

SUBJECT: Uniform Electronic Transactions Act

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Brimer, Dukes, Corte, J. Davis, Elkins, George, Solomons, Woolley
0 nays
1 absent — Giddings

WITNESSES: For — Jim Stewart, Stewart Title Guarantee Co.; Irene Kosturakis, Texas Business Law Foundation; Mary Beth Stevens, American Council of Life Insurers
Against — None
On — Everette D. Jobe, Texas Department of Banking; Rob Schneider, Consumers Union

BACKGROUND: In 2000, the 106th Congress enacted the Electronic Signatures in Global and National Commerce Act. The act provides that in any transaction affecting interstate commerce, an electronic signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form. The legislation also authorized states to enact or adopt the Uniform Electronic Transactions Act.

DIGEST: CSHB 1201 would enact the Uniform Electronic Transactions Act (UETA). The bill would apply to electronic records and electronic signatures but not to transactions governed by laws governing the creation and execution of wills, codicils, or testamentary trusts or to those governed by the Uniform Commercial Code, except for secs. 1.107 and 1.206 and chapters 2 and 2A. Transactions subject to the UETA also would be subject to other applicable substantive law. The UETA would apply to electronic records and signatures created, generated, sent, communicated, received, or stored on or after January 1, 2002.

CSHB 1201 would apply only to transactions between parties who agreed to conduct transactions by electronic means. A party could refuse to conduct other transactions by electronic means, and that right could not be waived by agreement, although some UETA provisions could be varied by agreement. Whether an electronic record or signature had legal consequences would be determined by the UETA and other applicable law.

A record, signature, or contract could not be denied legal effect solely because it was in electronic form. If law required a record to be in writing or required a signature, an electronic version would satisfy the law.

If a law required a party to provide another party with written information, the requirement would be satisfied if the information was sent in an electronic record that the recipient could retain at the time of receipt. If a law other than UETA required a record to be posted, sent, or formatted a certain way, the record would have to comply. If the sender or the sender's information processing system inhibited the recipient's ability to print or store the electronic record, the record would be considered incapable of retention and would not be enforceable against the recipient.

An electronic record or signature would be attributable to a person if it could be shown in any manner that it was the act of the person. The effect of an electronic record or signature would be determined from the context and circumstances at the time of its creation.

If the parties agreed to use a security procedure to detect changes or errors and if one party used the procedure but the other party did not, the party who used the procedure could avoid the effect of the change or error if the other party would have detected the change or error had it used the procedure. In an electronic transaction, a person could avoid the effect of an electronic record that resulted from an error made in dealing with another person's electronic agent if the electronic agent did not provide a chance to prevent or correct an error and, at the time the person learned of the error, the person:

- ! promptly notified the other party of the error and of the person's intention not to be bound by the record;
- ! took reasonable steps to return to the other person or to destroy any consideration received as a result of the erroneous electronic record; and

! had not used or received any benefit or value from the consideration.

If a law required notarization or acknowledgment, the requirement would be satisfied if the electronic signature of the person authorized to perform such acts was attached to the record with all other required information.

If a law required that a record be retained, the requirement would be satisfied if the record accurately reflected the information as it was first set forth and if it remained accessible for later reference. If a law required a record to be retained in its original form and provided consequences for not doing so, the law would be satisfied by an electronic record that met the requirements above. The record retention requirements would not apply to information whose sole purpose was to enable the record to be communicated. If a law required retention of a check, an electronic record would satisfy that requirement if the information on the front and the back of the check was retained accurately and reflected in the record. Records retained in these ways would satisfy a law requiring a person to retain a record for evidentiary, audit, or similar purpose. A governmental agency could specify additional requirements.

Evidence of a record or signature could not be excluded as evidence in a proceeding solely because it was in electronic form.

A contract could be formed by the interaction of electronic agents even if no one was aware of or reviewed the agents' actions or the resulting terms and agreements. The terms of the contract formed would be determined by applicable substantive law.

An electronic record would be considered sent if it:

- ! was addressed properly or otherwise directed properly to an information processing system designated by the recipient;
- ! was in a form capable of being processed by that system; and
- ! entered an information processing system outside the sender's control.

An electronic record would be considered received when it entered an information processing system designated by the recipient and was in a form capable of being processed by that system. This provision would apply even

if the information processing system was located in a different place from the place where the electronic record was deemed to be received.

Unless otherwise agreed to, an electronic record would be deemed sent from the sender's place of business and received at the recipient's place of business. If the sender or recipient had more than one place of business, that person's place would be the place having the closest relationship to the underlying transaction. If the sender or recipient did not have a place of business, the place of business would be the sender's or recipient's residence.

An electronic record would be considered received even if no one was aware of its receipt. Receipt of an electronic acknowledgment by an electronic processing system would establish that a record had been received but would not establish that the content received was the same as the content sent. If a person was aware that an electronic record purportedly sent or received actually was not sent or received, the legal effect of the sending or receipt would be determined by other applicable law.

A person would be considered to have control of a transferable record if a system employed to evidence the transfer reliably established that person as the person to which the record was transferred. A person would be deemed to have control of a transferable record if the transferable record was created, stored, and assigned such that:

- ! a single authoritative copy of the record existed that was unique, identifiable, and unalterable;
- ! the authoritative copy identified the person asserting control as the person to which the record was issued, or, if the copy indicated that the record had been transferred, the person to which the record most recently had been transferred;
- ! the authoritative copy was communicated to and maintained by the person asserting control;
- ! revisions that changed an identified assignee of the authoritative copy could be made only with the consent of the person asserting control;
- ! each copy of the authoritative copy was readily identifiable as a copy that was not the authoritative copy; and

- ! any revision of the authoritative copy was readily identifiable as authorized or unauthorized.

A person having control of a transferable record would be considered the holder of the transferable record and would have the same rights and defenses as a holder of an equivalent record, including, if the applicable statutory requirements were satisfied, the rights and defense of a holder in due course, a holder to which a negotiable document of title had been duly negotiated, or a purchaser. Delivery, possession, and endorsement would not be required to obtain or exercise any of these rights.

An obligor under a transferable record would have the same rights and defenses as an equivalent obligor under equivalent records under the Uniform Commercial Code. If requested by a person against which enforcement was sought, the person seeking to enforce the transferable record would have to provide reasonable proof that the person was in control of the transferable record.

Each state agency would have to determine whether, and the extent to which, the agency would send and accept electronic records and signatures and otherwise would create, generate, communicate, store, process, use, and rely upon electronic records and signatures. The Department of Information Resources (DIR) would have to specify:

- ! the manner and format of the electronic records;
- ! the manner and format of the electronic signature and any third-party identification;
- ! control processes and procedures; and
- ! any other required attributes for electronic records.

An agency would not have to use or allow the use of electronic records or signatures. DIR could encourage and promote consistency and interoperability with similar requirements adopted by other agencies.

A regulatory agency could exempt without condition a specified category or type of record from the requirements relating to consent under the federal Electronic Signatures in Global and National Commerce Act if the exemption was necessary to eliminate a substantial burden on electronic commerce. If a

regulatory agency determined that one or more exceptions in the federal law no longer were necessary to protect consumers, the agency could extend the application of the UETA to those exceptions.

A county clerk could accept and record electronic records. An instrument would be considered filed with the county clerk when it was received, unless the clerk rejected it.

This bill would take effect January 1, 2002.

NOTES:

The committee substitute added the provisions authorizing a county clerk to accept and record an electronic record and authorizing a state regulatory agency to exempt a specific category or type of electronic record if necessary to eliminate a substantial burden on electronic commerce.

The companion bill, SB 393 by Carona, passed the Senate by a voice vote on April 4 and was reported favorably, without amendment, by the House Business and Industry Committee on April 19, making it eligible for consideration in lieu of HB 1201.