

MEMORANDUM

To: Uniform Electronic Transactions Act Drafting Committee and Observers.

From: Ben Beard, Reporter.

Date: September 18, 1998.

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

Enclosed is the fifth draft (including the Annual Meeting Draft) of the Uniform Electronic Transactions Act (the "Act"). This draft has been revised from the March 23, 1998 Draft discussed at the April, 1998 meeting of the Drafting Committee in Washington D.C., and also includes some changes from the 1998 Annual Meeting Draft.

Following the Annual Meeting, Chair Fry and I discussed the content of the draft to be presented in Rapid City. Since the Drafting Committee had not reviewed and commented on the changes made in the Annual Meeting draft, and it appeared that we would not have full attendance by all members of the Committee for all or part of the meeting in Rapid City, we initially considered simply presenting the Annual Meeting draft for discussion in Rapid City. However, certain provisions required obvious redrafting in light of the Committee's directions at the April meeting (e.g., Sections 202, 203 and 302). Further, drafts of the Report of the Task Force on Scope have been available in time to consider addressing some of its recommendations in this Draft. Finally, the intention to have this Act ready for final reading next summer, suggested that some changes and alternatives be presented to the Drafting Committee in Rapid City, in order to move the process along.

The enclosed draft has been marked to show changes from the March 23, 1998 draft. Changes from, and alternatives to, the Annual Meeting Draft are also reflected in this draft. These changes or alternatives have been discussed in the "Reporter's Note to this Draft" following the affected sections. I have done everything possible to present the changes in the clearest manner possible. To the extent any changes were missed in the marking, it was inadvertent and entirely my responsibility.

PRINCIPAL ISSUES IN THIS DRAFT.

1. **SCOPE.** Scope was a significant concern at the Annual Meeting and remains the principal issue to be resolved by the Drafting Committee. The Committee will have the Report of the Task Force on Scope before the meeting in Rapid City. This draft reflects some of the concepts in earlier drafts of the Report. This issue will likely occupy a significant portion of the meeting in Rapid City.
2. **STATUS OF MANIFESTING ASSENT.** This concept has been removed

from the substantive provisions of the Act. Should it be retained as a procedural provision to make clear that manifestation of assent can occur electronically? The section has been revised to track Section 19 of the Restatement regarding conduct which may constitute a manifestation of assent. This is in response to criticism of the prior draft at the Annual Meeting.

3. **PRESUMPTION ISSUES.** The Annual Meeting Draft reflected the specific directions from the Drafting Committee to the Reporter at the April, 1998 meeting. The result was holdover provisions in Sections 202 and 302 which created problems in light of the general view of the Committee to eliminate presumptions. The alternatives provided here are offered as clarifications of those provisions in keeping with the Committee's direction.

Although the Drafting Committee deleted presumptions from this Act in April, there remain advocates of the need for presumptions, on the ground that the law needs to provide direct legal incentives to use and implement reasonable security procedures. The concern over deletion of presumptions is that parties will be less motivated to implement good security procedures without the benefit of legal presumptions.

On the other hand there are those who assert that, in the absence of legally created presumptions, parties will have even greater incentives to implement reasonable, reliable, robust procedures at the lowest cost commensurate with the types of risk inherent in the particular type of transaction. From a legal perspective, these incentives are indirect, based on evidentiary considerations relating to the ability to prove the source and content of an electronic record or signature. Without such procedures, those seeking to enforce electronic records and signatures will have difficulty establishing for a finder of fact that a given electronic record or signature is in fact that of the other party, or accurately presents the information conveyed.

Moreover, the existence of a presumption does not necessarily permit early resolution of litigation through summary judgment. In the face of a denial by the party to be bound, a bursting bubble presumption is exploded and of no aid to the proponent. If a stronger presumption which shifts the burden of persuasion is adopted, the party to be bound can avoid summary judgment by denying the reasonableness of the procedure, thereby creating a question of fact as to the predicate for obtaining the benefit of the presumption. Finally, once the reasonableness of the procedure is established, the need for the presumption largely evaporates, since the inference to be drawn from a

reasonable procedure will be that the record or signature is that of the party to be bound.

Finally it is important to remember that there are also self-interested, business reasons for parties to implement strong procedures. Parties using electronic commerce have a natural desire to avoid fraudulent transactions which can be prevented by reasonable means. Particularly when dealing with customers unfamiliar with, and perhaps wary of, electronic media, it is in business' interest to develop reasonable procedures to assure and convince people that electronic commerce is safe and reliable. Creation of legal presumptions may have the unintended consequence of skewing the natural development of technology which best addresses these needs based on reasonable decisions weighing the cost of the technology against the goals the technology is intended to accomplish.

Although the Drafting Committee has expressed its view on presumptions, this remains a critical issue in light of the continued existence of presumptions in the electronic contracting provisions of Article 2B.

4. **ORGANIZATION.** It was noted at the Annual Meeting that this Act is short enough that it can be set forth without the numerous parts. Attached is a proposed revised Table of Contents which places all of Parts 1-4 into a single non-governmental Part 1, and redesignates Part 5 on Governmental Records as Part 2.

This reorganization was not implemented in this draft to prevent confusion. This draft reflects changes from the March 23 draft through the Annual Meeting Draft and from the Annual Meeting Draft to this draft. Adding a major reorganization was viewed as too much at this time. I will implement the reorganization in the next draft.

Aside from the foregoing, the "Reporter's Note to this Draft" following several sections, highlight issues new to this draft. In addition, there are a number of minor issues (e.g., the standard of reliability in Section 205) which can be addressed at the meeting with, hopefully, a minimum of controversy.

I look forward to our meeting October 9-11 and moving the project forward.

UNIFORM ELECTRONIC TRANSACTIONS ACT
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- SECTION 112. ATTRIBUTION OF ELECTRONIC RECORD TO PARTY.
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