

## MEMORANDUM

To: Uniform Electronic Transactions Act Drafting Committee and Observers.

From: Ben Beard, Reporter.

Date: January 29, 1999.

Re: Sixth Draft of The Uniform Electronic Transactions Act - General Comments and Issues.

Enclosed is the sixth draft of the Uniform Electronic Transactions Act (the "Act") revised from the September 18, 1998 Draft discussed at the October, 1998 meeting of the Drafting Committee in Rapid City, SD.

Since the October meeting the Chair and Reporter have had discussions with, and received input from, several interest groups. In December the Chair, Reporter and Executive Director met with representatives from the Federal Reserve Banks of NY, Boston and Atlanta, Federal Reserve Board Staff and representatives from banking interests to discuss the issues of UETA applicability to checks and other negotiable instruments (the "Fed Meeting").

The Reporter was able to meet with representatives of working groups of the ABA, Business Law Section, Cyberspace Law Committee in Atlanta on January 15-16. The focus of these discussions related to transferable records and electronic agents (the Joint Report regarding UETA provisions governing transferable records has been distributed to the Committee with this Draft ("Joint Report")). Some of the views expressed at those meetings are reflected in this draft. The Bank Working Group has submitted a letter (which has been distributed to the Committee with this Draft) setting forth its views on the issues of scope, effect of security procedures, the deletion of manifest assent/opportunity to review and inadvertent error. Those views were further discussed with the Chair and Reporter on a conference call on January 13. Finally, the Business Software Alliance has submitted a letter (distributed to the Committee with this Draft) to the Article 2B Drafting Committee urging that UETA be conformed to the provisions in Article 2B.

**REORGANIZATION:** This draft reflects the reorganization of the Act into two Parts (from 5 parts) proposed at the October, 1998 meeting. To aid in tracking the reorganization, a correlation table noting the disposition of sections in the September, 1998 draft to the current draft has been included. In addition, the markings to show changes and deletions can make reading the draft more difficult so I have included an unmarked, text-only version of the draft as Attachment A. In addition to the consolidation of the sections into two Parts, the provisions regarding general validity of electronic records, signatures and contracts have been collected in section 106. Also, the provisions relating to the operations of electronic agents have been collected in section 116.

**COORDINATION:** On January 23, 1999, the Chair and Reporter for the UETA met with the Chair and Reporter for Article 2B and the Executive Director of the Conference to coordinate the provisions of Article 2B and UETA where necessary (the "Coordination Meeting"). The participants systematically reviewed the UETA to determine where coordination of concept and

language was necessary or desirable. Of particular note, the UETA draft has returned to the term "electronic agents" rather than "electronic devices" because of the widespread recognition of the term electronic agents in the industry. Other instances of language conformity are noted in the reporter's notes.

Two principal issues require consideration by the Drafting Committee. First, Article 2B (and revised Article 9) use the term authentication instead of signature. The term is far more detailed and specific than the UETA definition of signature. It was suggested at the Coordination Meeting that perhaps UETA ought define signature by reference to the substantive law applicable to a given transaction, or alternatively, that the term be undefined and so by default refer to the definition otherwise applicable to the transaction. While the current definition attempts to capture the basic essence of a signature in the paper world (in the same way that record is intended to capture the basic essence of a writing in the paper world), the substantive impact of the UETA is to validate electronic signatures and leave to the substantive law applicable to the transaction the issue of the effect of the signature. The Committee has voted to avoid the specific attributes of a signature set forth in the Article 2B definition which is appropriate given the broader applicability of the UETA. **THE QUESTION FOR THE COMMITTEE** is whether the UETA should conform more closely to the Article 2B formulation, defer to the definition of signature/authentication applicable to the underlying transaction, or remain essentially the same.

A second issue at the Coordination Meeting related to the effect of security procedures, now reflected in Section 107 of the UETA. While the participants acknowledged the fundamental differences in policy choice made by the two Committees (UETA and Article 2B), the question was raised whether the UETA should have any provision relating to the effect of a security procedure. The Bank Working Group has indicated its view that the UETA should leave the effect of security procedures to the parties' agreement or other law. If such an approach were adopted there would be no conflict between the UETA and other laws, including Article 2B. The provision in Section 107, however, reflects the Committee's view that some provision addressing the impact of a security procedure in a transaction was warranted and that the risk of security procedures should generally fall on those responsible for the use of a particular procedure in a given transaction. **THE QUESTION FOR THE COMMITTEE** is whether the UETA should provide for the effect of security procedures in any context, or should leave the parties to their agreement and other substantive law.

**SCOPE:** The issue of scope continues as one of the more difficult issues to be resolved. However, the focus has narrowed somewhat to the interplay of the UETA with the UCC and its revisions. Section 103(b) now specifically excludes Articles 4, 5 and 8 of the UCC, for the reasons set forth in the Reporter's Notes. The applicability to Article 3 has been narrowed to promises, with orders being expressly excluded, except to the extent checks and other orders are used solely for evidentiary and record retention purposes. The critical areas remain Articles 2, 2A, 2B and 9. As

noted in the Reporter's Notes, these Articles, once adopted in a jurisdiction in their revised form, will be excluded by the interaction of the exclusion in 103(b)(6) and (c), because they will include unified treatments of electronic issues. If the UETA were enacted after all these revisions, a blanket exclusion for the UCC would be possible. However, the timing of enactments is uncertain and so long as the UETA may be enacted while Articles 2, 2A and 9 are unrevised, it would be unwise to exclude these articles from the operation of the UETA.

**TRANSFERABLE RECORDS:** Closely tied to the issues of scope is the issue of the applicability of the UETA to Transferable Records, i.e., negotiable instruments and documents. The Joint Report has been distributed with this draft. Section 118 has been revised to provide that the issue is control and to set forth a general standard for control and a specific provision which operates as a safe harbor. The specific provision is taken from Revised Article 9's provisions for control of electronic chattel paper. At the Fed Meeting the provisions of UETA dealing with Notes as Transferable Records was tentatively acknowledged as serving as a bridge to a fuller consideration of the need to amend Articles 3,4 and 4A to fully address electronic issues. Through the UETA it would be possible to have an electronic analog to a note, without addressing the more complex issues involved in a full consideration of electronic negotiability. By providing for a substitute for possession and holder status, those that had need for such an electronic substitute felt they could satisfy the UETA and obtain the benefit of avoiding adverse claims to the electronic notes. The provision in Section 118(c) has been narrowly drafted to accommodate commercial needs while having the least impact on current law. **THE QUESTION FOR THE COMMITTEE** is whether to include Section 118 at all, and if so whether 118(b) should be retained.

**MANIFESTING ASSENT/OPPORTUNITY TO REVIEW:** Comments received since the October meeting have questioned whether the deletion of manifesting assent and opportunity to review was appropriate. The concern has been raised that in the on-line context a specific provision addressing the ability to assent and be bound by the classic "click-through" transaction is necessary. The provisions on manifesting assent and opportunity to review were drafted to track the Restatement of Contracts, and the thought was that therefore they were actually unnecessary. However, the Restatement is not the law in all fifty jurisdictions, and reliance on the Restatement has been viewed as misplaced. Accordingly, it has been suggested that the UETA needs a provision authorizing manifestations of assent in a uniform manner. **THE QUESTION FOR THE COMMITTEE** is whether to reconsider and include the concepts of manifest assent/opportunity to review in the UETA.

Such are the principal issues I see for the meeting in Richmond. I look forward to resolving these issues and moving forward toward final approval this summer.