

## MEMORANDUM

To: Uniform Electronic Transactions Act Drafting Committee and Observers.

From: Ben Beard, Reporter.

Date: March 19, 1999.

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

Enclosed is the seventh draft of the Uniform Electronic Transactions Act (the "Act") revised from the January 19, 1999 Draft discussed at the February, 1999 meeting of the Drafting Committee in Richmond, VA. This is the final draft before the Annual Meeting Draft to be submitted to the Conference for approval this summer. Noted below are those issues remaining in this draft which must be resolved to enable me to prepare the Annual Meeting Draft. I have noted five issues which are fundamental policy issues and then have listed several minor clean-up issues.

**USE OF ELECTRONIC RECORDS AND SIGNATURES:** The purpose of the UETA is to remove barriers to the conduct of transactions electronically. At the same time, a fundamental policy, reflected in section 104(a) is that no one is *required* to use electronic records or signatures. Yet, requiring express agreement to the use of electronic records is also a barrier to electronic transactions. Based on the discussions in Richmond, Section 104(b) attempts to establish a reasonable use standard. Combined with the requirements in Section 115(b) for receipt of notice, these provisions protect the possibly unsuspecting recipient while protecting the reasonable expectations of users of electronic records. **THE QUESTION FOR THE COMMITTEE IS WHETHER THE BALANCE STRUCK IS APPROPRIATE AND CORRECT.**

**DEFINITION OF ELECTRONIC SIGNATURE:** In Richmond the Committee voted to delete the terms signature and signed, and to bolster the definition of electronic signature as appropriate. One unanswered question was the need for an additional element of intent when executing or adopting an electronic signature. That is, should there be some intention to "authenticate," "sign," or otherwise indicate approval of the electronic record? Or is it sufficient to have an identifier that is executed/adopted with intention to associate oneself with the record? **THE QUESTION FOR THE COMMITTEE IS WHETHER ADDITIONAL ELEMENTS OF INTENTION ARE NECESSARY IN THE DEFINITION OF ELECTRONIC SIGNATURE?**

**SCOPE:** After the discussions in Richmond, it appears that the approach to the issue of scope has become clearer. The votes to delete the generic descriptions of laws which provide for non-written records, and the narrow "repugnancy" provision, indicate that the Committee wants a firm list of those laws excluded. Section 103(b) now excludes the majority of the Articles of UCC, and specifically provides for exclusion of revised Articles 2, 2A and 9, and proposed Article 2B when enacted. There is also a bracketed provision for states to exclude other laws they deem appropriate and the Note indicates the types of laws which an individual state may choose to include for exclusion. **TWO QUESTIONS ARE PRESENTED FOR THE COMMITTEE: 1) SHOULD THE LIST OF "MINISTERIAL" SECTIONS OF ARTICLES 3, 4, AND 4A BE**



**EXCEPTED FROM THE EXCLUSIONS; AND 2) MORE GENERALLY, ARE THE EXCLUSIONS IN SECTION 103 COMPLETE AND APPROPRIATE?**

**TRANSFERABLE RECORDS:** Closely tied to the issue of scope is the issue of the applicability of the UETA to Transferable Records. The current draft has been revised to make Section 116 a stand-alone provision with no impact on Article 3 of the UCC. The scope of the coverage of Transferable Records as defined is now limited to electronic records which would be negotiable notes under Article 3 if they were in writing. Chattel paper under Article 9 and Documents of Title under Article 1 have been excluded for reasons noted in the notes to the definition and Section 116. It is submitted, that the Section 116 allows market development of the use of Transferable Records in a controlled manner. Protections for the obligor and the party in control have been built into the section which should minimize much of the concern in this area. **THE QUESTION FOR THE COMMITTEE IS WHETHER THE PROVISIONS ON TRANSFERABLE RECORDS SHOULD REMAIN A PART OF THE UETA?**

**ELECTRONIC AGENTS:** Former Section 116 addressing electronic agents and automated transactions has been reorganized. The provisions relating to contract formation have been moved to Section 113 covering formation of contract, and the provisions on "inadvertent error" have been moved to section 109 dealing with errors and changes. The purpose was to shift the focus to the problem arising from the use of machines, from a focus on the use of machines *per se*. That leaves in section 114 the sole provision that operations of electronic agents are the acts of the person using the agent. In light of the definition of electronic agent, and the contexts in which the term and concept are used in the Act, **THE QUESTION FOR THE COMMITTEE IS WHETHER THIS PROVISION SHOULD REMAIN IN THE UETA?**

**OTHER ISSUES:** Other "clean-up" issues remain regarding bracketed language in the following sections which **RAISE QUESTIONS FOR THE COMMITTEE:**

1. The legal effect of an agreement. The last sentence from the definition has been moved, at the insistence of the Committee on Style, to substantive section 104(d). **SHOULD IT BE RETAINED OR DELETED?**

2. The Committee on Style continues to insist that Section 105 Application and Construction be deleted as inappropriate. **SHOULD SECTION 105 BE RETAINED?**

3. Section 110 Notarization continues to include the requirement that the notarization assure content integrity. Though beyond the normal purpose of a notarization, this provision was favorably received by some members of the committee. **SHOULD IT BE RETAINED OR DELETED?**



4. Section 111 Retention and Originals contains several bracketed provisions. **THE QUESTIONS FOR THE COMMITTEE ARE** A. Whether the provision in 111(d) should override commercial practice; B. Whether a governmental agency should be excluded from the operation of section 111(f); and whether section 111(e) should be retained making a special rule for retention of checks.

5. Section 112 Admissibility in Evidence. **WHETHER SUBSECTION (b), INSTRUCTING A COURT REGARDING THE PERSUASIVE EFFECT OF EVIDENCE, SHOULD BE RETAINED?**

6. Finally, Section 115(f) is a remnant from the prior Acknowledgment of Receipt section. **SHOULD THE SUBSECTION BE DELETED?**

**NOTES TO THIS DRAFT V. Reporter's Notes:** The sections of the draft are followed by notes designated as NOTES TO THIS DRAFT and Reporter's Notes. The former are new notes explanatory of the provision in this draft and the reasons for the changes. The Reporter's Notes are historical in nature, providing a description of the development of the ideas and concepts appearing in the section. The Reporter's Notes have not changed substantially from prior drafts, though some updating changes have been made.

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