

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa2190/1dn
JTK:kg:jf

February 16, 2004

With the exception of the treatments discussed below, SB-404 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 s. 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 s. 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 s. 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 s. 137.20 (6) (b) and (7) that may trigger the preemption analysis under the second exemption.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778