may be substituted for a manual signature if certain requirements are met.

E-sign, however, may require any governmental unit that is a "governmental agency" under E-sign (an undefined term) to accept certain electronic documents that relate to transactions in or affecting interstate or foreign commerce. E-sign states that it does not require any person to agree to use or accept electronic documents or electronic signatures, other than a governmental agency with respect to any document that is not a contract to which it is a party. Although no provision of E-sign specifically requires a governmental agency to use or accept electronic documents or signatures, under E-sign, a document relating to a covered transaction

may not be denied legal effect solely because it is in electronic form. Thus, E-sign implies that a governmental agency may be required under E-sign to accept an electronic document relating to a covered transaction, as long as the document is not a contract to which the governmental agency is a party. This implication conflicts with another provision of E-sign, which states that E-sign generally does not limit or supersede any requirement imposed by a state regulatory agency (an undefined term) that documents be filed in accordance with specified standards or formats.

#### **ELECTRONIC DOCUMENTS AND SIGNATURES IN COMMERCE**

##### ***Promissory notes***

Currently, this state's version of the Uniform Commercial Code contains the primary legal framework allowing for transactions in this state involving promissory notes (commonly, loan documents). Title II of E-sign contains the primary legal framework relating to a new type of promissory note, termed a "transferrable record," which allows for the marketing of electronic versions of promissory notes in transactions secured by real property.

##### ***Other documents and records***

The primary electronic commerce provisions of E-sign are contained in Title I, which establishes a legal framework relating to electronic transactions in or affecting interstate or foreign commerce. Generally, Title I contains provisions that relate to the use of "electronic records" and signatures in covered transactions, the retention of "electronic records" of covered transactions, and the notarization and acknowledgement of covered electronic transactions. Title I broadly defines the term "electronic record" to include, among other things, any information that is stored by means of electrical or digital technology and that is retrievable in perceivable form. This definition likely covers such things as information stored on a computer disk or a voice mail recording. Because of this broad definition, in this analysis of E-sign, the term "document" is generally used in place of the term record. Title I also defines "transaction" broadly to mean any action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including governmental agencies.

Currently, under Title I, a signature, contract, or other document relating to a covered transaction may not be denied legal effect, validity, or enforceability solely because it is in an electronic form, as long as the electronic contract or record, if it is otherwise required to be in writing, is capable of being retained and accurately reproduced by the relevant parties. Similarly, a contract relating to a covered transaction may not be denied legal effect solely because an electronic signature or electronic document was used in its formation.

Title I also permits electronic notarization, acknowledgement, or verification of a signature or document relating to a covered transaction, as long as the electronic signature of the person performing the notarization, acknowledgement, or verification is accompanied by all other information required by law. In addition, Title I provides that no person is required under Title I to agree to use or accept electronic records or signatures.

However, under Title I, any law that requires retention of a contract or document relating to a covered transaction may be satisfied by retaining an

electronic document, as long as the retained information satisfies certain requirements relating to accuracy and accessibility. Title I contains similar provisions with regard to laws requiring retention of a check. An electronic contract or document retained in compliance with these provisions generally has the same legal status as an original document. As discussed above with regard to public records custodians, this provision of Title I also likely permits any *private* custodian of records relating to covered transactions to destroy original records if a proper electronic copy is retained.

### ***Consumer protections***

Under Title I, with regard to consumer transactions in or affecting interstate or foreign commerce, existing laws requiring written disclosure currently may be satisfied electronically only if the consumer consents after being informed of certain rights and of the technical requirements necessary to access and retain the electronic document. In addition, the consumer must consent or confirm his or her consent electronically in a manner that reasonably demonstrates that the consumer can access the information that is required to be provided to the consumer. The legal effect of a contract, though, may not be denied solely because of a failure to obtain the consumer's electronic consent consistent with this requirement. Title I also specifies that the use of electronic documents permitted under these consumer provisions does not include the use of an oral communication, such as a voice mail recording, unless that use is permitted under other applicable law.

Any federal regulatory agency, with respect to a matter within the agency's jurisdiction, may exempt a specified category or type of document from the general consumer consent requirement, if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

### ***Exemptions***

All of the following are exempt from coverage under the primary electronic commerce provisions of E-sign and, as a result, currently may not be provided in electronic format unless otherwise authorized by law:

1. A document to the extent that it is governed by a law covering the creation and execution of wills, codicils, or testamentary trusts.
2. A document to the extent that it is governed by a law covering adoption, divorce, or other matters of family law.
3. A document to the extent that it is governed by certain sections of the Uniform Commercial code.
4. Court orders or notices and official court documents, including briefs, pleadings, and other writings.
5. Notices of cancellation or termination of utility services, including water, heat, and power.
6. Notices of default, acceleration, repossession, foreclosure, or eviction or the right to cure under a credit agreement secured by, or a rental agreement for, a primary residence of an individual.
7. Notices of the cancellation or termination of health insurance or life insurance, other than annuities.

8. Product recall notices.

9. Documents required to accompany the transportation of hazardous materials.

A federal regulatory agency may remove any of these exemptions, as the particular exemption applies to a matter within the agency's jurisdiction, if the agency finds that the exemption is no longer necessary for the protection of consumers and that the elimination of the exemption will not increase the material risk of harm to consumers.

### ***Limits on the scope of Title I***

In addition to these specific exemptions, Title I has a limited effect upon certain specified laws. For example, Title I states that it does not affect any requirement imposed by state law relating to a person's rights or obligations other than the requirement that contracts or other documents be in nonelectronic form. However, this provision may conflict with other provisions of Title I which appear to specifically affect obligations other than writing or signature requirements. Title I also has a limited effect on any state law enacted before E-sign that expressly requires verification or acknowledgement of receipt of a document. Under Title I, this type of document may be provided electronically only if the method used also provides verification or acknowledgement of receipt. In addition, Title I does not affect any law that requires a warning, notice, disclosure, or other document to be posted, displayed, or publicly affixed within a specified proximity.

### ***State authority under Title I***

Title I provides that a state regulatory agency that is responsible for rule making under any statute may interpret the primary electronic commerce provisions of Title I with respect to that statute, if the agency is authorized by law to do so. Rules, orders, or guidance produced by an agency under this authority must meet specific requirements relating to consistency with existing provisions of Title I; to regulatory burden; to justification for the rule, order, or guidance; and to neutrality with regard to the type of technology needed to satisfy the rule, order, or guidance. A state agency may also mandate specific performance standards with regard to document retention, in order to assure accuracy, integrity, and accessibility of retained electronic documents. However, under state law, the rule-making authority of a state agency is limited to interpretation and application of state law and no state agency may promulgate a rule that conflicts with state law.

## **RELATIONSHIP BETWEEN E-SIGN AND UETA**

With certain exceptions, E-sign preempts state laws that are inconsistent with its provisions. One of the exceptions permits a state to supersede the effect of the primary electronic commerce provisions of Title I by enacting a law that constitutes an enactment of UETA. However, a state may not use the optional provision in UETA that permits a state to insert exemptions relating to specific areas of state law from the application of UETA as a loophole to avoid the requirements of E-sign. If a state enacts UETA without significant change and containing no new exemptions under this provision of UETA, the state enactment of UETA will likely not be preempted by E-sign.

Because this bill makes no significant changes to the substance of UETA and the text is consistent with the intent of the version of UETA recommended for enactment in all of the states, the bill likely qualifies for this exception from preemption and, if enacted, would likely supplant the primary electronic commerce provisions of E-sign in this state. However, certain provisions of UETA and, as a result, this bill, are susceptible to varying interpretations. Many of these provisions are similar to current law under E-sign. This bill generally does not clarify these provisions. Rather, in order to avoid preemption, the text of this bill generally remains consistent with the recommended version of UETA.

### UETA

The following analysis of the version of UETA contained in this bill generally reflects an interpretation that is consistent with the prefatory note and official comments accompanying UETA, which generally discuss the intent of each recommended provision of UETA. For the provisions that are subject to varying interpretations, this analysis discusses each primary interpretation and indicates which interpretation, if any, is supported by the prefatory note or comments. 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 some instances, the interpretation supported by the prefatory note or comments is difficult to derive from the text of the bill.

### PUBLIC RECORDS

This bill includes a provision potentially affecting the maintenance of public records that is similar to the provision currently in effect under E-sign. With certain exceptions, the bill permits a person to satisfy any law that requires retention of a document by retaining an electronic document, as long as the retained information satisfies certain requirements relating to accuracy and accessibility. Like current law under E-sign, this provision may be interpreted to permit a custodian of a public record relating to a transaction to destroy the original record and retain an electronic copy, notwithstanding other current statutes regarding the conversion of public records into electronic format and retention requirements.

However, this interpretation is less likely to occur under this bill than it is in current law under E-sign. Unlike E-sign, this bill specifically states that it applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. (See discussion under "Electronic Documents and Signatures in Commerce" (subheading "Applicability and definitions") below.) Although the definition of "transaction" may be interpreted broadly to include a typical governmental action like the filing of a document, the prefatory note and comments to UETA imply that a narrower interpretation is intended which covers only the actions of the government as a market participant. Thus, if interpreted consistently with the prefatory note and comments, the electronic document retention provisions will likely apply to the parties to a transaction, rather than to a governmental unit that stores public records relating to the filings and transactions of others.

This bill also provides that a person may comply with these electronic document retention provisions using the services of another person. If the term "transaction" is interpreted broadly, this provision may permit a public records custodian to transfer public records to other governmental or private parties for retention. However, if the term "transaction" 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.

#### **ACCEPTANCE OF ELECTRONIC DOCUMENTS BY GOVERNMENTAL UNITS**

The same ambiguities regarding the acceptance of electronic documents by governmental units exist under this bill as exist currently under E-sign, although under this bill it is more likely that a governmental unit is not required to accept electronic documents. This bill attempts, in a manner consistent with UETA, to restore the law as it existed in this state before E-sign regarding the acceptance of electronic documents by governmental units. Thus, under this bill, 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 in an electronic format if the governmental unit consents. Although this bill, like current law under E-sign, also states that a document relating to a transaction may not be denied legal effect solely because it is in electronic form, it is more likely under this bill that this provision has no effect on the authority of a governmental unit to refuse to accept an electronic document. Unlike current law under E-sign, this bill does not contain any statement that a governmental unit is required to accept an electronic document.

This bill also requires any governmental unit that adopts standards regarding the governmental unit's receipt of electronic records or electronic signatures to promote consistency and interoperability with similar standards adopted by other governmental units, the federal government, and other persons interacting with governmental units of this state.

#### **ELECTRONIC DOCUMENTS AND SIGNATURES IN COMMERCE**

##### ***Rule of construction***

This bill specifies that it must be construed and applied to facilitate electronic transactions consistent with other applicable law, to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices, and to bring about uniformity in the law of electronic transactions.

##### ***Applicability and definitions***

Generally, the bill applies to the use of electronic records and electronic signatures relating to transactions. Like current law under E-sign, this bill broadly defines the term "electronic record" to include, among other things, any information that is stored by means of electrical or digital technology and that is retrievable in a perceivable form. This definition would likely cover such things as information stored on a computer disk or a voice mail recording. Because of this broad definition, in this analysis of the version of UETA contained in this bill, the term "document" is generally used in place of the term "record." Under the bill, an "electronic signature" includes, among other things, a sound, symbol, or process that relates to

electrical technology, 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.

The bill defines “transaction” to mean an action or set of actions between two or more persons relating to the conduct of business, commercial, or governmental affairs. Although this definition may be interpreted broadly to include a typical interaction with the government like the filing of a document, the prefatory note and comments to UETA imply that a narrower interpretation is intended which covers the actions of the government as a market participant. In addition, although the definition does not expressly cover consumer-to-consumer or consumer-to-business transactions, it is possible to interpret this definition, consistent with the official comments, to cover these transactions.

This bill, like current law under E-sign, does not apply to a transaction governed by a law relating to the execution of wills or the creation of testamentary trusts or to a transaction governed by any chapter of this state’s version of the Uniform Commercial Code other than the chapter dealing with sales of goods. However, because this bill does not contain all of the exemptions currently in effect under E-sign, this bill may permit a broader use of electronic documents relating to transactions than is currently permitted under E-sign. Unlike current law, this bill may permit the use of electronic documents for matters relating to family law; electronic court documents; electronic notices of the cancellation of utility services; electronic notices of default, acceleration, repossession, foreclosure, or eviction or the right to cure under a credit agreement secured by, or a rental agreement for, an individual’s primary residence; electronic notices of the cancellation or termination of health insurance or life insurance; and electronic notices of product recalls.

#### ***Agreements to use electronic documents and electronic signatures***

This bill does not require the use of electronic documents or electronic signatures. Rather, the bill applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Under the bill, this agreement is determined from the context, the surrounding circumstances, and the parties’ conduct. A party that agrees to conduct one transaction by electronic means may refuse to conduct other transactions by electronic means. Although the bill also states that a document relating to a transaction may not be denied legal effect solely because it is in electronic form, it is likely that, consistent with the comments, these provisions permit a person to deny the legal effect of an electronic document relating to a transaction if a party to the transaction never agreed to conduct the transaction electronically. With certain exceptions, the parties to any transaction may agree to vary the effect of this bill as it relates to that transaction.

#### ***Consumer protections***

Unlike current law under E-sign, this bill does not contain any protections that specifically apply only to consumers. The consumer protections currently in effect under E-sign would likely have no effect in this state upon the enactment of this bill.

#### ***Legal effect of electronic documents and electronic signatures***

As noted earlier, this bill specifies that a document or signature may not be denied legal effect or enforceability solely because it is in electronic form. The bill also specifies that a contract may not be denied legal effect or enforceability solely



because an electronic document was used in its formation. These provisions are similar to provisions in current law under E-sign. Unlike E-sign, this bill further states that an electronic document satisfies any law requiring a record to be in writing and that an electronic signature satisfies any law requiring a signature.

#### ***Effect of laws relating to the provision of information***

Under this bill, if the parties to a transaction have agreed to conduct the transaction electronically and if a law requires a person to provide, send, or deliver information in writing to another person, a party may, with certain exceptions, satisfy the requirement with respect to that transaction by providing, sending, or delivering the information in an electronic document that is capable of retention by the recipient at the time of receipt. Although the bill also states that a document relating to a transaction may not be denied legal effect solely because it is in electronic form, it is likely that, consistent with the comments, the bill permits a person to deny the legal effect of an electronic document relating to a transaction if the electronic document is provided, sent, or delivered in violation of this provision. The bill further provides that an electronic document is not enforceable against the recipient of the document if the sender inhibits the ability of the recipient to store or print the document.

The bill also specifies that, with certain exceptions, a document must satisfy any law requiring the document to be posted or displayed in a certain manner; to be sent, communicated, or transmitted by a specified method; or to contain information that is formatted in a certain manner. There are three possible interpretations of this provision. First, the provision may prohibit the use of an electronic document if a law requires the document to be posted, displayed, sent, communicated, transmitted, or formatted on paper. Second, the provision may instead require a paper document to be used in addition to an electronic document in these circumstances. Third, consistent with the comments, the provision may require the parties to a transaction to comply with any legal requirement relating to the provision of information *other than a requirement that the information be provided on paper*.

#### ***Attribution of electronic documents***

Under this bill, an electronic document or electronic signature is attributable to a person whose act created the document or signature. The act of a person may be shown in any manner, including through the use of a security procedure that determines the person to whom an electronic document or electronic signature is attributable.

#### ***Effect of change or error***

This bill contains three provisions that determine the effect of a change or error in an electronic document that occurs in a transmission between the parties to a transaction. First, if the parties have agreed to use a security procedure to detect changes or errors and if one of the parties fails to use a security procedure and an error or change occurs that the nonconforming party would have detected had the party used the security procedure, the other party may avoid the effect of the changed or erroneous electronic document. Second, in an automated transaction involving an individual, the individual may avoid the effect of an electronic document that results from an error made by the individual in dealing with the automated agent of another

person, if the automated agent did not provide an opportunity for prevention or correction of the error. However, an individual may avoid the effect of the electronic document only if the individual, at the time he or she learns of the error, has received no benefit from the thing of value received from the other party under the transaction and only if the individual satisfies certain requirements relating to notification of the other party and return or destruction of the thing of value received. Third, if neither of these provisions applies to the transaction, the change or error has the effect provided by other law, including the law of mistake, and by any applicable contract between the parties.

### ***Electronic notarization and acknowledgement***

Like current law under E-sign, this bill permits electronic notarization, acknowledgement, or verification of a signature or document relating to a transaction, as long as the electronic signature of the person performing the notarization, acknowledgement, or verification is accompanied by all other information required by law.

### ***Retention of electronic documents***

Under this bill, any law that requires retention of a document may, with certain exceptions, be satisfied by retaining an electronic document, as long as the retained information satisfies certain requirements relating to accuracy and accessibility. The bill contains similar provisions with regard to laws requiring retention of a check, although the term “check” is not defined under the bill and, as a result, may not include a share draft or money order. These provisions are similar to current law under E-sign. However, unlike E-sign, this bill specifies that an electronic document that is required to be retained must accurately reflect 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 provision is intended to ensure that the content of a document is retained when documents are converted or reformatted to allow for ongoing electronic retention. However, this provision may be interpreted to permit a retention requirement to be satisfied by retaining only the final version of a document that has earlier versions.

The bill provides that an electronic document retained in compliance with these provisions need not contain any information the sole purpose of which is to enable the document to be sent, communicated, or received. Under current law, this ancillary information is normally required to be retained along with the document to which it is attached. In addition, as under E-sign, an electronic contract or document retained in compliance with these provisions generally has the same legal status as an original document. Like E-sign, this bill also provides that a person may comply with these electronic document retention provisions using the services of another person.

The bill provides that the state may enact laws, after enactment of this bill, that prohibit a person from using an electronic document to satisfy any requirement that the person retain a document for evidentiary, audit, or like purposes. It is unclear, though, what types of retention requirements are enacted for “evidentiary, audit, or like purposes”. It is also unclear how this provision relates to other provisions of the bill which provide that an electronic document satisfies any retention requirement

as long as specified requirements relating to accuracy and accessibility are also satisfied.

In addition, the bill specifies that it does not preclude a governmental unit of this state from specifying additional requirements for the retention of any document subject to its jurisdiction. It is unclear how this provision relates to other provisions of the bill which provide that an electronic document satisfies any retention requirement as long as specified requirements relating to accuracy and accessibility are also satisfied. It is also unclear whether this provision grants rule-making authority or merely references any authority that may exist currently. Also, although it is unclear from the text whether this provision applies to nongovernmental documents or only to documents in the possession of a governmental unit, the official comments imply that the provision is intended to apply to nongovernmental documents that are subject to a governmental unit's jurisdiction.

#### ***Evidence***

Under this bill, a document or signature may not be excluded as evidence solely because it is in electronic form. This provision confirms the treatment of electronic documents and signatures under current law.

#### ***Automated transactions***

This bill validates contracts formed in automated transactions by the interaction of automated agents of the parties or by the interaction of one party's automated agent and an individual. Under current law, it is possible to argue that an automated transaction may not result in an enforceable contract because, at the time of the transaction, either or both of the parties lack an expression of human intent to form the contract.

#### ***Time and location of electronic sending and receipt***

Under this bill, an electronic document is sent when the electronic document a) is addressed or otherwise properly directed to an information processing system that the intended recipient has designated or uses for the purpose of receiving electronic documents or information of the type sent and from which the recipient is able to retrieve the electronic document; b) is in a form capable of being processed by that information processing system; and c) enters an information processing system outside of the control of the sender or enters a region of the information processing system used or designated by the recipient that is under the recipient's control. An electronic document is received when the electronic document enters and is in a form capable of being processed by an information processing system that the recipient has designated or uses for the purpose of receiving electronic documents or information of the type sent and from which the recipient is able to retrieve the electronic document. The bill permits the parties to a transaction to agree to alter the effect of these provisions with respect to the transaction. Under the bill, an electronic document may be received even if no individual is aware of its receipt. Furthermore, under the bill, an electronic acknowledgment of receipt from the information processing system used or designated by the recipient establishes that the electronic document was received but does not establish that the information sent is the same as the information received.

These provisions may be interpreted to alter laws under which the date of receipt of a public record submitted for filing is the date on which a paper copy is received or postmarked, so that the date of electronic filing constitutes the date of receipt instead. However, as noted earlier, this bill specifically states that it applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Although the definition of “transaction” may be interpreted broadly to include a typical governmental action like the filing of a document, the prefatory note and comments to UETA imply that a narrower interpretation is intended which covers only the actions of the government as a market participant. If the narrower interpretation applies, then these provisions will likely have no effect upon the filing of most public records.

Under this bill, an electronic document is deemed to be sent from the sender’s place of business that has the closest relationship to the underlying transaction and to be received at the recipient’s place of business that has the closest relationship to the underlying transaction. If the sender or recipient does not have a place of business, the electronic document is deemed to be sent or received from the sender’s or recipient’s residence. The bill also permits a sender to expressly provide in an electronic document that the document is deemed to be sent from a different location. The bill also permits the parties to a transaction to agree to alter the effect of these provisions on the transaction. To the extent that an electronic document may constitute a sale, with the seller receiving payment electronically, these provisions may be interpreted to permit a seller to argue that a sale occurred in a jurisdiction where the seller is not subject to a tax that would otherwise be imposed under Wisconsin law. However, the official comments imply that this interpretation is not intended.

In addition, under the bill, if a person is aware that an electronic document purportedly sent or purportedly received in compliance with these provisions was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Although the official comments are silent on the meaning of this provision, it is likely intended to give a court direction as to what law to apply to determine the legal effect when there is a *failure* to send or receive an electronic document in the manner provided under the bill.

### ***Transferable records***

This bill expands current law with regard to transactions involving the use of transferable records (electronic versions of certain documents under the Uniform Commercial Code). Although current law under E-sign only permits the use of transferrable records in transactions secured by real property, this bill permits the use of transferable records in any transaction in which a promissory note or document of title under the Uniform Commercial Code may be used. Under this bill, an electronic document qualifies as a transferable record only if the issuer of the





ELECTRONIC NOTARIZATION  
AND ACKNOWLEDGEMENT

SECTION 10. 137.04 of the statutes is repealed.

SECTION 11. 137.05 of the statutes is renumbered 137.25 and amended to read:

**137.25 Submission of written documents records to governmental units.** Unless otherwise prohibited by law, with the consent of a governmental unit of this state that is to receive a record, any document record that is required by law to be submitted in writing to a that governmental unit and that requires a written signature may be submitted ~~by transforming the document into~~ as an electronic format, ~~but only with the consent of the governmental unit that is to receive the document record,~~ and if submitted as an electronic record may incorporate an electronic signature.

NOTE: Expands current law to conform to the substance of U.E.T.A. SECTION 18, an optional section that directs governmental units to determine whether and to what extent they will send and accept electronic records and electronic signatures.

SECTION 12. 137.06 of the statutes is repealed.

SECTION 13. 137.11 to 137.24 of the statutes are created to read:

NOTE: SECTION 1 [Short Title] is deleted. Short titles are not generally used in Wisconsin currently.

**137.11 Definitions.** In this subchapter:

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

(2) “Automated transaction” means a transaction conducted or performed, in whole or in part, by electronic means or by the use of electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary

1 course in forming a contract, performing under an existing contract, or fulfilling an  
2 obligation required by the transaction.

3 (3) “Computer program” means a set of statements or instructions to be used  
4 directly or indirectly in an information processing system in order to bring about a  
5 certain result.

6 (4) “Contract” means the total legal obligation resulting from the parties’  
7 agreement as affected by this subchapter and other applicable law.

8 (5) “Electronic” means relating to technology having electrical, digital,  
9 magnetic, wireless, optical, electromagnetic, or similar capabilities.

NOTE: See NOTE to sub. (7).

10 (6) “Electronic agent” means a computer program or an electronic or other  
11 automated means used independently to initiate an action or respond to electronic  
12 records or performances in whole or in part, without review or action by an  
13 individual.

14 (7) “Electronic record” means a record that is created, generated, sent,  
15 communicated, received, or stored by electronic means.

NOTE: 1. This definition conflicts with the definitions of “electronic” and “record,”  
which are also defined. See analysis and drafter’s note.

2. This definition covers voice mail communications. See analysis and drafter’s  
note.

16 (8) “Electronic signature” means an electronic sound, symbol, or process  
17 attached to or logically associated with a record and executed or adopted by a person  
18 with the intent to sign the record.

NOTE: This definition apparently was intended to apply only to electronic records,  
but, as drafted, applies to nonelectronic records. See analysis and drafter’s note.

19 (9) “Governmental unit” means ~~an executive, legislative, or judicial:~~



1           (a) An agency, department, board, commission, office, authority, institution, or  
2 instrumentality of the federal government or of a state or of a county, municipality,  
3 or other political subdivision of a state or special purpose district within a state,  
4 regardless of the branch or branches of government in which it is located.

5           (b) A political subdivision of a state or special purpose district within a state.

6           (c) An association or society to which appropriations are made by law.

7           (d) Any body within one or more of the entities specified in pars. (a) to (c) that  
8 is created or authorized to be created by the constitution, by law, or by action of one  
9 or more of the entities specified in pars. (a) to (c).

10          (e) Any combination of any of the entities specified in pars. (a) to (d).

NOTE: 1. Broadens definition consistently with the apparent intent of U.E.T.A. to cover all Wisconsin governmental entities. See, for example, ss. 16.70 (1), 16.97 (7), and 137.04 (3), stats., which utilize language that goes beyond the U.E.T.A. definition.

2. The word "unit" is substituted for "agency" in order to avoid defining an authority as an agency because, in Wisconsin, state authorities are not considered to be agencies.

3. Wisconsin usage limits the word "political subdivision" only to counties and municipalities (cities, villages, and towns).

11          (10) "Information" means data, text, images, sounds, codes, computer  
12 programs, software, databases, or the like.

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

NOTE: SUBSECTION (12) [definition of "person"] is deleted per s. 990.01 (26), stats.

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

NOTE: 1. That this definition covers voice mail communications. See analysis and drafter's note.

2. See NOTE to sub. (7).

17          (13) "Security procedure" means a procedure employed for the purpose of  
18 verifying that an electronic signature, record, or performance is that of a specific

1 person or for detecting changes or errors in the information in an electronic record.  
2 The term includes a procedure that requires the use of algorithms or other codes,  
3 identifying words or numbers, encryption, callback, or other acknowledgment  
4 procedures.

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

NOTE: What does “formally acknowledged” mean?

10 (15) “Transaction” means an action or set of actions occurring between 2 or  
11 more persons relating to the conduct of business, commercial, or governmental  
12 affairs.

NOTE: 1. This definition may be interpreted to mean that the act does not apply  
to consumer-to-consumer interactions, although the reporter’s comments indicate  
otherwise.

2. It is unclear whether “governmental affairs” includes only activities where the  
government is a market participant. Some of the comments suggest that this was  
intended, but **SECTIONS 17 to 19** appear to be based on a different assumption.

3. See analysis and drafter’s note.

13 **137.12 Scope Application.** (1) Except as otherwise provided in sub. (2) and  
14 except in ss. 137.25 and 137.26, this subchapter applies to electronic records and  
15 electronic signatures relating to a transaction.

NOTE: Because some of the comments suggest that the term “transaction” is  
intended to apply only to governmental affairs in which the government is a market  
participant, this subsection is amended to enable proposed ss. 137.25 (currently s. 137.05,  
stats.) and 137.26 to be included. These sections are clearly intended to have broader  
application.

16 (2) This Except as otherwise provided in sub. (3), this subchapter does not  
17 apply to a transaction to the extent it is governed by:

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

NOTE: Corrects terminology. Reference to “codicils” is deleted per s. 990.01 (47),  
stats.

3 (b) Chapters 401 and 403 to 410, other than ss. 401.107 and 401.206.

4 (3) This subchapter applies to an electronic record or electronic signature  
5 otherwise excluded from the application of this subchapter under sub. (2) to the  
6 extent it is governed by a law other than those specified in sub. (2).

7 (4) A transaction subject to this subchapter is also subject to other applicable  
8 substantive law.

NOTE: Reference in sub. (2) to exclusion of transactions covered by the Uniform  
Computer Information Transactions Act is deleted because this act has not been enacted  
in Wisconsin.

9 (5) This subchapter applies to the state of Wisconsin, unless otherwise  
10 expressly provided.

NOTE: This subsection is inserted to thwart any interpretation, based upon cases  
such as *State ex rel. Dept. of Public Instruction v. ILHR Dept.*, 68 Wis.2d 677, 681 (1975),  
that this subchapter, as a regulatory statute, should not be interpreted to apply to the  
state because that interpretation would be in derogation of the common law.

NOTE: SECTION 4 [Prospective Application] has been moved to the Initial  
Applicability provision.

11 **137.13 Use of electronic records and electronic signatures; variation**  
12 **by agreement.** (1) This subchapter does not require a record or signature to be  
13 created, generated, sent, communicated, received, stored, or otherwise processed or  
14 used by electronic means or in electronic form.

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

NOTE: See NOTE to proposed s. 137.12 (1). Application to governmental contacts may be unclear because they are not clearly consensual in some contexts and there may not be a “transaction”.

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

NOTE: It may be unclear where one transaction ends and another one begins. See analysis and drafter’s note.

4           (4) Except as otherwise provided in this subchapter, the effect of any of its  
5 ~~provisions~~ provision of this subchapter may be varied by agreement. ~~The presence~~  
6 ~~in certain provisions of this Act~~ Use of the words “unless otherwise agreed,” or words  
7 of similar import, ~~does not imply~~ in this subchapter shall not be interpreted to  
8 preclude other provisions ~~may not be~~ of this subchapter from being varied by  
9 agreement.

NOTE: Clarifies wording.

10           (5) Whether an electronic record or electronic signature has legal consequences  
11 is determined by this subchapter and other applicable law.

12           **137.14 Construction and application.** This subchapter ~~must~~ shall be  
13 construed and applied:

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

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

17           (3) To effectuate its general purpose to make uniform the law with respect to  
18 the subject of this subchapter among states enacting it laws substantially similar to  
19 the Uniform Electronic Transactions Act as approved and recommended by the  
20 National Conference of Commissioners on Uniform State Laws in 1999.

NOTE: Reference to “this law” in sub. (3) is changed to “laws substantially similar to U.E.T.A.” because this draft is not identical to the Uniform Act and most states have not enacted verbatim versions of that act.

1           **137.15 Legal recognition of electronic records, electronic signatures,**  
2 **and electronic contracts.** (1) A record or signature may not be denied legal effect  
3 or enforceability solely because it is in electronic form.

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

6           (3) If a law requires a record to be in writing, an electronic record satisfies ~~the~~  
7 that requirement in that law.

8           (4) If a law requires a signature, an electronic signature satisfies ~~the~~ that  
9 requirement in that law.

NOTE: Clarifies wording to avoid unintended interpretation. This entire section arguably conflicts with proposed s. 137.13 (1) to (3). See analysis and drafter’s note.

10           **137.16 Provision of information in writing; presentation of records.**

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

NOTE: This subsection conflicts with proposed s. 137.15 and sub. (2). See analysis and drafter’s note.

19           (2) If a law other than this subchapter requires a record to be posted or  
20 displayed in a certain manner, to be sent, communicated, or transmitted by a

1 specified method, or to contain information that is formatted in a certain manner, ~~the~~  
2 ~~following rules apply then:~~

3 (a) The record ~~must~~ shall be posted or displayed in the manner specified in the  
4 other law.

5 (b) Except as otherwise provided in sub. (4) (b), the record ~~must~~ shall be sent,  
6 communicated, or transmitted by the method specified in the other law.

7 (c) The record ~~must~~ shall contain the information formatted in the manner  
8 specified in the other law.

NOTE: 1. Paragraphs (b) and (c) seem to require adherence to requirements for documents to be in writing, which conflicts with proposed s. 137.15 and sub. (1).

2. Because of technological limitations, this subsection may preclude electronic formats from being used for postings or displays.

3. See analysis and drafter's note.

9 (3) If a sender inhibits the ability of a recipient to store or print an electronic  
10 record, the electronic record is not enforceable against the recipient.

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

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

16 (b) A requirement under a law other than this subchapter to send,  
17 communicate, or transmit a record by 1st-class or regular mail or with postage  
18 prepaid may be varied by agreement to the extent permitted by the other law.

NOTE: 1. Provisions of the Wisconsin Statutes that permit requirements for written material or mailings to be varied by agreement are believed to be rare or nonexistent.

2. Original text of the sub. (4) (b) shows "1st class," "regular mail," or "postage prepaid" to be bracketed options.

19 **137.17 Attribution and effect of electronic records and electronic**  
20 **signatures.** (1) An electronic record or electronic signature is attributable to a

1 person if it was the electronic record or electronic signature was created by the act  
2 of the person. The act of the person may be shown in any manner, including a  
3 showing of the efficacy of any security procedure applied to determine the person to  
4 which the electronic record or electronic signature was attributable.

NOTE: Clarifies wording. To provide that "... the record ... was the act of the person ..." is nonsensical.

5 (2) The effect of an electronic record or electronic signature that is attributed  
6 to a person under sub. (1) is determined from the context and surrounding  
7 circumstances at the time of its creation, execution, or adoption, including the  
8 parties' agreement, if any, and otherwise as provided by law.

9 **137.18 Effect of change or error.** (1) If a change or error in an electronic  
10 record occurs in a transmission between parties to a transaction, ~~the following rules~~  
11 apply then:

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

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

22 1. Promptly notifies the other person of the error and that the individual did  
23 not intend to be bound by the electronic record received by the other person;

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

5           3. Has not used or received any benefit or value from the consideration, if any,  
6 received from the other person.

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

9           (3) Subsections (1) (b) and (2) may not be varied by agreement.

10           **137.19 Notarization and acknowledgement.** If a law requires a signature  
11 or record to be notarized, acknowledged, verified, or made under oath, the  
12 requirement is satisfied if the electronic signature of the person authorized to  
13 ~~perform those acts~~ administer the oath or to make the notarization,  
14 acknowledgment, or verification, together with all other information required to be  
15 included by other applicable law, is attached to or logically associated with the  
16 signature or record.

NOTE: Clarifies wording to avoid unintended interpretation.

17           **137.20 Retention of electronic records; originals.** (1) If a law requires  
18 that a record be retained, the requirement is satisfied by retaining ~~an electronic~~  
19 ~~record of the information~~ set forth in the record as an electronic record which:

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

NOTE: This paragraph may be interpreted to permit earlier versions of records to  
be destroyed, notwithstanding retention requirements in other laws. The comments,  
however, indicate that the paragraph was intended to ensure that content is retained  
when records are reformatted. See analysis and drafter's note.

22           (b) Remains accessible for later reference.



NOTE: Under sub. (6), laws may be enacted prohibiting the use of an electronic record for specified purposes.

1           (2) A requirement to retain a record in accordance with sub. (1) does not apply  
2 to any information the sole purpose of which is to enable the record to be sent,  
3 communicated, or received.

NOTE: 1. Although the language is imprecise, the comments suggest that this subsection means that if ancillary information is not retained, an electronic record may still be used to satisfy a retention requirement.

2. Authorization to discard ancillary information, such as a date, time, or address may be undesirable because this information is normally retained and may be significant in some cases.

4           (3) A person may satisfy comply with sub. (1) by using the services of another  
5 person if the requirements of that subsection are satisfied.

NOTE: This subsection seems to allow public records to be transferred to the custody of private persons. If the application of this subchapter to governmental units extends beyond transactions, this has particularly broad ramifications. The reporter's comments suggest, rather, that the intent was only to convey that retention requirements are not altered if a third party is engaged to retain records. See analysis and drafter's note.

6           (4) If Except as provided in sub. (6), if a law requires a record to be presented  
7 or retained in its original form, or provides consequences if the record is not  
8 presented or retained in its original form, ~~that law is satisfied~~ a person may comply  
9 with that law by using an electronic record that is retained in accordance with sub.  
10 (1).

NOTE: Subsections (1) and (4) seem to imply that any person, except a person who is not engaged in a "transaction", that is required to retain a record that is currently in nonelectronic format may transfer the record to electronic format, and perhaps destroy the original. This subsection may necessitate amendment of all statutes requiring retention of any public records relating to a transaction, or any private records, to reflect this subsection. Policy implications of retention in less durable formats, as well as evidentiary issues, should be noted.

11           (5) If a law requires retention of a check, that requirement is satisfied by  
12 retention of an electronic record ~~of~~ containing the information on the front and back  
13 of the check in accordance with sub. (1).

NOTE: It is unclear whether the term "check" includes other negotiable instruments. See drafter's note.

1           (6) A record retained as an electronic record in accordance with sub. (1)  
2 satisfies a law requiring a person to retain a record for evidentiary, audit, or like  
3 purposes, unless a law enacted after the effective date of this subsection .... [revisor  
4 inserts date], specifically prohibits the use of an electronic record for the specified  
5 purpose.

NOTE: 1. Laws enacted on or before the effective date must be reviewed for conflicts.

2. If a law specifically provides for a nonelectronic format, is it superceded by this subsection unless it also specifically prohibits use of an electronic format? This subsection appears to attempt to void future laws unless the legislature expresses its intent in a particular way, which is probably ineffective.

3. What is the effect of the limiting language "...for evidentiary, auditing or other like purposes..."? Rationale for a statutory provision is usually regarded as surplusage, because the provision usually applies regardless of the rationale; therefore rationale is generally not stated. The purposes of a retention requirement, therefore, would generally not be stated. Compare with proposed ss. 137.15 (3) and subs. (1) and (4), which do not have this limiting language.

6           (7) This section does not preclude a governmental unit of this state from  
7 specifying additional requirements for the retention of any record subject to the  
8 jurisdiction of the that governmental unit.

NOTE: 1. This subsection appears to contravene subs. (1), (4), and (6), which provide that compliance with the requirements provided in sub. (1) is sufficient in some cases.

2. According to the comments, this subsection applies to nongovernmental records subject to a governmental unit's jurisdiction. It is unclear whether this subsection is intended to supply rule-making authority or merely to reference existing authority, if any.

3. Is this subsection directed at retention methodology only?

4. See drafter's note and analysis.

9           **137.21 Admissibility in evidencce.** In a proceeding, ~~evidence of~~ a record or  
10 signature may not be excluded as evidence solely because it is in electronic form.

NOTE: Clarifies wording. See related change to s. 910.01 (1), stats.

11           **137.22 Automated transactions.** In an automated transaction:

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

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

6           (3) The terms of ~~the~~ a contract under sub. (1) or (2) are determined governed  
7 by the substantive law applicable to ~~it~~ the contract.

NOTE: Clarifies scope and wording.

8           **137.23 Time and place of sending and receipt.** (1) Unless otherwise  
9 agreed between the sender and the recipient, an electronic record is sent when it:

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

14           (b) Is in a form capable of being processed by that system; and

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

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

21           (a) It enters an information processing system that the recipient has  
22 designated or uses for the purpose of receiving electronic records or information of  
23 the type sent and from which the recipient is able to retrieve the electronic record;  
24 and

1 (b) It is in a form capable of being processed by that system.

NOTE: Is the combined effect of proposed ss. 137.15 (1) and (3) and this subsection to change laws under which the date of receipt is the date on which a hard copy is received or mailed, so that an electronic filing constitutes receipt instead? If so, do we need to identify and amend these laws?

2 (3) Subsection (2) applies even if the place where the information processing  
3 system is located is different from the place where the electronic record is deemed  
4 to be received under sub. (4).

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

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

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

NOTE: The language of this subsection may permit alteration of places of business for tax purposes, although the comments indicate that this was not intended. See drafter's note and analysis.

14 (5) An electronic record is received under sub. (2) even if no individual is aware  
15 of its receipt.

16 (6) Receipt of an electronic acknowledgment from an information processing  
17 system described in sub. (2) establishes that a record was received but, by itself, does  
18 not establish that the content sent corresponds to the content received.

19 (7) If a person is aware that an electronic record purportedly sent under sub.  
20 (1), or purportedly received under sub. (2), was not actually sent or received, the legal  
21 effect of the sending or receipt is determined by other applicable law. Except to the

1 extent permitted by the other law, the requirements of this subsection may not be  
2 varied by agreement.

NOTE: Although the language of this subsection, when directing a court as to what law to apply when an electronic record was purportedly, but not actually, sent or received, refers to the "legal effect of the sending or receipt" of the electronic record, this subsection appears to give the court direction as to what law to apply to determine the legal effect when there is a **failure** to send or receive the electronic record.

3 **137.24 Transferable records.** (1) In this section, "transferable record"  
4 means an electronic record that:

5 ~~(a) Would would be a note under ch. 403 or a record under ch. 407 if the~~  
6 ~~electronic record were in writing; and~~

7 ~~(b) The issuer of the electronic record expressly has agreed is a transferable~~  
8 ~~record.~~

9 (1m) An electronic record qualifies as a transferable record under this section  
10 only if the issuer of the electronic record expressly has agreed that the electronic  
11 record is a transferable record.

NOTE: Clarifies intent and avoids use of defined term as part of its own definition.

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

15 (3) A system satisfies the requirements of sub. (2), and a person is deemed to  
16 have control of a transferable record, if the transferable record is created, stored, and  
17 assigned in such a manner that:

18 (a) A single authoritative copy of the transferable record exists which is unique,  
19 identifiable, and, except as otherwise provided in pars. (d) to (f), unalterable;

20 (b) The authoritative copy identifies the person asserting control as:

21 ~~1. The the person to which the transferable record was issued; or~~

1           ~~2. If~~ if the authoritative copy indicates that the transferable record has been  
2 transferred, the person to which the transferable record was most recently  
3 transferred;

4           (c) The authoritative copy is communicated to and maintained by the person  
5 asserting control or its designated custodian;

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

8           (e) Each copy of the authoritative copy and any copy of a copy is readily  
9 identifiable as a copy that is not the authoritative copy; and

10           (f) Any revision of the authoritative copy is readily identifiable as authorized  
11 or unauthorized.

12           (4) Except as otherwise agreed, a person having control of a transferable record  
13 is the holder, as defined in s. 401.201 (20), of the transferable record and has the same  
14 rights and defenses as a holder of an equivalent record or writing under chs. 401 to  
15 411, including, if the applicable statutory requirements under s. 403.302 (1),  
16 407.501, or 409.308 are satisfied, the rights and defenses of a holder in due course,  
17 a holder to which a negotiable record of title has been duly negotiated, or a purchaser,  
18 respectively. Delivery, possession, and endorsement are not required to obtain or  
19 exercise any of the rights under this subsection.

20           (5) Except as otherwise agreed, an obligor under a transferable record has the  
21 same rights and defenses as an equivalent obligor under equivalent records or  
22 writings under chs. 401 to 411.

23           (6) If requested by a person against which enforcement is sought, the person  
24 seeking to enforce the transferable record shall provide reasonable proof that the  
25 person is in control of the transferable record. Proof may include access to the

1 authoritative copy of the transferable record and related business records sufficient  
2 to review the terms of the transferable record and to establish the identity of the  
3 person having control of the transferable record.

NOTE: SECTION 17 [Creation and Retention of Electronic Records and Conversion of Written Records by Governmental Units], which is optional, is deleted because it largely reflects current Wisconsin law. See, for example, ss. 16.61 (5) (a) and 19.21 (4) (c), stats. The coverage of these and other statutes, while broad, is arguably not quite as broad as this draft 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, incorporates a broad definition of “governmental unit.” However, since the legislature has addressed this issue in this state, there is no pressing need to address the issue again, and it may be inappropriate to question the legislature’s decision.

NOTE: SECTION 18 [Acceptance and Distribution of Electronic Records by Governmental Units], which is optional, is deleted because the substance is incorporated into s. 137.05, stats., which is renumbered as proposed s. 137.25 by this draft.

4 **137.26 Interoperability.** ~~The [governmental unit] [designated officer] of this~~  
5 ~~State which~~ If a governmental unit of this state adopts standards pursuant to Section  
6 18 may encourage and regarding its receipt of electronic records or electronic  
7 signatures under s. 137.25, the governmental unit shall promote consistency and  
8 interoperability with similar requirements standards adopted by other  
9 governmental units of this state and other states and the federal government and  
10 nongovernmental persons interacting with governmental units of this State. If  
11 appropriate, these state. Any standards so adopted may specify differing levels of  
12 standards from which governmental units of this State may choose in implementing  
13 the most appropriate standard for a include alternative provisions if warranted to  
14 meet particular application applications.

NOTE: Clarifies wording. The word “shall” is substituted for “may encourage” because the comments indicate that this section is intended to be mandatory and it would serve little purpose to permit governmental units to encourage consistency and interoperability, because they could do this without legislative authorization.

NOTE: SECTION 20 [Severability Clause] is deleted per s. 990.001 (11), stats.

15 SECTION 14. 224.30 (2) of the statutes is amended to read:

1           224.30 (2) ELECTRONIC ~~FORMS~~ RECORDS AND SIGNATURES. The department shall  
2 promulgate rules regarding the submission of ~~written documents~~ electronic records  
3 and electronic signatures to the department under s. ~~137.05~~ and the use and  
4 ~~verification of electronic signatures under s. 137.06~~ s. 137.25.

NOTE: Conforms to U.E.T.A. terminology and proposed s. 137.25.

5           **SECTION 15.** 228.01 of the statutes is amended to read:

6           **228.01 Recording of documents and public records by mechanical**  
7 **process authorized.** Whenever any officer of any county having a population of  
8 500,000 or more is required or authorized by law to file, record, copy, recopy or replace  
9 any document, court order, plat, paper, written instrument, writings, record or book  
10 of record, on file or of record in his or her office, notwithstanding any other provisions  
11 in the statutes, the officer may do so by photostatic, photographic,  
12 microphotographic, microfilm, optical imaging, electronic formatting or other  
13 mechanical process which produces a clear, accurate and permanent copy or  
14 reproduction of the original document, court order, plat, paper, written instrument,  
15 writings, record or book of record in accordance with the applicable standards  
16 specified under ss. 16.61 (7) and 16.612. Any such officer may also reproduce by such  
17 processes or transfer from optical disk or electronic storage any document, court  
18 order, plat, paper, written instrument, writings, record or book of record which has  
19 previously been filed, recorded, copied or recopied. Optical imaging or electronic  
20 formatting of any document is subject to authorization under s. 59.52 (14) (a).

21           **SECTION 16.** 228.03 (2) of the statutes is amended to read:

22           **228.03 (2)** Any photographic reproduction of an original record meeting the  
23 applicable standards prescribed in s. 16.61 (7) or copy of a record generated from an  
24 original record stored in optical disk or electronic format in compliance with the



1 applicable standards under ss. 16.61 and 16.612 shall be taken as and stand in lieu  
2 of and have all of the effect of the original record and shall be admissible in evidence  
3 in all courts and all other tribunals or agencies, administrative or otherwise, in all  
4 cases where the original document is admissible. A transcript, exemplification or  
5 certified copy of such a reproduction of an original record, or certified copy of a record  
6 generated from an original record stored in optical disk or electronic format, for the  
7 purposes specified in this subsection, is deemed to be a transcript, exemplification  
8 or certified copy of the original. The custodian of a photographic reproduction shall  
9 place the reproduction or optical disk in conveniently accessible storage and shall  
10 make provision for preserving, examining and using the reproduction of the record  
11 or generating a copy of the record from optical disk or electronic storage. An enlarged  
12 copy of a photographic reproduction of a record made in accordance with the  
13 applicable standards specified in s. 16.61 (7) or an enlarged copy of a record  
14 generated from an original record stored in optical disk or electronic format in  
15 compliance with the applicable standards under ss. 16.61 and 16.612 that is certified  
16 by the custodian as provided in s. 889.18 (2) has the same effect as an actual-size  
17 copy.

18 **SECTION 17.** 889.29 (1) of the statutes is amended to read:

19 889.29 (1) If any business, institution or member of a profession or calling in  
20 the regular course of business or activity has kept or recorded any memorandum,  
21 writing, entry, print, representation or combination thereof, of any act, transaction,  
22 occurrence or event, and in the regular course of business has caused any or all of the  
23 same to be recorded, copied or reproduced by any photographic, photostatic,  
24 microfilm, microcard, miniature photographic, or other process which accurately  
25 reproduces or forms a durable medium for so reproducing the original, or to be

1 recorded on an optical disk or in electronic format, the original may be destroyed in  
2 the regular course of business, unless its preservation is required by law. Such  
3 reproduction or optical disk record, when reduced to comprehensible format and  
4 when satisfactorily identified, is as admissible in evidence as the original itself in any  
5 judicial or administrative proceeding whether the original is in existence or not and  
6 an enlargement or facsimile of such reproduction of a record or an enlarged copy of  
7 a record generated from an original record stored in optical disk or electronic format  
8 is likewise admissible in evidence if the original reproduction is in existence and  
9 available for inspection under direction of court. The introduction of a reproduced  
10 record, enlargement or facsimile, does not preclude admission of the original. This  
11 subsection does not apply to records governed by s. 137.20.

12 **SECTION 18.** 910.01 (1) of the statutes is amended to read:

13 910.01 (1) WRITINGS AND RECORDINGS. “Writings” and “recordings” consist of  
14 letters, words or numbers, or their equivalent, set down by handwriting, typewriting,  
15 printing, photostating, photographing, magnetic impulse, mechanical or electronic  
16 recording, or other form of data compilation or recording.

17 **SECTION 19.** 910.02 of the statutes is amended to read:

18 **910.02 Requirement of original.** To prove the content of a writing, recording  
19 or photograph, the original writing, recording or photograph is required, except as  
20 otherwise provided in chs. 901 to 911, s. 137.21, or by other statute.

21 **SECTION 20.** 910.03 of the statutes is amended to read:

22 **910.03 Admissibility of duplicates.** A duplicate is admissible to the same  
23 extent as an original unless (1) a genuine question is raised as to the authenticity of  
24 the original or (2) in the circumstances it would be unfair to admit the duplicate in

1 lieu of the original. This section does not apply to records of transactions governed  
2 by s. 137.21.

3 **SECTION 21. Initial applicability.**

4 (1) This act first applies to electronic records or electronic signatures that are  
5 created, generated, sent, communicated, received, or initially stored on the effective  
6 date of this subsection.

NOTE: 1. Moved from **SECTION 4** [Prospective Application].

2. Because the original text uses the word “stored,” the effect is to apply the draft retroactively to all existing records. Because this appears to contravene the intent of the drafters, this draft provides that application is limited to electronic records or signatures that are *initially* stored on the effective date.

NOTE: **SECTION 22** [Effective Date] is deleted because we have no instruction to delay the effective date at this point.

7

(END)

PUBLIC LAW 106-229—JUNE 30, 2000

**ELECTRONIC SIGNATURES IN GLOBAL AND  
NATIONAL COMMERCE ACT**

Public Law 106-229  
106th Congress

An Act

June 30, 2000  
[S. 761]

To facilitate the use of electronic records and signatures in interstate or foreign commerce.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Electronic  
Signatures in  
Global and  
National  
Commerce Act.  
Contracts.  
15 USC 7001  
note.

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Electronic Signatures in Global and National Commerce Act”.

**TITLE I—ELECTRONIC RECORDS AND  
SIGNATURES IN COMMERCE**

15 USC 7001.

**SEC. 101. GENERAL RULE OF VALIDITY.**

(a) **IN GENERAL.**—Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce—

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

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

(b) **PRESERVATION OF RIGHTS AND OBLIGATIONS.**—This title does not—

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

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

(c) **CONSUMER DISCLOSURES.**—

(1) **CONSENT TO ELECTRONIC RECORDS.**—Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever

is required) such information satisfies the requirement that such information be in writing if—

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

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

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

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

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

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

(C) the consumer—

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

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

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

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

(ii) again complies with subparagraph (C).

(2) OTHER RIGHTS.—

(A) PRESERVATION OF CONSUMER PROTECTIONS.—

Nothing in this title affects the content or timing of any disclosure or other record required to be provided or made

available to any consumer under any statute, regulation, or other rule of law.

(B) VERIFICATION OR ACKNOWLEDGMENT.—If a law that was enacted prior to this 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).

(3) EFFECT OF FAILURE TO OBTAIN ELECTRONIC CONSENT OR CONFIRMATION OF CONSENT.—The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) PROSPECTIVE EFFECT.—Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

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

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

(d) RETENTION OF CONTRACTS AND RECORDS.—

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

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

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

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

(3) ORIGINALS.—If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided,

available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).

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

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

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

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

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

(i) INSURANCE.—It is the specific intent of the Congress that this title and title II apply to the business of insurance.

Applicability.

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

- (1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct;
- (2) the agent or broker was not involved in the development or establishment of such electronic procedures; and
- (3) the agent or broker did not deviate from such procedures.

#### SEC. 102. EXEMPTION TO PREEMPTION.

15 USC 7002.

(a) IN GENERAL. A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law—



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

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

(i) such alternative procedures or requirements are consistent with this title and title II; and

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

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

(b) EXCEPTIONS FOR ACTIONS BY STATES AS MARKET PARTICIPANTS.—Subsection (a)(2)(A)(ii) shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) PREVENTION OF CIRCUMVENTION.—Subsection (a) does not permit a State to circumvent this title or title II through the imposition of nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act.

15 USC 7003.

#### SEC. 103. SPECIFIC EXCEPTIONS.

(a) EXCEPTED REQUIREMENTS.—The provisions of section 101 shall not apply to a contract or other record to the extent it is governed by—

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

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

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

(b) ADDITIONAL EXCEPTIONS.—The provisions of section 101 shall not apply to—

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

(2) any notice of—

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

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

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

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

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

(c) REVIEW OF EXCEPTIONS.—

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

Deadline.  
Reports.

(2) DETERMINATIONS.—If a Federal regulatory agency, with respect to matter within its jurisdiction, determines after notice and an opportunity for public comment, and publishes a finding, that one or more such exceptions are no longer necessary for the protection of consumers and eliminating such exceptions will not increase the material risk of harm to consumers, such agency may extend the application of section 101 to the exceptions identified in such finding.

SEC. 104. APPLICABILITY TO FEDERAL AND STATE GOVERNMENTS. 15 USC 7004.

(a) FILING AND ACCESS REQUIREMENTS.—Subject to subsection (c)(2), nothing in this title limits or supersedes any requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.

(b) PRESERVATION OF EXISTING RULEMAKING AUTHORITY —

(1) USE OF AUTHORITY TO INTERPRET.—Subject to paragraph (2) and subsection (c), a Federal regulatory agency or State regulatory agency that is responsible for rulemaking under any other statute may interpret section 101 with respect to such statute through—

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

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

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

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

(A) such regulation, order, or guidance is consistent with section 101;

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

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

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

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

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

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

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

(3) PERFORMANCE STANDARDS.—

(A) ACCURACY, RECORD INTEGRITY, ACCESSIBILITY.—

Notwithstanding paragraph (2)(C)(iii), a Federal regulatory agency or State regulatory agency may interpret section 101(d) to specify performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of paragraph (2)(C)(iii) if the requirement (i) serves an important governmental objective; and (ii) is substantially related to the achievement of that objective. Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 101(d).

(B) PAPER OR PRINTED FORM.—Notwithstanding subsection (c)(1), a Federal regulatory agency or State regulatory agency may interpret section 101(d) to require retention of a record in a tangible printed or paper form if—

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

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

(4) EXCEPTIONS FOR ACTIONS BY GOVERNMENT AS MARKET PARTICIPANT.—Paragraph (2)(C)(iii) shall not apply to the statutes, regulations, or other rules of law governing procurement by the Federal or any State government, or any agency or instrumentality thereof.

(c) ADDITIONAL LIMITATIONS.—

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

(2) CONTINUING OBLIGATION UNDER GOVERNMENT PAPERWORK ELIMINATION ACT.—Nothing in subsection (a) or (b) relieves any Federal regulatory agency of its obligations under the Government Paperwork Elimination Act (title XVII of Public Law 105-277).

(d) AUTHORITY TO EXEMPT FROM CONSENT PROVISION.—

(1) IN GENERAL.—A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

(2) PROSPECTUSES.—Within 30 days after the date of enactment of this Act, the Securities and Exchange Commission shall issue a regulation or order pursuant to paragraph (1) exempting from section 101(c) any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940, or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 2(a)(10)(A) of the Securities Act of 1933.

Deadline.  
Regulations.

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

#### SEC. 105. STUDIES.

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

Deadlines.  
15 USC 7005.  
Mail.

Reports.

(b) STUDY OF ELECTRONIC CONSENT.—Within 12 months after the date of the enactment of this Act, the Secretary of Commerce and the Federal Trade Commission shall submit a report to the Congress evaluating any benefits provided to consumers by the procedure required by section 101(c)(1)(C)(ii); any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 101(c)(1)(C)(ii) would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission. In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses.

Reports.

Public  
information.

## SEC. 106. DEFINITIONS.

For purposes of this title:

(1) **CONSUMER.**—The term “consumer” means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

(2) **ELECTRONIC.**—The term “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) **ELECTRONIC AGENT.**—The term “electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response.

(4) **ELECTRONIC RECORD.**—The term “electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) **ELECTRONIC SIGNATURE.**—The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

(6) **FEDERAL REGULATORY AGENCY.**—The term “Federal regulatory agency” means an agency, as that term is defined in section 552(f) of title 5, United States Code.

(7) **INFORMATION.**—The term “information” means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(8) **PERSON.**—The term “person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(9) **RECORD.**—The term “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) **REQUIREMENT.**—The term “requirement” includes a prohibition.

(11) **SELF-REGULATORY ORGANIZATION.**—The term “self-regulatory organization” means an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such organization or entity, by a Federal regulatory agency, or by another self-regulatory organization.

(12) **STATE.**—The term “State” includes the District of Columbia and the territories and possessions of the United States.

(13) **TRANSACTION.**—The term “transaction” means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct—

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

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

**SEC. 107. EFFECTIVE DATE.**

15 USC 7001  
note.

(a) **IN GENERAL.**—Except as provided in subsection (b), this title shall be effective on October 1, 2000.

(b) **EXCEPTIONS.**—

(1) **RECORD RETENTION.**—

(A) **IN GENERAL.**—Subject to subparagraph (B), this title shall be effective on March 1, 2001, with respect to a requirement that a record be retained imposed by—

(i) a Federal statute, regulation, or other rule of law, or

(ii) a State statute, regulation, or other rule of law administered or promulgated by a State regulatory agency.

(B) **DELAYED EFFECT FOR PENDING RULEMAKINGS.**—If on March 1, 2001, a Federal regulatory agency or State regulatory agency has announced, proposed, or initiated, but not completed, a rulemaking proceeding to prescribe a regulation under section 104(b)(3) with respect to a requirement described in subparagraph (A), this title shall be effective on June 1, 2001, with respect to such requirement.

(2) **CERTAIN GUARANTEED AND INSURED LOANS.**—With regard to any transaction involving a loan guarantee or loan guarantee commitment (as those terms are defined in section 502 of the Federal Credit Reform Act of 1990), or involving a program listed in the Federal Credit Supplement, Budget of the United States, FY 2001, this title applies only to such transactions entered into, and to any loan or mortgage made, insured, or guaranteed by the United States Government thereunder, on and after one year after the date of enactment of this Act.

(3) **STUDENT LOANS.**—With respect to any records that are provided or made available to a consumer pursuant to an application for a loan, or a loan made, pursuant to title IV of the Higher Education Act of 1965, section 101(c) of this Act shall not apply until the earlier of—

(A) such time as the Secretary of Education publishes revised promissory notes under section 432(m) of the Higher Education Act of 1965; or

(B) one year after the date of enactment of this Act.

**TITLE II—TRANSFERABLE RECORDS**

**SEC. 201. TRANSFERABLE RECORDS.**

15 USC 7021.

(a) **DEFINITIONS.**—For purposes of this section:

(1) **TRANSFERABLE RECORD.**—The term “transferable record” means an electronic record that—

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

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

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

A transferable record may be executed using an electronic signature.

(2) OTHER DEFINITIONS.—The terms “electronic record”, “electronic signature”, and “person” have the same meanings provided in section 106 of this Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SEC. 202. EFFECTIVE DATE.**

This title shall be effective 90 days after the date of enactment of this Act.

15 USC 7021  
note.

**TITLE III—PROMOTION OF INTERNATIONAL ELECTRONIC COMMERCE**

**SEC. 301. PRINCIPLES GOVERNING THE USE OF ELECTRONIC SIGNATURES IN INTERNATIONAL TRANSACTIONS.**

15 USC 7031.

(a) PROMOTION OF ELECTRONIC SIGNATURES.—

(1) REQUIRED ACTIONS.—The Secretary of Commerce shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 101 of this Act. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.

(2) PRINCIPLES.—The principles specified in this paragraph are the following:

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

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

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

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

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

(c) DEFINITIONS.—As used in this section, the terms “electronic record” and “electronic signature” have the same meanings provided in section 106 of this Act.



## TITLE IV—COMMISSION ON ONLINE CHILD PROTECTION

### SEC. 401. AUTHORITY TO ACCEPT GIFTS.

Section 1405 of the Child Online Protection Act (47 U.S.C. 231 note) is amended by inserting after subsection (g) the following new subsection:

“(h) GIFTS, BEQUESTS, AND DEVICES.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real (including the use of office space) and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts or grants not used at the termination of the Commission shall be returned to the donor or grantee.”.

Approved June 30, 2000.

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#### LEGISLATIVE HISTORY—S. 761 (H.R. 1714):

HOUSE REPORTS: No. 106-341, accompanying H.R. 1714, Pt. 1 (Comm. on Commerce) and Pt. 2 (Comm. on the Judiciary).

SENATE REPORTS: Nos. 106-131 (Comm. on Commerce, Science, and Transportation) and 106-661 (Comm. of Conference).

#### CONGRESSIONAL RECORD:

Vol. 145 (1999): Nov. 19, considered and passed Senate.

Vol. 146 (2000): Feb. 16, considered and passed House, amended, in lieu of H.R. 1714.

June 14, House agreed to conference report.

June 15, 16, Senate considered and agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 36 (2000):  
June 30, Presidential remarks and statement.

