137.01 **(4)** (b) ~~All~~ Except as authorized in par. (a) and 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 ~~6~~. 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SECTION ~~7~~. 137.04 of the statutes is repealed.

SECTION ~~8~~. 137.05 (title) of the statutes is renumbered 137.25 (title) and amended to read:

137.25 (title) **Submission of ~~written documents~~ records to governmental units; interoperability.**

SECTION ~~9~~. 137.05 of the statutes is renumbered 137.25 (1) and amended to read:

137.25 **(1)** 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 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SECTION 10. 137.06 of the statutes is repealed.

SECTION 11. 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.

137.115 Relation to federal law. For the purpose of satisfying 15 USC 7002 (a) (2) (B) as that statute relates to this subchapter, this state acknowledges the existence of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 to 7031.

137.12 Application. (1) Except as otherwise provided in subs. (2) and (2m) and except in s. 137.25, 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.

(2m) This subchapter does not apply to any of the following records or any transaction evidenced by any of the following records:

(a) Records governed by any law relating to adoption, divorce, or other matters of family law.

(b) Notices provided by a court.

(c) Court orders or judgements.

(d) Official court documents, including, but not limited to, briefs, pleadings, affidavits, memorandum decisions, and other writings, required to be executed in connection with court proceedings.

(e) Records required by law to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(f) Notices of cancelation or termination of utility services, including heat, water, basic local telecommunications services, and power.

(g) 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.

(h) Notices of the cancellation or termination of health insurance or benefits or life insurance benefits other than annuities.

(i) Notices of the recall of a product, or the material failure of a product, that risks endangering health or safety.

(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, consistent with any applicable rules promulgated under s. 137.01 (4) (a), 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) Except as provided in sub. (6), 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) Except as provided in sub. (6), 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) Except as provided in par. (b), 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 paragraph .... [revisor inserts date], specifically prohibits the use of an electronic record for the specified purpose.

(b) A governmental unit that has custody of a record is also further subject to the retention requirements for public records of state agencies and the records of the University of Wisconsin Hospitals and Clinics Authority established under ss. 16.61 and 16.611 and the retention requirements for documents of local governmental units established under s. 16.612.

(7) The public records board may promulgate rules prescribing standards consistent with this subchapter for retention of records by state agencies, the University of Wisconsin Hospitals and Clinics Authority and local governmental units.

(8) This section does not preclude the public records board, the department of electronic government, or any other governmental unit of this state from specifying additional requirements for the retention of any record of another governmental unit subject to its jurisdiction.

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 document 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 12. 137.25 (2) of the statutes is created to read:

137.25 **(2)** The department of electronic government 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. The rules shall include standards regarding the receipt of electronic records or electronic signatures that promote consistency and interoperability with other 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. The standards may include alternative provisions if warranted to meet particular applications.

(end ms)

INSERT 11-5

SECTION 13. 224.30 (2) of the statutes is repealed.

SECTION 14. 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 15. 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 16. 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, in s. 137.21, or by other statute.

SECTION 17. 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.

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SECTION 18. Nonstatutory provisions.

(1) USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES BY GOVERNMENTAL UNITS; EMERGENCY RULES. Using the procedure under section 227.24 of the statutes, the department of electronic government 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.

(2) USE OF ELECTRONIC SIGNATURES BY NOTARIES PUBLIC; EMERGENCY RULES. Using the procedure under section 227.24 of the statutes, the secretary of state and the department of electronic government may promulgate emergency rules under

section 137.01 (4) (a) of the statutes, as affected by this act, for the period before the effective date of permanent rules initially promulgated under section 137.01 (4) (a) of the statutes, as affected by this act. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the secretary of state and the department are 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 are not required to provide a finding of emergency for a rule promulgated under this subsection.

(3) USE OF ELECTRONIC SIGNATURES BY NOTARIES PUBLIC; PERMANENT RULES. The secretary of state and department of electronic government shall initially promulgate permanent rules under section 137.01 (4) (a) of the statutes, as affected by this act, to become effective no later than January 1, 2004.

~~**SECTION 19. Initial applicability.**~~

(#) ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES. The treatment of sections 137.01 (3) (a) and (4) (a) and (b), 137.04, 137.05 (title), 137.06, 137.11 to 137.24, 137.25 (2), 224.30 (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 and the renumbering and amendment of section 137.05 of the statutes first 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)~~

2003 BILL

Inserts

AN ACT *to amend* 16.957 (2) (b) 1. (intro.), 16.957 (2) (c) 2., 16.957 (3) ~~(b), 25~~.96 and 196.374 (3); and *to create* 16.957 (2m) and 196.~~374~~ (3m) of the statutes; **relating to:** contributions by electric and gas utilities to the utility public benefits fund, grants for energy conservation and other programs, extending the time ~~limit~~ for emergency rule procedures, and granting rule–making authority.

Insert Anal 3071/5 (MDK)

~~*Analysis by the Legislative Reference Bureau*~~

Under current law, certain electric and gas utilities are required to make contributions to the ~~Public Service Commission~~ (PSC) in each fiscal year. The PSC deposits the contributions in the utility public benefits fund (fund), which also consists of monthly fees paid by utility customers. The fund is used by the Department of Administration (DOA) to make grants for low–income assistance, energy conservation and efficiency, environmental research and development, and renewable resource programs. The amount that each utility must contribute to the PSC is the amount that the PSC determines that the utility spent in 1998 on its own programs that are similar to the programs awarded grants by DOA.

Under this bill, the PSC may allow a utility to retain a portion of the amount that it is required to contribute in each fiscal year under current law. However, the PSC may allow a utility to do so only if the PSC determines that the portion is used by the utility for energy conservation programs for industrial, commercial, and

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No (B) (CS) Utility public benefits fund

agricultural customers in the utility's service area. Also, the programs must comply with rules promulgated by the PSC. The rules must specify annual energy savings targets that the programs must be designed to achieve. The rules must also require a utility to demonstrate that, within a reasonable period of time determined by the PSC, the economic benefits of such a program will be equal to the portion of the contribution that the PSC allows the utility to retain. If the PSC allows a utility to retain such a portion, the utility must contribute 1.75% of the portion to the PSC, which the PSC must deposit in the fund for DOA to use for programs for research and development for energy conservation and efficiency. In addition, the utility must contribute 4.5% of the portion to the PSC for deposit in the fund for DOA to use for renewable resource programs. The bill also requires the PSC to allow a utility to recover in rates any expenses related to administration, marketing, or delivery of services for the utility's energy conservation programs, and prohibits a utility from paying for such expenses from the portion of a contribution the utility is allowed to retain.

The bill also requires the PSC to promulgate rules for the grants made by DOA from the fund for energy conservation and other programs. Under the bill, an applicant is not eligible for such a grant unless the applicant's proposal for the grant complies with rules promulgated by the PSC. The rules must require an applicant to demonstrate that, within a reasonable period of time determined by the PSC, the economic benefits resulting from the proposal will be equal to the amount of the grant. The rules must also specify annual energy savings targets that a such proposal must be designed to achieve.

~~For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.~~ (add insert)

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

Insert 5-1

SECTION 1. 16.957 (2) (b) 1. (intro.) of the statutes is amended to read:

16.957 **(2)** (b) 1. (intro.) Subject to subd. 2. and the rules promulgated under sub. (2m), after holding a hearing, establish programs for awarding grants from the appropriation under s. 20.505 (3) (s) for each of the following:

SECTION 2. 16.957 (2) (c) 2. of the statutes is amended to read:

16.957 **(2)** (c) 2. Requirements and procedures for applications for grants awarded under programs established under par. (a) or (b) 1. The rules for grants

awarded under programs established under par. (b) 1. may not be inconsistent with the rules promulgated by the commission under sub. (2m).

SECTION 3. 16.957 (2m) of the statutes is created to read:

16.957 **(2m)** ENERGY CONSERVATION AND EFFICIENCY GRANTS. The commission shall promulgate rules that provide that a proposal for providing energy conservation or efficiency services is not eligible for a grant under sub. (2) (b) unless the applicant demonstrates that, no later than a reasonable period of time, as determined by the commission, after the applicant begins to implement the proposal, the economic value of the benefits resulting from the proposal will be equal to the amount of the grant. The rules shall also specify annual energy savings targets that a such proposal must be designed to achieve in order for the proposal to be eligible for a grant under sub. (2) (b).

SECTION 4. 16.957 (3) (b) of the statutes is amended to read:

16.957 **(3)** (b) The department shall, on the basis of competitive bids, contract with one or more nonstock, nonprofit corporations organized under ch. 181 to administer the programs established under sub. (2) (b) 1., including soliciting proposals, processing grant applications, selecting, based on criteria specified in rules promulgated under sub. (2) (c) 2m. and the standards established in the rules promulgated under sub. (2m), proposals for the department to make awards and distributing grants to recipients.

SECTION 5. 25.96 of the statutes is amended to read:

25.96 Utility public benefits fund. There is established a separate nonlapsible trust fund designated as the utility public benefits fund, consisting of deposits by the public service commission under s. 196.374 (3) and (3m), public

benefits fees received under s. 16.957 (4) (a) and (5) (c) and (d) and contributions received under s. 16.957 (2) (c) 4. and (d) 2. (end of insert)

SECTION 6. 196.374 (3) of the statutes is amended to read:

196.374 **(3)** In 2000, 2001 and 2002, the commission shall require each utility to spend a decreasing portion of the amount determined under sub. (2) on programs specified in sub. (2) and contribute the remaining portion of the amount to the commission for deposit in the fund. ~~In~~ Except as provided in sub. (3m), in each year after 2002, each utility shall contribute the entire amount determined under sub. (2) to the commission for deposit in the fund. The commission shall ensure in rate–making orders that a utility recovers from its ratepayers the amounts spent on programs or contributed to the fund under this subsection or retained under sub. (3m). The commission shall allow each utility the option of continuing to use, until January 1, 2002, the moneys that it has recovered under s. 196.374 (3), 1997 stats., to administer the programs that it has funded under s. 196.374 (1), 1997 stats. The commission may allow each utility to spend additional moneys on the programs specified in sub. (2) if the utility otherwise complies with the requirements of this section and s. 16.957 (4).

SECTION 7. 196.374 (3m) of the statutes is created to read:

196.374 **(3m)** (a) In each fiscal year, the commission may allow a utility to retain a portion of the amount determined under sub. (2) instead of contributing the entire amount to the commission, if the commission determines that the portion is used by the utility for energy conservation programs for industrial, commercial, and agricultural customers in the utility's service area and that the programs comply with rules promulgated by the commission. The rules shall specify annual energy savings targets that the programs must be designed to achieve. The rules shall also

require a utility to demonstrate that, no later than a reasonable period of time, as determined by the commission, after the utility implements a program, the economic value of the benefits resulting from the program will be equal to the portion that the utility is allowed to retain under this paragraph.

(b) If the commission allows a utility to retain a portion under par. (a), the utility must contribute 1.75% of the portion to the commission for deposit in the fund for programs for research and development for energy conservation and efficiency and must contribute 4.5% of the portion to the commission for deposit in the fund for renewable resource programs.

(c) The commission shall allow a utility to recover in rates any expenses related to administration, marketing, or delivery of services for programs specified in par. (a). A utility may not pay for such expenses from any portion of a contribution the utility is allowed to retain under par. (a).

~~SECTION 8. Nonstatutory provisions.~~

~~(1)~~ EMERGENCY RULES. Using the procedure under section 227.24 of the statutes, the public service commission shall promulgate as emergency rules the rules required under section 16.957 (2m) of the statutes, as created by this act. Notwithstanding section 227.24 (1) (c) and (2) of the statutes, the emergency rules promulgated under this subsection may remain in effect until the date on which the permanent rules required under section 16.957 (2m) of the statutes, as created by this act, take effect. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the public service commission is not required to provide evidence that promulgating rules under this subsection as emergency rules is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for the rules promulgated under this subsection.

(4) ENERGY CONSERVATION AND EFFICIENCY GRANTS;

SECTION 9. ~~Initial applicability.~~

~~(1)~~ The treatment of section 16.957 (2) (b) 1. (intro.) of the statutes first applies to grants that are awarded on the effective date of the rules promulgated under SECTION ~~8~~ (1) of this act.

SECTION ~~10.~~ Effective date.

~~(1)~~ The treatment of sections 16.957 (2) (b) 1. (intro.) and (c) 2., ~~2m.~~, and ~~3b.~~ of the statutes takes effect on July 1, 2005.

(END)

RELATING CLAUSE INSERTS:

reciprocal agreements for real estate licenses; recovery of economic development costs by gas and electric utilities

MDK INSERTS:

Reciprocal agreements for real estate licenses

Under current law, the Department of Regulation and Licensing (DRL) grants licenses that allow persons to practice as real estate brokers or salespersons. Current law specifies the requirements a person must satisfy to obtain such a license. The Real Estate Board (board) advises DRL on rules regarding licensing and other matters.

This bill allows DRL to grant licenses to persons licensed as real estate brokers or salespersons in other states and territories, in addition to persons who satisfy the requirements specified under current law. Under the bill, DRL may, after consulting with the board, enter into reciprocal agreements with officials of other states or territories for granting licenses to persons licensed in those states or territories.

Recovery of economic development costs by gas and electric utilities

Under current law, the ~~Public Service Commission~~ (PSC) regulates rates charged to consumers by gas and electric utilities. This bill authorizes the PSC to allow such utilities to recover in rates the costs of promoting economic development, including infrastructure deployment that is necessary for providing gas or electricity.

SECTION 1. 196.03 (7) of the statutes is created to read:

196.03 **(7)** The commission may allow a public utility that provides gas or electricity to the public to recover in rates charged to consumers the costs of promoting economic development, including infrastructure deployment necessary for providing gas or electricity to the public.

SECTION 2. 452.05 (3) of the statutes is created to read:

452.05 **(3)** The department may, after consultation with the board, enter into reciprocal agreements with officials of other states or territories of the United States for licensing brokers and salespersons and grant licenses to applicants who are

licensed as brokers or salespersons in those states or territories according to the terms of the reciprocal agreements.

SECTION 3. 452.09 (2) (a) of the statutes is amended to read:

452.09 **(2)** (a) ~~Each~~ Except as provided in a reciprocal agreement under s. 452.05 (3), each applicant for a salesperson's license shall submit to the department evidence satisfactory to the department of successful completion of educational programs approved for this purpose under s. 452.05 (1) (c). The department may waive the requirement under this paragraph upon proof that the applicant has received 10 academic credits in real estate or real estate related law courses from an accredited institution of higher education.

History: 1981 c. 94, 391; 1983 a. 273; 1985 a. 305; 1989 a. 341; 1995 a. 400; 1997 a. 27.

SECTION 4. 452.09 (2) (c) (intro.) of the statutes is amended to read:

452.09 **(2)** (c) (intro.) Except as provided in par. (d) or a reciprocal agreement under s. 452.05 (3), each applicant for a broker's license shall do all of the following:

History: 1981 c. 94, 391; 1983 a. 273; 1985 a. 305; 1989 a. 341; 1995 a. 400; 1997 a. 27.

SECTION 5. 452.09 (3) (d) of the statutes is amended to read:

452.09 **(3)** (d) ~~The~~ Except as provided in a reciprocal agreement under s. 452.05 (3), the department may not grant a broker's license to an applicant who does not hold a salesperson's license unless the applicant passes the salesperson's examination and the broker's examination.

History: 1981 c. 94, 391; 1983 a. 273; 1985 a. 305; 1989 a. 341; 1995 a. 400; 1997 a. 27.

anal: title: text

sub

No (B) (CS)

INSERT ANAL DAK

Patient health care records

Under current state law, patient health care records must remain confidential and may be released by a health care provider only with the informed consent of the patient or of a person authorized by the patient. However, patient health care records are required to be released without informed consent by the health care provider in specified circumstances, including for patient treatment, health care provider payment and medical records management, and certain audits, program monitoring, accreditation, and health care services review activities by health care facility staff committees or accreditation or review organizations.

Under current federal law, patient health care information may be released without patient authorization by health care providers for, among other purposes, treatment, payment, and health care operations. "Health care operations" is defined in federal law to include quality assessment and improvement activities; credentialing or evaluating of health care practitioners and training; underwriting; medical review, legal services, and auditing; business planning and development; and business management and general administrative activities.

This bill modifies the requirement for release of patient health care records without patient consent to authorize, rather than require, release under specified circumstances, and to eliminate the requirement that a request for the records be received before release. The bill also increases the circumstances under which patient health care records are authorized to be released without patient informed consent, to include purposes of health care information, as defined and authorized in federal law.

INSERT DAK–1

SECTION 1. 146.82 (2) (a) (intro.) of the statutes is amended to read:

146.82 **(2)** (a) (intro.) ~~Notwithstanding~~ It is not a violation of sub. (1)~~,~~ to release patient health care records ~~shall be released upon request~~ without informed consent in the following circumstances:

History: 1979 c. 221; 1983 a. 398; 1985 a. 29, 241, 332, 340; 1987 a. 40, 70, 127, 215, 233, 380, 399; 1989 a. 31, 102, 334, 336; 1991 a. 39; 1993 a. 16, 27, 445, 479; 1995 a. 98, 169, 417; 1997 a. 35, 114, 231, 271, 292, 305; 1999 a. 32, 78, 83, 114, 151; 2001 a. 38, 59, 69, 105.

SECTION 2. 146.82 (2) (a) 22. of the statutes is created to read:

146.82 **(2)** (a) 22. For purposes of health care operations, as defined in 45 CFR 164.501, and as authorized under 45 CFR 164, subpart E.

RELATING CLAUSE INSERT ~~JK~~

the sales ~~tax imposed on services provided by a temporary help company;~~

anal: title ~~Sub~~

ANALYSIS INSERT JK ✓

SALES TAX EXEMPTION FOR TEMPORARY HELP ~~COMPANIES~~ SERVICES

Under this bill, no part of the charge for services provided by a temporary help company is subject to the sales tax, if the client for whom the services are provided controls the means of performing the services and is responsible for the satisfactory completion of the services. Under current law, a temporary help company is, generally, any entity that contracts with a client to supply individuals to perform services for the client on a temporary basis.

This bill will be referred to the Joint Survey Committee on Tax Exemptions for a detailed analysis, which will be printed as an appendix to this bill.

~~For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.~~

TEXT INSERT JK ✓
Insert 6-17

SECTION 1. 77.52 (2r) of the statutes is created to read:

77.52 **(2r)** No part of the charge for services provided by a temporary help company, as defined in s. 108.02 (24m), is subject to tax under sub. (2), if the client for whom the services are provided controls the means of performing the services and is responsible for the satisfactory completion of the services.

EFFECTIVE DATE INSERT JK
Insert 13-14 c*

~~SECTION 2. Effective date.~~

(8) ~~(1)~~ TEMPORARY SERVICES. The treatment of section 77.52 (2r) of the statutes takes effect on the first day of the 2nd month beginning after publication.

(3)
SALES TAX EXEMPTION FOR

LRB-3380/P3dr

D-Note

~~GMM/RAM/JTK~~

Date

GM/RM/JTK/RK/RN/JK:
kg
kg

Senator Stepp:

This redraft includes the items submitted in your follow-up drafting instructions of October 15 and 21. Those items ~~are~~ relate to the following:

1. The Uniform Electronic Transactions Act (UETA).

2. The confidentiality of patient health care records.

3. A sales tax exemption for temporary help services.

4. Retention by utilities of energy conservation dollars.

5. Recovery of economic development costs by utilities.

6. ~~Real~~ Real estate license reciprocity.

If you have any questions about this draft, please do not hesitate to contact me or the drafting attorney directly.

GMM

↓

2003 – 2004 LEGISLATURE

LRBs~~0180/1~~ 50180/2
RJM:cjs:~~jf~~

ASSEMBLY SUBSTITUTE AMENDMENT ,

TO 2003 ASSEMBLY BILL 184

AN ACT *to create* 422.210 (1m) of the statutes; **relating to:** documentation of agricultural credit transactions.

Analysis by the Legislative Reference Bureau

With certain exceptions, the Wisconsin Consumer Act (consumer act) currently requires a person who extends credit of $25,000 or less to a consumer to give the consumer, before any payment is due, a copy of each document evidencing the consumer's obligation under the transaction. With limited exceptions, a transaction that is entered into primarily for an agricultural purpose (agricultural credit transaction) is exempt from the requirements of the consumer act.

With certain exceptions, this substitute amendment requires the creditor in an agricultural credit transaction to give the consumer a copy of any document that is signed by the consumer and that evidences the consumer's obligation under an agricultural credit transaction in an amount of ~~$25,000 or less~~ to be executed in ~~duplicate original copies~~. The substitute amendment permits a creditor to omit any signatures from such a copy, provided the creditor gives the consumer a signed statement indicating that the copy is exact in all other respects.

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

INSERT 2-1

SECTION 1. 422.210 (1m) of the statutes is created to read:

422.210 **(1m)** DOCUMENTATION. With respect to a credit transaction in an amount of $20,000 or more and that is primarily for an agricultural purpose, before any payment is due the creditor shall furnish the customer with an exact copy of any instrument, document, agreement, or contract that is signed by the customer and that evidences the customer's obligation, except that a creditor may omit copying any signatures if the copy of the instrument, document, agreement, or contract contains a statement, signed by the creditor, indicating that the copy is exact in all respects except for the omitted signatures.

SECTION 2. Initial applicability.

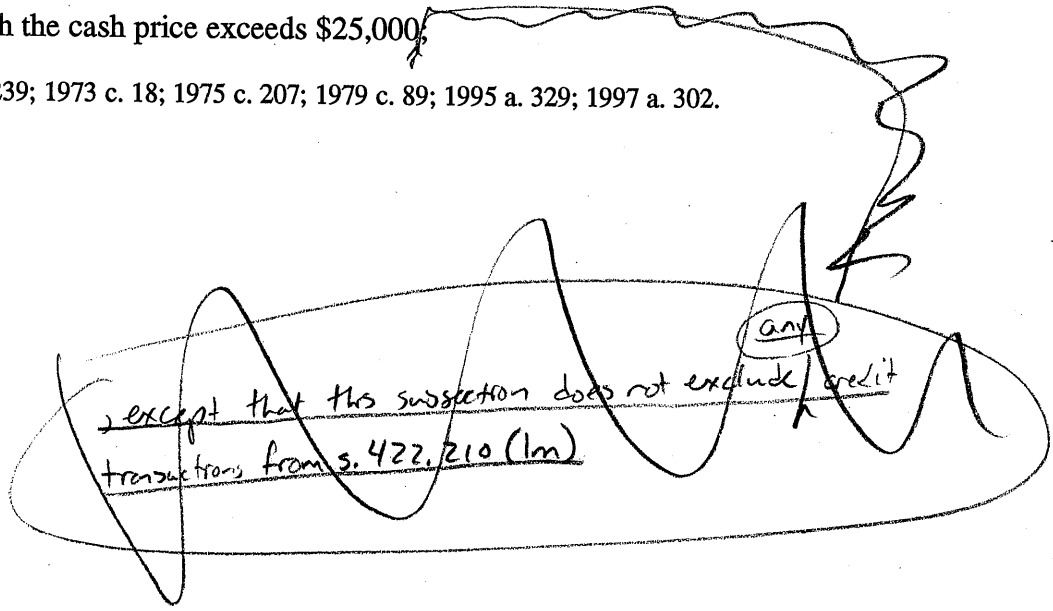
(1) This act first applies to transactions entered into on the effective date of this subsection.

(END)

Section #. 421.202 (6) of the statutes is amended to read:

421.202 **(6)** ~~Consumer~~ credit transactions in which the amount financed exceeds $25,000, motor vehicle consumer leases in which the total lease obligation exceeds $25,000 or other consumer transactions in which the cash price exceeds $25,000.

History: 1971 c. 239; 1973 c. 18; 1975 c. 207; 1979 c. 89; 1995 a. 329; 1997 a. 302.



DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0176/1dn
JTK/RM/RK/RN/JK:kg:pg

October 14, 2002

Senator Stepp

Amy Morgan:

As instructed, we used LRB-4542/2 as the base for this draft, with one change to proposed s. 137.12 (2m) to eliminate the exemption for deeds. Please let us know if we have misunderstood your intent.

1. With the exception of the treatments discussed under item 2. below, this draft represents the combined efforts of the LRB legal staff to engraft the Uniform Electronic Transactions Act (UETA) into Wisconsin law. 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, as discussed below, to avoid federal preemption under E–sign, we have not clarified the provisions.

2. With the exception of the treatments discussed below, this draft 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." See p. 3 and ff. of the analysis for a discussion of the primary electronic commerce provisions of E–sign and p. 5 and ff. of the analysis for a discussion of preemption issues. E–sign contains two methods of avoiding preemption. One method, which is established under 15 USC 7002 (a) (1), is to enact a law that constitutes UETA. The treatment of proposed ss. 137.01 (4) (a), 137.12 (2m) (d) and (f), and 137.20 (6) (b) and (7) in this draft was not included in the recommended version of UETA. This treatment

may make this draft something other than "an enactment of [UETA] as approved and recommended for enactment in all the [states]" and, thus may take the bill out from under the first exemption from preemption under 15 USC 7002 (a) (1).

If the bill does not qualify for the first exemption from preemption, it may still qualify for the second exemption from preemption, which is established under 15 USC 7002 (a) (2). However, this second exemption is much more difficult to apply. The second exemption permits the state to enact laws that modify, limit, or supersede certain provisions of E–sign, as long as the laws specify alternative procedures or requirements for the use or acceptance of electronic records or signatures to establish the legal effect of contracts or other records. Among other things, the alternative procedures or requirements must be consistent with Titles I and II of E–sign. As outlined below, it is difficult to predict how a court would apply this exemption and, as a result, it is difficult to predict whether and to what extent this version of the draft would qualify for this exemption from preemption.

There are three primary interpretations of the manner in which the second exemption from preemption is intended to apply when a state enacts substantive provisions that are not uniform with the recommended version of UETA. Until a court rules on the issue, there is no way of knowing which interpretation will apply. Under the most literal interpretation, a court would be required to treat the state enactment as a coherent whole, rather than separately analyze individual statutes created in the enactment. As noted above, it is possible that this version of the draft would not qualify as an enactment of UETA as approved and recommended for enactment in all the states. Under this interpretation, as a result, the entire enactment would be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign and would have no legal effect.

Under a second interpretation, a court would be required to analyze the individual statutes created in the draft, rather than treat the enactment as a coherent whole. Under this interpretation, all specific provisions that are uniform with UETA would be exempt from preemption under 15 USC 7002 (a) (1). The non–uniform provisions in proposed ss. 137.01 (4) (a), 137.12 (2m) (a), (e), and (g) and 137.20 (6) (b) and (7) would be analyzed separately under 15 USC 7002 (a) (2) to determine if the provisions are exempt from preemption under that section. Under this interpretation, the six provisions would likely be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign.

Under a third interpretation, a court would treat the state enactment in different ways for different purposes. The court would first be required to treat the draft as a coherent whole in determining if, under 15 USC 7002 (a) (1), the law qualifies as an enactment of UETA. If the law is not an enactment of UETA, then the court would be required to analyze each individual statute, including a statute that *is* uniform with a UETA provision, under 15 USC 7002 (a) (2) to determine if the statute is exempt from preemption under that section. Under this interpretation proposed ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and 137.20 (6) (b) and (7) would likely be preempted as inconsistent with E–sign Titles I and II. In addition, any other provision that is

inconsistent with E–sign Titles I and II would likely be preempted, even if the provision is uniform with a UETA provision.

Because it is so difficult to predict how a court would apply the second exemption from preemption, you may want to avoid any treatment of ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and 137.20 (6) (b), (7), and (8) that may trigger the preemption analysis under the second exemption.

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.

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." However, we did not make this clarification because doing so may trigger preemption under E–sign.

5. This draft uses the term "governmental unit" rather than "governmental agency" because state authorities are included within the definition and, in Wisconsin, state authorities are not agencies. The draft also broadens the definition of "governmental unit" in proposed s. 137.11 (9) to include certain Wisconsin entities that might not otherwise be included in the definition, which appears to be consistent with the intent of the drafters of UETA. The only effect is on the optional provisions (in the draft, the proposed treatment of s. 137.05, stats., and proposed s. 137.25 (2)). We think this does not interfere with uniformity because the draft retains the substance of the UETA definition in full.

6. Under proposed s. 137.11 (7) and (12), the definition of "electronic record" and "record" include voice mail communications. Please note that, under these definitions, certain documents such as contracts, applications, licenses, or tax returns may potentially be evidenced by voice mail communications. In some cases, current law under E–sign already permits these documents to be evidenced by voice mail communications.

7. The exemptions in proposed s. 137.12 (2m) are problematic both as a matter of drafting and with regard to federal preemption. The exemptions for deeds, official

court documents, and termination notices for telecommunications services in proposed s. 137.12 (2m) (a), (e), and (g) are inconsistent with the recommended version of UETA and with E–sign and, as a result, are likely to trigger preemption under 15 USC 7002 (a) (2). In addition, the remaining exemptions, which are based upon those contained in E–sign, raise potential preemption issues because the exemptions in E–sign may be rescinded by federal regulatory agencies. If this rescission happens, the exemptions in this draft may become inconsistent with those in E–sign. This inconsistency would likely result in some form of preemption.

Other than the exemption for deeds, telecommunications notices, and official court documents, we have tried to remain as consistent as possible with the language of the E–sign exemptions, in order to avoid preemption. However, the federal language itself has severe problems and does not meet our typical drafting standards. It is unclear what qualifies as a "matter of family law" as that phrase is used in E–sign and the exemption in proposed s. 137.12 (2m) (b). Does this phrase mean laws governing marriage, divorce, adoption, and paternity? What about powers of attorney, marital property, and guardianship? If it includes marital property laws, then this exception may be extremely broad, given the subject matter governed by s. 766.56, stats.

It is also unclear what qualifies as "hazardous materials, pesticides, or other toxic or dangerous materials" as that phrase is used in E–sign and proposed s. 137.12 (2m) (f). Does this phrase apply to fireworks and fertilizer?

It is also unclear what qualifies as "utility services (including heat, water, and power)" as that phrase is used in E–sign and proposed s. 137.12 (2m) (g). Is the phrase intended to limit the meaning of "utility services" to the three services listed in the parenthetical phrase or to include those three services, in addition to other potential utility services like basic local telecommunications services under s. 196.01 (1g) and sewage system services under s. 196.01 (5) (a) 1.? Although this draft includes basic local telecommunications services in this list, that inclusion raises preemption issues as discussed above. This problem exemplifies why we try to avoid using "including" phrases in the statutes. These phrases may provide a court or an attorney with a method for avoiding the intended breadth of the original reference. See, for example, *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527 (1974) and *State v. Engler*, 80 Wis. 2d 402, 407–8 (1977).

With regard to notices of foreclosure, eviction, and the like, the federal exemption and that in proposed s. 137.12 (2m) (h) probably is intended to apply to notices provided to the individual who resides in the particular dwelling. Unfortunately, the exemption is worded more broadly than that. For example, the exemption would cover a foreclosure notice that is given to the landlord of a dwelling that is not owner–occupied, if the dwelling is occupied by a tenant who rents the dwelling as a primary residence.

The exemption for notices of termination of "health insurance or benefits" in E–sign and proposed s. 137.12 (2m) (i) is also likely broader than is intended under E–sign and this bill. It is unclear what benefits are covered by the exemption. For example, does the exemption cover only health benefits (whatever that term means), or does it apply to benefits of employment (like disability insurance, the right to purchase stock

options, or a right granted under an employee manual), public assistance benefits, or benefits of membership in a music club?

8. Under proposed s. 137.12 (1), UETA applies to electronic records (documents) and electronic signatures relating to a "transaction." A "transaction" is defined in proposed s. 137.11 (15) to mean action between persons relating to the conduct of business, commercial, or governmental affairs. The prefatory note and comments suggest that the application of UETA to governmental affairs may be limited to activities where the government is a market participant (for example, governmental procurement). The text does not seem to explicitly reflect that interpretation. However, because the optional sections of UETA (the treatment of s. 137.05, stats., and proposed s. 137.25 (2)) clearly contemplate application beyond "transactions," this draft clarifies in proposed s. 137.12 (1) that the optional sections affect matters other than "transactions." Another issue that has been raised with respect to the definition of "transaction" is that the text does not clearly indicate that UETA applies to consumer–to–consumer transactions, even though the comments suggest that it does.

9. 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.

10. You may want to clarify the interaction of proposed ss. 137.13 (2) and 137.15 (1), in order to make the intended result of these statutes more apparent. Proposed s. 137.13 (2) states that the subchapter of the statutes that constitutes UETA only applies to transactions between parties who have agreed to conduct transactions electronically. Proposed s. 137.15 (1) states that a document or signature may not be denied legal effect solely because it is in electronic form. The manner in which these two statutes relate could be more clearly stated.

For example, a problem may arise if a person (A) makes a written offer to contract with another person (B), and if B then communicates its acceptance in electronic form. If A refuses to deal electronically, B may argue that the acceptance is enforceable under proposed s. 137.15 (1). According to B, the only reason the acceptance would not be enforceable is because it is in electronic form and, under proposed s. 137.15 (1), this reason is insufficient to deny the 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. Although this type of clarification is currently used in proposed s. 137.16 we did not include it in this bill because to do so might trigger preemption under E–sign.

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

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

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

14. 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).

15. 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.

16. 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.

17. Consistent with your instructions, this draft preserves the effect of certain existing laws with regard to public records. See proposed s. 137.20 (6) (b). Please review this treatment to ensure it satisfies your intent. As discussed previously, this treatment may be viewed as going beyond the recommended version of UETA and, therefore, may trigger preemption under E–sign. Also, please note that proposed s. 137.20 (1), (4), and (6) likely authorize a custodian of *private* records to destroy original records if an electronic copy is retained.

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) (a) 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) (a), 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 with our understanding of your intent.

27. **SECTION 19**, which permits governmental units to encourage interoperability between jurisdictions, is retained as proposed s. 137.25 (2) but is significantly clarified per our understanding of your intent. 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. There are numerous provisions in current law that require that a notice, request, statement, application, document, or other information (notice) be provided to a governmental unit in writing or that the notice be sent or mailed, suggesting that it be provided in written form. Under current law in s. 137.05, stats., and under this draft in proposed s. 137.25, most of those notices may be provided in electronic form if the governmental unit consents to receiving the notice in electronic form. Without an examination of each of those notice provisions, it is not possible to determine whether any particular provision should be amended to specify that the notice may only be furnished in written form and not in electronic form because, for example, electronic notice was not intended or contemplated by the provision when it was enacted. Because this issue arises under current law, because the application of UETA to each of these provisions is not completely clear, and because it is impractical to examine each of these provisions, the draft does not treat any of these provisions. Consequently, under this draft, as under current law, most of the provisions in current law requiring a notice to be given to a governmental unit in writing or to be sent or mailed to a governmental unit, may be satisfied by furnishing the notice in electronic form if the governmental unit consents to receive it in that form.

30. 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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If you have any questions concerning UETA or desire any changes to the UETA provisions in this draft, please let us know.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3380/P3dn
GM/RM/JTK/RK/RN/JK:kjf&kg:pg

October 24, 2003

Senator Stepp:

This redraft includes the items submitted in your follow–up drafting instructions of October 15 and 21. Those items relate to the following:

1. The Uniform Electronic Transactions Act (UETA).
2. The confidentiality of patient health care records.
3. A sales tax exemption for temporary help services.
4. Retention by utilities of energy conservation dollars.
5. Recovery of economic development costs by utilities.
6. Real estate license reciprocity.

If you have any questions about this draft, please do not hesitate to contact me or the drafting attorney directly.

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As instructed, we used LRB–0176/1 as the base for the UETA (Uniform Electronic Transactions Act) provisions in this draft.

1. With the exception of the treatments discussed under item 2. below, this draft represents our combined efforts to engraft UETA into Wisconsin law. 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, as discussed below, to avoid federal preemption under E–sign, we have not clarified the provisions.

2. With the exception of the treatments discussed below, this draft 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." See the bill analysis for a discussion of the primary electronic commerce provisions of E–sign for a discussion of preemption issues. E–sign contains two methods of avoiding preemption. One method, which is established under 15 USC 7002 (a) (1), is to enact a law that constitutes UETA. The treatment of proposed ss. 137.01 (4) (a), 137.12 (2m) (d) and (f), and 137.20 (6) (b) and (7) in this draft was not included in the recommended version of UETA. This treatment may make this draft something other than "an enactment of [UETA] as approved and recommended for enactment in all the [states]" and, thus may take the bill out from under the first exemption from preemption under 15 USC 7002 (a) (1).

If the bill does not qualify for the first exemption from preemption, it may still qualify for the second exemption from preemption, which is established under 15 USC 7002 (a) (2). However, this second exemption is much more difficult to apply. The second exemption permits the state to enact laws that modify, limit, or supersede certain provisions of E–sign, as long as the laws specify alternative procedures or requirements for the use or acceptance of electronic records or signatures to establish the legal effect of contracts or other records. Among other things, the alternative procedures or requirements must be consistent with Titles I and II of E–sign. As outlined below, it is difficult to predict how a court would apply this exemption and, as a result, it is difficult to predict whether and to what extent this version of the draft would qualify for this exemption from preemption.

There are three primary interpretations of the manner in which the second exemption from preemption is intended to apply when a state enacts substantive provisions that are not uniform with the recommended version of UETA. Until a court rules on the issue, there is no way of knowing which interpretation will apply. Under the most literal interpretation, a court would be required to treat the state enactment as a coherent whole, rather than separately analyze individual statutes created in the enactment. As noted above, it is possible that this version of the draft would not qualify as an enactment of UETA as approved and recommended for enactment in all the states. Under this interpretation, as a result, the entire enactment would be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign and would have no legal effect.

Under a second interpretation, a court would be required to analyze the individual statutes created in the draft, rather than treat the enactment as a coherent whole. Under this interpretation, all specific provisions that are uniform with UETA would be exempt from preemption under 15 USC 7002 (a) (1). The non–uniform provisions in proposed ss. 137.01 (4) (a), 137.12 (2m) (a), (e), and (g) and 137.20 (6) (b) and (7) would be analyzed separately under 15 USC 7002 (a) (2) to determine if the provisions are exempt from preemption under that section. Under this interpretation, the six provisions would likely be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign.

Under a third interpretation, a court would treat the state enactment in different ways for different purposes. The court would first be required to treat the draft as a coherent whole in determining if, under 15 USC 7002 (a) (1), the law qualifies as an enactment of UETA. If the law is not an enactment of UETA, then the court would be required to analyze each individual statute, including a statute that *is* uniform with a UETA provision, under 15 USC 7002 (a) (2) to determine if the statute is exempt from preemption under that section. Under this interpretation proposed ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and 137.20 (6) (b) and (7) would likely be preempted as inconsistent with E–sign Titles I and II. In addition, any other provision that is

inconsistent with E–sign Titles I and II would likely be preempted, even if the provision is uniform with a UETA provision.

Because it is so difficult to predict how a court would apply the second exemption from preemption, you may want to avoid any treatment of ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and 137.20 (6) (b), (7), and (8) that may trigger the preemption analysis under the second exemption.

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.

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." However, we did not make this clarification because doing so may trigger preemption under E–sign.

5. This draft uses the term "governmental unit" rather than "governmental agency" because state authorities are included within the definition and, in Wisconsin, state authorities are not agencies. The draft also broadens the definition of "governmental unit" in proposed s. 137.11 (9) to include certain Wisconsin entities that might not otherwise be included in the definition, which appears to be consistent with the intent of the drafters of UETA. The only effect is on the optional provisions (in the draft, the proposed treatment of s. 137.05, stats., and proposed s. 137.25 (2)). We think this does not interfere with uniformity because the draft retains the substance of the UETA definition in full.

6. Under proposed s. 137.11 (7) and (12), the definition of "electronic record" and "record" include voice mail communications. Please note that, under these definitions, certain documents such as contracts, applications, licenses, or tax returns may potentially be evidenced by voice mail communications. In some cases, current law under E–sign already permits these documents to be evidenced by voice mail communications.

7. The exemptions in proposed s. 137.12 (2m) are problematic both as a matter of drafting and with regard to federal preemption. The exemptions for deeds, official court documents, and termination notices for telecommunications services in proposed s. 137.12 (2m) (a), (e), and (g) are inconsistent with the recommended version of UETA and with E–sign and, as a result, are likely to trigger preemption under 15 USC 7002 (a) (2). In addition, the remaining exemptions, which are based upon those contained in E–sign, raise potential preemption issues because the exemptions in E–sign may be rescinded by federal regulatory agencies. If this rescission happens, the exemptions in this draft may become inconsistent with those in E–sign. This inconsistency would likely result in some form of preemption.

Other than the exemption for deeds, telecommunications notices, and official court documents, we have tried to remain as consistent as possible with the language of the E–sign exemptions, in order to avoid preemption. However, the federal language itself has severe problems and does not meet our typical drafting standards. It is unclear what qualifies as a "matter of family law" as that phrase is used in E–sign and the exemption in proposed s. 137.12 (2m) (b). Does this phrase mean laws governing marriage, divorce, adoption, and paternity? What about powers of attorney, marital property, and guardianship? If it includes marital property laws, then this exception may be extremely broad, given the subject matter governed by s. 766.56, stats.

It is also unclear what qualifies as "hazardous materials, pesticides, or other toxic or dangerous materials" as that phrase is used in E–sign and proposed s. 137.12 (2m) (f). Does this phrase apply to fireworks and fertilizer?

It is also unclear what qualifies as "utility services (including heat, water, and power)" as that phrase is used in E–sign and proposed s. 137.12 (2m) (g). Is the phrase intended to limit the meaning of "utility services" to the three services listed in the parenthetical phrase or to include those three services, in addition to other potential utility services

like basic local telecommunications services under s. 196.01 (1g) and sewage system services under s. 196.01 (5) (a) 1.? Although this draft includes basic local telecommunications services in this list, that inclusion raises preemption issues as discussed above. This problem exemplifies why we try to avoid using "including" phrases in the statutes. These phrases may provide a court or an attorney with a method for avoiding the intended breadth of the original reference. See, for example, *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527 (1974) and *State v. Engler*, 80 Wis. 2d 402, 407–8 (1977).

With regard to notices of foreclosure, eviction, and the like, the federal exemption and that in proposed s. 137.12 (2m) (h) probably is intended to apply to notices provided to the individual who resides in the particular dwelling. Unfortunately, the exemption is worded more broadly than that. For example, the exemption would cover a foreclosure notice that is given to the landlord of a dwelling that is not owner–occupied, if the dwelling is occupied by a tenant who rents the dwelling as a primary residence.

The exemption for notices of termination of "health insurance or benefits" in E–sign and proposed s. 137.12 (2m) (i) is also likely broader than is intended under E–sign and this bill. It is unclear what benefits are covered by the exemption. For example, does the exemption cover only health benefits (whatever that term means), or does it apply to benefits of employment (like disability insurance, the right to purchase stock options, or a right granted under an employee manual), public assistance benefits, or benefits of membership in a music club?

8. Under proposed s. 137.12 (1), UETA applies to electronic records (documents) and electronic signatures relating to a "transaction." A "transaction" is defined in proposed s. 137.11 (15) to mean action between persons relating to the conduct of business, commercial, or governmental affairs. The prefatory note and comments suggest that the application of UETA to governmental affairs may be limited to activities where the government is a market participant (for example, governmental procurement). The text does not seem to explicitly reflect that interpretation. However, because the optional sections of UETA (the treatment of s. 137.05, stats., and proposed s. 137.25 (2)) clearly contemplate application beyond "transactions," this draft clarifies in proposed s. 137.12 (1) that the optional sections affect matters other than "transactions." Another issue that has been raised with respect to the definition of "transaction" is that the text does not clearly indicate that UETA applies to consumer–to–consumer transactions, even though the comments suggest that it does.

9. 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.

10. You may want to clarify the interaction of proposed ss. 137.13 (2) and 137.15 (1), in order to make the intended result of these statutes more apparent. Proposed s.

137.13 (2) states that the subchapter of the statutes that constitutes UETA only applies to transactions between parties who have agreed to conduct transactions electronically. Proposed s. 137.15 (1) states that a document or signature may not be denied legal effect solely because it is in electronic form. The manner in which these two statutes relate could be more clearly stated.

For example, a problem may arise if a person (A) makes a written offer to contract with another person (B), and if B then communicates its acceptance in electronic form. If A refuses to deal electronically, B may argue that the acceptance is enforceable under proposed s. 137.15 (1). According to B, the only reason the acceptance would not be enforceable is because it is in electronic form and, under proposed s. 137.15 (1), this reason is insufficient to deny the 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. Although this type of clarification is currently used in proposed s. 137.16 we did not include it in this bill because to do so might trigger preemption under E–sign.

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

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

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

14. 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).

15. 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.

16. 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.

17. Consistent with your instructions, this draft preserves the effect of certain existing laws with regard to public records. See proposed s. 137.20 (6) (b). Please review this treatment to ensure it satisfies your intent. As discussed previously, this treatment may be viewed as going beyond the recommended version of UETA and, therefore, may trigger preemption under E–sign. Also, please note that proposed s. 137.20 (1), (4), and (6) likely authorize a custodian of *private* records to destroy original records if an electronic copy is retained.

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) (a) 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) (a), 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 with our understanding of your intent.

27. **SECTION 19**, which permits governmental units to encourage interoperability between jurisdictions, is retained as proposed s. 137.25 (2) but is significantly clarified per our understanding of your intent. 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. 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.

If you have any questions concerning UETA or desire any changes to the UETA provisions in this draft, please let us know.

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Malaise, Gordon

From: Risch, Jay
Sent: Friday, October 31, 2003 8:45 AM
To: Malaise, Gordon
Subject: FW: Reasonable Fee Language -- LRB Draft

Hi Gordon,

Would you please draft this into the omnibus regulatory reform package? Since it was once budget language, hopefully it would be a quick one to insert.

Sorry for this latest last minute addition.

Jay Risch
Office of Senator Cathy Stepp

-----Original Message-----
From: Manley, Scott
Sent: Thursday, October 30, 2003 4:47 PM
To: Risch, Jay
Subject: FW: Reasonable Fee Language -- LRB Draft

Jay,

Can you send this drafting request in, so we can amend it into the omnibus bill if need be.

Scott

-----Original Message-----
From: richard chandler [mailto:rgcwis@charter.net]
Sent: Thursday, October 30, 2003 11:34 AM
To: scott.manley@legis.state.wi.us; Risch, Jay
Cc: Larson,Tom; MIke Theo; jdeschane@wisbuild.org; Mike Semmann
Subject: Reasonable Fee Language -- LRB Draft

Scott and Jay --

Here's the LRB draft of the language regarding reasonable fees that was included in the Legislature's version of the budget hill. It's LRBb0449/1. It was subsequently vetoed by the Governor.

The Realtors Association and the Builders Association would like to have this language included in the regulatory reform coalition bill. The other members of the coalition have agreed to include it, but due to an oversight it wasn't included in the most recent draft.

I'll also send you a copy of some talking points regarding this provision that were prepared by Jerry Deschane.

Rick Chandler
628-0433