

**2003 DRAFTING REQUEST**

**Senate Amendment (SA-SB404)**

Received: 02/12/2004

Received By: jkuesel

Wanted: Soon

Identical to LRB:

For: Ted Kanavas (608) 266-9174

By/Representing: Jeremy Shepherd

This file may be shown to any legislator: NO

Drafter: jkuesel

May Contact:

Addl. Drafters:

Subject: Trade Regulation - electron com  
State Govt - miscellaneous

Extra Copies: RPN, RNK, RAC - 1  
ARG, MJL, PJH - 1  
Russ Whitesel, LCS - 1-EM

Submit via email: YES

Requester's email: Sen.Kanavas@legis.state.wi.us

Carbon copy (CC:) to: Russ.Whitesel@legis.state.wi.us

---

**Pre Topic:**

No specific pre topic given

---

**Topic:**

SA to SB-404

---

**Instructions:**

Per LRB-0176, p. 18, lines 2-10.

---

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkuesel 02/12/2004	kgilfoy 02/16/2004		_____			
/1			jfrantze 02/16/2004	_____	sbasford 02/16/2004	sbasford 02/16/2004	

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/2	jkuesel 02/16/2004	kgilfoy 02/16/2004	rschluet 02/16/2004	_____	sbasford 02/16/2004	sbasford 02/16/2004	

FE Sent For:

<END>

2003 DRAFTING REQUEST

Senate Amendment (SA-SB404)

Received: 02/12/2004

Received By: jkuesel

Wanted: Soon

Identical to LRB:

For: Ted Kanavas (608) 266-9174

By/Representing: Jeremy Shepherd

This file may be shown to any legislator: NO

Drafter: jkuesel

May Contact:

Addl. Drafters:

Subject: Trade Regulation - electron com  
State Govt - miscellaneous

Extra Copies: RPN, RNK, RAC - 1  
ARG, MJL, PJH - 1  
Russ Whitesel, LCS - 1-EM

Submit via email: YES

Requester's email: Sen.Kanavas@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

SA to SB-404

Instructions:

Per LRB-0176, p. 18, lines 2-10.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkuesel 02/12/2004	kgilfoy 02/16/2004					
/1	jkuesel 12-2/16 King		jfrantze 02/16/2004		sbasford 02/16/2004	sbasford 02/16/2004	
/2	jkuesel 2/16						

FE Sent For:

Handwritten signatures and scribbles over the table, including a large signature that appears to be 'sbasford' and another that looks like 'jkuesel'.

<END>

**2003 DRAFTING REQUEST**

**Senate Amendment (SA-SB404)**

Received: 02/12/2004

Received By: jkuesel

Wanted: Soon

Identical to LRB:

For: Ted Kanavas (608) 266-9174

By/Representing: Jeremy Shepherd

This file may be shown to any legislator: NO

Drafter: jkuesel

May Contact:

Addl. Drafters:

Subject: Trade Regulation - electron com  
State Govt - miscellaneous

Extra Copies: RPN, RNK, RAC - 1  
ARG, MJL, PJH - 1

Submit via email: YES

Requester's email: Sen.Kanavas@legis.state.wi.us

Carbon copy (CC:) to:

---

**Pre Topic:**

No specific pre topic given

---

**Topic:**

SA to SB-404

---

**Instructions:**

Per LRB-0176, p. 18, lines 2-10.

---

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkuesel 02/12/2004	kgilfoy 02/16/2004		_____			
/1			jfrantze 02/16/2004	_____	sbasford 02/16/2004	sbasford 02/16/2004	

02/16/2004 11:15:40 AM  
Page 2

**LRBa2192**

FE Sent For:

**<END>**

DRAFTS

**2003 DRAFTING REQUEST**

**Senate Amendment (SA-SB404)**

Received: 02/12/2004

Received By: **jkuesel**

Wanted: **Soon**

Identical to LRB:

For: **Ted Kanavas (608) 266-9174**

By/Representing: **Jeremy Shepherd**

This file may be shown to any legislator: **NO**

Drafter: **jkuesel**

May Contact:

Addl. Drafters:

Subject: **Trade Regulation - electron com  
State Govt - miscellaneous**

Extra Copies: **RPN, RNK, RAC - 1  
ARG, MJL, PJH - 1**

Submit via email: **YES**

Requester's email: **Sen.Kanavas@legis.state.wi.us**

Carbon copy (CC:) to:

**Pre Topic:**

No specific pre topic given

**Topic:**

SA to SB-404

**Instructions:**

Per LRB-0176, p. 18, lines 2-10.

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1? / 1	jkuesel	2/12/11 - 2/12/11 Kmg	2/16	J/ch 2/16			

FE Sent For:

<END>

2003

Date (time) needed

DN 07/5

LRBa 2192, 1

**AMENDMENT**

Wanted mon 2/16 SJR:Kg

See form **AMENDMENTS — COMPONENTS & ITEMS.**

**S A AMENDMENT**

~~TO S A AMENDMENT (LRBa / ),~~

~~TO S A SUBSTITUTE AMENDMENT (LRBs / ),~~

TO 2003 SB ~~SJR SR AB AJR AR~~ 404 (LRB / )

At the locations indicated, amend the bill as follows:  
(fill ONLY if "engrossed ...." or "as shown by ....." )

✓ #. Page 17, line 22 after that line insert:

#. Page ....., line .....

#. Page ....., line .....

#. Page ....., line .....

#. Page ....., line .....

**BILL**

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

<sup>1</sup>  
**(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. <sup>11</sup>

~~(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).

✓ # Page 17, line 24: delete "sub. (2)" and substitute "subs. (2) and (2m)"  
✓ # Page 17, line 25: delete "sub. (2)" and substitute "subs. (2) and (2m)"  
(end)



LRBa 2192 / 1  
JTK: kg:

D NOTE:

19. SB-404

---

21 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 (e), 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), (c), 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

~~137.01~~

S,

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 (9)~~ that may trigger the preemption analysis under the second exemption.

JTK

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRBa2192/1dn  
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. 137.12 (2m) 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. 137.12 (2m) 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. 137.12 (2m) 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. 137.12 (2m) that may trigger the preemption analysis under the second exemption.

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



Wanted Mon 2/16

**SENATE AMENDMENT ,  
TO 2003 SENATE BILL 404**

Now

1 At the locations indicated, amend the bill as follows:

2 **1.** Page 17, line 22: after that line insert:

3 **“(2m)** This subchapter does not apply to any of the following records or any  
4 transaction evidenced by any of the following records:

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

7 (b) Notices provided by a court.

8 (c) Court orders ~~or judgments~~.

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

12 **2.** Page 17, line 24: delete “sub. (2)” and substitute “subs. (2) and (2m)”.

1 3. Page 17, line 25: delete "sub. (2)" and substitute "subs. (2) and (2m)".

2

(END)  
# Page 29, line 24: delete the material beginning with "This" and ending with "137.20." <sup>on</sup> in line 25 and substitute "No such record is inadmissible solely because it is in electronic format."

✓ # Page 30, line 14: delete the material beginning with "This" and ending with "137.21." <sup>on</sup> in line 15 and substitute "No duplicate is inadmissible solely because it is in electronic format."

(END)