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2001 – 2002 LEGISLATURE

LRB-~~0688/1~~

JTK/RM/RK/RC/RN/JK:ejs:jf

1-10-00

RM NK

DWDOE

2001 BILL

BUDGET

DO NOT GEN

AN ACT ***to repeal*** 137.04 and 137.06; ***to renumber and amend*** 137.05; ***to amend*** chapter 137 (title), subchapter I (title) of chapter 137 [precedes s. 137.01], 137.01 (3) (a), 137.01 (4) (a), 137.01 (4) (b), subchapter II (title) of chapter 137 [precedes 137.04], 224.30 (2), 228.01, 228.03 (2), 889.29 (1), 910.01 (1), 910.02 and 910.03; and ***to create*** 16.61 (7) (d), 16.611 (2) (e), 16.612 (2) (c), 137.11 to 137.24 and 137.26 of the statutes; **relating to:** electronic transactions and records and granting rule-making authority

need COMMERCE AND ECONOMIC DEVELOPMENT

sub COMMERCE

Analysis by the Legislative Reference Bureau

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.

Subsub

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.

1. **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.

2. **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.

1 < 3, ELECTRONIC DOCUMENTS AND SIGNATURES IN COMMERCE

not bold

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.

not bold

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.

1. 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.

(With certain exceptions) This bill ~~also~~ grants DOA primary rule-making authority with regard to the use of electronic documents and signatures by governmental units. In addition,

2. 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.

3. ELECTRONIC DOCUMENTS AND SIGNATURES IN COMMERCE

Rule of construction (certain) and grants DOA and the secretary of state joint rule-making authority with regard to electronic notarizations.

(no bold)

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.

(no bold)

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.

no bold →***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.

no bold →***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.

no bold →***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.

no bold →***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.*

no bold → ***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.

no bold → ***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.

no bold → ***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.

no bold → ***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.

no bold

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 document expressly agrees that the electronic document is a transferable record.

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

SECTION 1. 16.61 (7) (d) of the statutes is created to read:

16.61 **(7)** (d) This subsection does not apply to public records governed by s. 137.20.

SECTION 2. 16.611 (2) (e) of the statutes is created to read:

16.611 **(2)** (e) This subsection does not apply to public records governed by s. 137.20.

SECTION 3. 16.612 (2) (c) of the statutes is created to read:

16.612 **(2)** (c) This subsection does not apply to documents or public records governed by s. 137.20.

SECTION 4. Chapter 137 (title) of the statutes is amended to read:

CHAPTER 137

AUTHENTICATIONS AND ELECTRONIC

TRANSACTIONS AND RECORDS

SECTION 5. Subchapter I (title) of chapter 137 [precedes s. 137.01] of the statutes is amended to read:

CHAPTER 137

SUBCHAPTER I

NOTARIES AND COMMISSIONERS

OF DEEDS; NONELECTRONIC

NOTARIZATION AND ACKNOWLEDGEMENT

SECTION 6. 137.01 (3) (a) of the statutes is amended to read:

137.01 **(3)** (a) ~~Every~~ Except as authorized in s. 137.19, every notary public shall provide an engraved official seal which makes a distinct and legible impression or official rubber stamp which makes a distinct and legible imprint on paper. The impression of the seal or the imprint of the rubber stamp shall state only the following: "Notary Public," "State of Wisconsin" and the name of the notary. But any notarial seal in use on August 1, 1959, shall be considered in compliance.

SECTION 7. 137.01 (4) (a) of the statutes is amended to read:

137.01 **(4)** (a) Every official act of a notary public shall be attested by the notary public's written signature or electronic signature, as defined in s. ~~137.04 (2)~~ 137.11 (8).

SECTION 8. 137.01 (4) (b) of the statutes is amended to read:

137.01 **(4)** (b) ~~All~~ Except as authorized in s. 137.19, all certificates of acknowledgments of deeds and other conveyances, or any written instrument required or authorized by law to be acknowledged or sworn to before any notary public, within this state, shall be attested by a clear impression of the official seal or imprint of the rubber stamp of said officer, and in addition thereto shall be written or stamped either the day, month and year when the commission of said notary public will expire, or that such commission is permanent.

SECTION 9. Subchapter II (title) of chapter 137 [precedes 137.04] of the statutes is amended to read:

CHAPTER 137

SUBCHAPTER II

ELECTRONIC ~~SIGNATURES~~

TRANSACTIONS AND RECORDS;

ELECTRONIC NOTARIZATION

AND ACKNOWLEDGEMENT

SECTION 10. 137.04 of the statutes is repealed.

(A) SECTION XX. RA; 137.05 (title); 137.25 (title) (A) (1)

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

137.25 (title) **Submission of written ~~documents~~ records to governmental units.** Unless otherwise ~~prohibited~~ provided 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

(A) 137.25 (1) (B)

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.

SECTION 12. 137.06 of the statutes is repealed.

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

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

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

(4) "Contract" means the total legal obligation resulting from the parties' agreement as affected by this subchapter and other applicable law.

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

(6) "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.

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

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

(9) "Governmental unit" means:

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

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

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

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

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

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

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

(12) "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.

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

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

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

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

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

(a) Any law governing the execution of wills or the creation of testamentary trusts; or

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

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

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

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

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

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

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

(4) Except as otherwise provided in this subchapter, the effect of any provision of this subchapter may be varied by agreement. Use of the words "unless otherwise agreed," or words of similar import, in this subchapter shall not be interpreted to preclude other provisions of this subchapter from being varied by agreement.

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

137.14 Construction. This subchapter shall be construed and applied:

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

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

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

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

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

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

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

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

(2) If a law other than this subchapter requires a record 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, then:

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

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

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

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

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

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

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

137.17 Attribution and effect of electronic records and electronic signatures. (1) An electronic record or electronic signature is attributable to a person if the electronic record or electronic signature was created by the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(2) The effect of an electronic record or electronic signature that is attributed to a person under sub. (1) is determined from the context and surrounding

circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

137.18 Effect of change or error. (1) If a change or error in an electronic record occurs in a transmission between parties to a transaction, then:

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

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

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

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

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

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

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

137.19 Notarization and acknowledgement. If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to administer the oath or to make the notarization, acknowledgment, or verification, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

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

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

(b) Remains accessible for later reference.

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

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

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

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

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

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

137.21 Admissibility in evidence. In a proceeding, a record or signature may not be excluded as evidence solely because it is in electronic form.

137.22 Automated transactions. In an automated transaction:

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

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

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

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

(a) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of

receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

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

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

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

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

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

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

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

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

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

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

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

(7) If a person is aware that an electronic record purportedly sent under sub. (1), or purportedly received under sub. (2), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

137.24 Transferable records. (1) In this section, "transferable record" means an electronic record that would be a note under ch. 403 or a record under ch. 407 if the electronic record were in writing.

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

(2) 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.

(3) A system satisfies the requirements of sub. (2), 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:

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

(b) The authoritative copy identifies the person asserting control as the person to which the transferable record was issued or, if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

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

(d) 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;

(e) 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

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

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

(5) 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 chs. 401 to 411.

(6) 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.

SECTION 14. 137.26 of the statutes is created to read:

137.26 Interoperability. If a governmental unit of this state adopts standards regarding its receipt of electronic records or electronic signatures under s. 137.25, the governmental unit shall promote consistency and interoperability with similar standards adopted by other governmental units of this state and other states and the federal government and nongovernmental persons interacting with governmental units of this state. Any standards so adopted may include alternative provisions if warranted to meet particular applications.

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

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

SECTION 16. 228.01 of the statutes is amended to read:

228.01 Recording of documents and public records by mechanical process authorized. Whenever any officer of any county having a population of 500,000 or more is required or authorized by law to file, record, copy, recopy or replace any document, court order, plat, paper, written instrument, writings, record or book of record, on file or of record in his or her office, notwithstanding any other provisions

INSERT 27-6

in the statutes, the officer may do so by photostatic, photographic, microphotographic, microfilm, optical imaging, electronic formatting or other mechanical process which produces a clear, accurate and permanent copy or reproduction of the original document, court order, plat, paper, written instrument, writings, record or book of record in accordance with the applicable standards specified under ss. 16.61 (7) and 16.612. Any such officer may also reproduce by such processes or transfer from optical disk or electronic storage any document, court order, plat, paper, written instrument, writings, record or book of record which has previously been filed, recorded, copied or recopied. Optical imaging or electronic formatting of any document is subject to authorization under s. 59.52 (14) (a).

SECTION 17. 228.03 (2) of the statutes is amended to read:

228.03 **(2)** Any photographic reproduction of an original record meeting the applicable standards prescribed in s. 16.61 (7) or copy of a record generated from an original record stored in optical disk or electronic format in compliance with the applicable standards under ss. 16.61 and 16.612 shall be taken as and stand in lieu of and have all of the effect of the original record and shall be admissible in evidence in all courts and all other tribunals or agencies, administrative or otherwise, in all cases where the original document is admissible. A transcript, exemplification or certified copy of such a reproduction of an original record, or certified copy of a record generated from an original record stored in optical disk or electronic format, for the purposes specified in this subsection, is deemed to be a transcript, exemplification or certified copy of the original. The custodian of a photographic reproduction shall place the reproduction or optical disk in conveniently accessible storage and shall make provision for preserving, examining and using the reproduction of the record or generating a copy of the record from optical disk or electronic storage. An enlarged

copy of a photographic reproduction of a record made in accordance with the applicable standards specified in s. 16.61 (7) or an enlarged copy of a record generated from an original record stored in optical disk or electronic format in compliance with the applicable standards under ss. 16.61 and 16.612 that is certified by the custodian as provided in s. 889.18 (2) has the same effect as an actual–size copy.

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

889.29 **(1)** If any business, institution or member of a profession or calling in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, or to be recorded on an optical disk or in electronic format, the original may be destroyed in the regular course of business, unless its preservation is required by law. Such reproduction or optical disk record, when reduced to comprehensible format and when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction of a record or an enlarged copy of a record generated from an original record stored in optical disk or electronic format is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. This subsection does not apply to records governed by s. 137.20.

SECTION 19. 910.01 (1) of the statutes is amended to read:

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

SECTION 20. 910.02 of the statutes is amended to read:

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

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

910.03 Admissibility of duplicates. A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. This section does not apply to records of transactions governed by s. 137.21.

SECTION 22. Initial applicability.

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

(END)

CS
ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES.

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1536/1 ins

INSERT 27-C

¶ SEC #. CR; 137.25 (2):

¶ 137.25 (2) (B) 1. The department of administration shall promulgate rules concerning the use of electronic records and electronic signatures by governmental units, which shall govern the use of electronic records or signatures by governmental units, unless otherwise provided by law.

¶ 2. The department of administration and the secretary of state shall jointly promulgate rules establishing requirements that a notary public must satisfy, unless otherwise provided by law, in order to use an electronic signature for any attestation. The joint rules shall be numbered as rules of each agency in the Wisconsin Administrative Code.

(ea2 ins)

(B) INSERT 30-15 1536/ insNS

SECTION 9101. Nonstatutory provisions; administration.

non Stat

Pg3Ln17 Pg3Ln18 Pg3Ln19 Pg3Ln20 Pg3Ln21 Pg3Ln22 Pg3Ln23 Pg3Ln24 Pg4Ln1 Pg4Ln2

(1) Using the procedure under section 227.24 of the statutes, the department of administration may promulgate emergency rules under section 137.25 (2) of the statutes, as created by this act, for the period before the effective date of permanent rules initially promulgated under section 137.25 (2) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b) and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

not B

137.25 (2)

AND ELECTRONIC SIGNATURES

CS

USE OF ELECTRONIC RECORDS BY GOVERNMENTAL UNITS.

not B

CS

(2) USE OF ELECTRONIC SIGNATURES BY NOTARIES PUBLIC. The secretary of state and department of administration shall promulgate initial rules under section 137.25 (2) 2. of the statutes, as created by this act, to become effective no later than January 1, 2004.

insert to LRB-1536/1

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(no ¶) The treatment of sections 16.61 (7)(d), 16.611 (2)(e), 16.612 (2)(c), 137.01 (3)(a) and (4)(a) and (b), 137.04, 137.05 (title), 137.06, 137.11 to 137.24, 137.26, 224.30(2), 228.01, 228.03 (2), 889.29(1), 910.01(1), 910.02, and 910.03, subchapters I (title) and II (title) of chapter 137, and chapter 137 (title) of the statutes, the renumbering and amendment of section 137.05 of the statutes, and the creation of section 137.25 (2) of the statutes

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1536/1dnins
RJM:/...:...
cjs

INSERT DNOTE

(2)

1. You requested a separate budget draft to make the definition of "electronic signature" in s. 137.04 (2), stats., consistent with that used in UETA and to provide DOA with rule–making authority relating to the use of electronic signatures by governmental units. In the instructions to that request, you referred to 1999 AB–267. This draft incorporates that request, using SSA–1 to 1999 AB–267 as a general guide to your intent. This draft also attempts to reconcile that request with the request to draft UETA. Under this draft, s. 137.05, stats., is renumbered to be part of UETA and amended consistent with the intent of UETA and s. 137.25 (2) is created consistent with your request concerning rule–making authority. Section 137.06, stats., is repealed because it is covered by UETA, s. 137.04, stats., is repealed because the definitions established in that section are no longer needed under UETA, and s. 224.30 (2), stats., is repealed because the draft gives DOA primary rule–making authority.

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

otherwise

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

1536/1dn

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-~~0688/1dn~~
JTK/RM/RK/RC/RN/JK:cjs:jf

January 6, 2001

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

INSERT DRAFT

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

3

2. Current state law uses the term "record" as a noun about 4,000 times. Almost uniformly, the term "record" is currently used more narrowly than the word "record" in proposed s. 137.11 (12), the distinction being that "record" under current state law is generally used to describe something that is kept or required to be kept while

"record" in UETA is apparently intended to cover anything other than an oral communication. In other words, the drafters of UETA apparently intended "record" to mean "document." The use of different meanings for the same term is contrary to normal drafting procedure and it may cause some confusion. This draft, however, maintains the usage of the word "record" in UETA (proposed subch. II of ch. 137), but generally retains other terminology outside UETA to avoid confusion in other statutes.

(4) 4. The draft defines "electronic" in proposed s. 137.11 (5) and "record" (document) in proposed s. 137.11 (12). The draft then defines "electronic record" in proposed s. 137.11 (7) in a way that is inconsistent with the definition of "electronic" and "record." Under the draft, a "record" must be *inscribed* on a tangible medium or *stored* in an electronic or other medium and be *retrievable* in a perceivable form. An "electronic" record is a record having *electrical, digital, magnetic, wireless, optical, electromagnetic,* OR similar capabilities. However, an "electronic record" is a record that is *created, generated, sent communicated, received, or stored* by electronic means. The resulting confusion could be mitigated by deleting the definition of "electronic" and building all of the operative characteristics into the definition of "electronic record."

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

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For example, a problem may arise if a person (A) makes a written offer to contract with another person (B), and if B then communicates its acceptance in electronic form. If A refuses to deal electronically, B may argue that the acceptance is enforceable under proposed s. 137.15 (1). According to B, the only reason the acceptance would not be enforceable is because it is in electronic form and, under proposed s. 137.15 (1), this reason is insufficient to deny the enforceability of the document. According to A, however, proposed s. 137.15 (1) does not apply to the transaction because A did not consent to deal electronically. This result is dictated by proposed s. 137.13 (2), which applies a consent requirement to the entire subchapter that constitutes UETA.

To make this result more straightforward, you may want to clarify that proposed s. 137.15 applies only to transactions between consenting parties. This type of clarification is currently used in proposed s. 137.16.

10

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15 ~~14~~. Proposed s. 137.20 (2) provides that document retention requirements in proposed s. 137.20 (1) do not apply to any information the sole purpose of which is to enable a document to be sent, communicated, or received. The comments suggest that if ancillary information is not retained, an electronic document may still be used to satisfy a retention requirement. Ancillary information, such as a date, time, or address, may be significant in some cases, and you may not want to permit destruction of this information.

16 ~~15~~. Proposed s. 137.20 (3) provides that a custodian of a document may utilize the services of another person to comply with electronic retention procedures. If the application of UETA extends beyond transactions, that is, beyond situations where a governmental unit is acting only as a market participant, this infers that a custodian of public records may transfer those records to private persons. However, if the application of UETA is interpreted consistently with the prefatory note and comments to UETA, this provision generally would not apply to a public records custodian's retention of most public records.

17 ~~16~~. Proposed s. 137.20 (1), (4), and (6) provide essentially that unless a law enacted after UETA provides otherwise, electronic retention is sufficient to satisfy an existing retention requirement. This may be interpreted to authorize any public or private custodian to destroy original records if an electronic copy is retained. Although the

application of these subsections is limited if UETA applies only to transactions, this authority overlaps existing state law that already provides for electronic retention, but requires that it be done in certain ways to preserve the evidentiary value of records and to ensure quality control. See ss. 16.61 (7) and (8), 16.611, 16.612, and 19.21 (4) (c), stats.

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~~17~~. Proposed s. 137.20 (5) provides that if a law requires retention of a check, the requirement is satisfied by retention of an electronic document containing the information on the front and back of the check in the manner provided in the draft. The term "check" is not defined in the draft. It is unclear whether this provision applies to other kinds of negotiable instruments, such as share drafts and money orders. However, since proposed s. 137.20 (1) and (4) suggest the same thing as proposed s. 137.20 (5) in more general terms, it is possible that proposed s. 137.20 (5) may be interpreted to be redundant.

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~~18~~. Proposed s. 137.20 (6) provides that an electronic document satisfies a law requiring retention of a document for evidentiary, audit, or like purposes, unless a law enacted after UETA specifically prohibits the use of an electronic document for retention purposes. Insofar as this provision attempts to force future legislatures to express their intent in a particular way in order for their laws to have legal effect, this provision is unenforceable. *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 363–369 (1983). In addition, the qualifying language "for evidentiary, audit, or like purposes" appears to put this subsection in tension with proposed ss. 137.15 (3) and 137.20 (1) and (4), which contain similar statements but do not include the qualifying language.

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~~19~~. Proposed s. 137.20 (7) provides that the retention provisions of UETA do not preclude a governmental unit of this state from specifying additional requirements for any document subject to the jurisdiction of the governmental unit. This subsection seems to contravene proposed s. 137.20 (1), (4), and (6), which provide that compliance with the retention requirements in those subsections is sufficient in some cases. In addition, it is unclear from the text whether this provision applies to governmental documents or to nongovernmental documents subject to a governmental unit's jurisdiction. The comments suggest that the latter interpretation was intended, but the authority of a particular governmental unit to exercise control over specific private documents may be unclear in some cases. Finally, it is unclear whether this subsection is intended to grant rule–making authority or merely to reference existing rule–making authority, if any.

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~~20~~. Proposed s. 137.23 (2) provides that an electronic document is received when it enters a recipient's designated information processing system and is in a form capable of being processed by that system, and proposed s. 137.15 (1) and (3) permit electronic documents to be substituted for nonelectronic documents and require that they be given the same legal effect. These provisions may have the result of altering laws under which the date of receipt of a document filed with a governmental unit is the date on which a hard copy is received or postmarked, so that electronic filing constitutes receipt instead. The application of this subsection depends upon whether UETA's application to governmental units is limited to transactions and whether the

requirement for mutual consent in proposed s. 137.13 (2) overrides proposed s. 137.15 (1) and (3), which do not mention mutual consent.

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

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

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

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

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

(1)

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~~26~~. **SECTION 19**, which permits governmental units to encourage interoperability between jurisdictions, is retained as proposed s. 137.26 but is significantly clarified. This draft also broadens the definition of "governmental unit" to employ Wisconsin terminology and ensure that all Wisconsin governmental units are covered, which appears to be consistent with the drafters' intent.

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~~27~~. **SECTION 22** of the original draft provides for the state to insert its desired effective date. Since we have no instruction on this point, we have not inserted any effective date. Under this draft, the act takes effect on the day after publication.

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~~28~~. **SECTION 3** (b) (4) of UETA allows states to insert exemptions for certain transactions from the application of UETA. This draft does not insert any exemptions under this **SECTION** of UETA. Under sec. 102 (a) (1) of E–sign, any exemption enacted under this **SECTION** of UETA is preempted to the extent that the exemption is inconsistent with E–sign. If you desire to insert any additional exemptions, please let us know. However, you should be aware that, in most cases, it will likely be difficult to predict whether an exemption is preempted by E–sign.

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~~29~~. There are numerous provisions in current law that require that a notice, request, statement, application, document, or other information (notice) be provided to a governmental unit in writing or that the notice be sent or mailed, suggesting that it be provided in written form. Under current law in s. 137.05, stats., and under this draft in proposed s. 137.25, most of those notices may be provided in electronic form if the governmental unit consents to receiving the notice in electronic form. Without an examination of each of those notice provisions, it is not possible to determine whether any particular provision should be amended to specify that the notice may only be furnished in written form and not in electronic form because, for example, electronic notice was not intended or contemplated by the provision when it was enacted. Because this issue arises under current law, because the application of UETA to each of these provisions is not completely clear, and because it is impractical to examine each of these provisions, the draft does not treat any of these provisions. Consequently, under this draft, as under current law, most of the provisions in current law requiring a notice to be given to a governmental unit in writing or to be sent or mailed to a governmental unit, may be satisfied by furnishing the notice in electronic form if the governmental unit consents to receive it in that form.

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~~30~~. This bill raises two issues relating to ch. 180, stats., regarding corporations. Chapter 180, stats., currently permits the use of electronic transmissions and electronic notices. However, the definition of "electronic transmission" in s. 180.0103 (7m), stats., relies upon an understanding of the term "electronic" that may be different from the meaning of "electronic" under UETA (proposed s. 137.11 (5)). You may want to harmonize s. 180.0103 (7m), stats., with the definition of "electronic" under UETA.

Second, s. 180.0141, stats., permits the use of an electronic notice under ch. 180, stats., but, unlike UETA, does not require the receiving party to consent to receive the notice in an electronic format. It is unclear how this provision would work in conjunction with UETA. The application of UETA may depend upon whether the receiving party consents to receive the electronic notice. Under this interpretation, UETA would apply if the electronic notice is sent with the consent of the receiving party but would not

apply if the electronic notice, consistent with s. 180.0141, stats., is sent notwithstanding the receiving party's failure to consent. It may be difficult to determine in a specific case whether a party has consented to receive the electronic notice or has received the electronic notice as a result of the unilateral action of the sender. If you would like to clarify the interaction of UETA and s. 180.0141, stats., please let us know.

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DRAFTER'S NOTE LRB–1536/1dn
FROM THE JTK/RM/RK/RC/RN/JK:cjs:jf
LEGISLATIVE REFERENCE BUREAU

January 10, 2001

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

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

2. You requested a separate budget draft to make the definition of "electronic signature" in s. 137.04 (2), stats., consistent with that used in UETA and to provide

DOA with rule–making authority relating to the use of electronic signatures by governmental units. In the instructions to that request, you referred to 1999 AB–267. This draft incorporates that request, using SSA–1 to 1999 AB–267 as a general guide to your intent. This draft also attempts to reconcile that request with the request to draft UETA. Under this draft, s. 137.05, stats., is renumbered to be part of UETA and amended consistent with the intent of UETA and s. 137.25 (2) is created consistent with your request concerning rule–making authority. Section 137.06, stats., is repealed because it is covered by UETA, s. 137.04, stats., is repealed because the definitions established in that section are no longer needed under UETA, and s. 224.30 (2), stats., is repealed because the draft gives DOA primary rule–making authority.

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

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

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

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

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

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

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

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

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

19. Proposed s. 137.20 (6) provides that an electronic document satisfies a law requiring retention of a document for evidentiary, audit, or like purposes, unless a law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

sender. If you would like to clarify the interaction of UETA and s. 180.0141, stats., please let us know.

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