**DRAFTER'S NOTE** LRB-4037/1dn
**FROM THE** JTK/RK/RC/RN/JK:cjs:pg
**LEGISLATIVE REFERENCE BUREAU**

January 15, 2004

Senator Kanavas:

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

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drafting, to specifically refer to, and amend or repeal as necessary, all parts of the statutes that are intended to be superceded or repealed by a proposal, insofar as practicable.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

Below is a discussion of numerous issues concerning UETA. If you would like to discuss options for addressing any of the concerns raised below, please feel free to call.

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

3. 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.

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

5. Under proposed s. 137.11 (7) and (12), the definition of "electronic record" and "record" include voice mail communications. Currently, certain documents such as contracts, applications, deeds, licenses, or tax returns must be evidenced in paper form. Under these definitions, these documents may potentially be evidenced by voice mail communications instead.

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

the text does not clearly indicate that UETA applies to consumer-to-consumer transactions, even though the comments suggest that it does.

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

8. 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.

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

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

11. Proposed s. 137.15 (4) provides that if a law requires a signature, an electronic signature satisfies that requirement in that law. Although the comments indicate this was not intended, under the text of proposed s. 137.11 (8), an "electronic signature" may be associated with a nonelectronic document. Therefore, the effect of proposed s. 137.15 (4) is to permit an electronic signature to be used to sign a nonelectronic document. In UETA **SECTION 18**, which is optional (see the treatment of s. 137.05, stats., by this draft), we have limited the use of electronic signatures to sign electronic

documents, since this is consistent with the intent of UETA and no preemption issue arises under this optional provision.

12. 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).

13. 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.

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

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

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

17. Proposed s. 137.20 (5) provides that if a law requires retention of a check, the requirement is satisfied by retention of an electronic document containing the information on the front and back of the check in the manner provided in the draft. The term "check" is not defined in the draft. It is unclear whether this provision applies

to other kinds of negotiable instruments, such as share drafts and money orders. However, since proposed s. 137.20 (1) and (4) suggest the same thing as proposed s. 137.20 (5) in more general terms, it is possible that proposed s. 137.20 (5) may be interpreted to be redundant.

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

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

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

21. Proposed s. 137.23 (4) (a) provides that, generally, an electronic document is deemed to be sent from the sender's place of business and, if the sender does business at more than one location, an electronic document is deemed to be sent from the location that has "the closest relationship to the underlying transaction." To the extent that an electronic document may evidence a sale, with the seller receiving payment electronically, a business could use proposed s. 137.23 (4) (a) to argue that a sale occurred at a location where the business is not subject to an income tax or franchise tax rather than at a location, such as this state, where the business is subject to such

taxes. If a court accepted that argument, the business would receive income from such a sale but avoid paying any tax on that income. Although the comments to UETA seem to indicate that the above scenario is not an intended consequence of proposed s. 137.23 (4) (a), you should be aware that, under the proposed language of that paragraph, that scenario is possible.

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

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

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

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

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

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

28. **SECTION 3** (b) (4) of UETA allows states to insert exemptions for certain transactions from the application of UETA. This draft does not insert any exemptions

under this **SECTION** of UETA. Under sec. 102 (a) (1) of E-sign, any exemption enacted under this **SECTION** of UETA is preempted to the extent that the exemption is inconsistent with E-sign. If you desire to insert any additional exemptions, please let us know. However, you should be aware that, in most cases, it will likely be difficult to predict whether an exemption is preempted by E-sign.

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

governmental unit, may be satisfied by furnishing the notice in electronic form if the governmental unit consents to receive it in that form.

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