SUBJECT: Uniform Electronic Transactions Act

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 7 ayes — Brimer, Dukes, Corte, J. Davis, Elkins, Solomons, Woolley

0 nays

2 absent — George, Giddings

SENATE VOTE: On final passage, April 4 — voice vote

WITNESSES: *(On House companion bill, HB 1201)*
For — Jim Stewart, Stewart Title Guarantee Co.; Irene Kostirakis, 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—Southwest Regional Office

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: SB 393 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 those governed by the Uniform Commercial Code, except 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 on or after January 1, 2002.

SB 393 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 varied by agreement. Whether an electronic record or signature has 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 requires 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 the other party with written information, the requirement would be satisfied if the information was sent in an electronic record that the recipient could be 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 an 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 one party used the procedure but the other party did not, the party who used the procedure could the effect of the change of 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 al 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 it remained accessible for later reference. If a law required a record be retained in its original form and provides 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 is in electronic form.

A contract could be formed by the interaction of electronic agents even if no individual was aware of or reviewed the agent's 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 when 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 enters 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 has 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 would establish that a record was 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 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 establishes 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 the record has 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 are 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 indorsement 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 determine whether, and the extent to which, the agency will send and accept electronic records and signatures and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and signatures. The Department of Information Resources (DIR) and the Texas State Library and Archives Commission, pursuant to their rulemaking authority under other law, would be permitted to specify:

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

An agency would 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 governmental 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 determines that one or more exceptions in the federal law

were no longer 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.

The bill would take effect January 1, 2002.

SUPPORTERS SAY:

SB 393 would help protect those who use electronic transactions to conduct business. Because no current state law exists governing most electronic transactions, persons who enter into electronic contracts do so at their own risk. SB 393 would inform the public of the laws governing electronic signatures, contracts, and records. The Uniform Electronic Transactions Act (UETA) would provide basic protections that ensure that transactions are fair to consumers by requiring consumers have access to getting paper copies of the transactions and ensuring that consumers truly have given their consent to electronic transactions.

The bill would help preserve state authority by implementing federal law at the state level. Federal law provides that as long as the UETA is adopted "as is," it will not be pre-empted by federal law. SB 393 also would bring Texas in line with other states which have adopted similar versions of the Uniform Electronic Transactions Act (UETA). This would help validate the manner in which interstate electronic commerce is conducted and would provide a uniform framework.

SB 393 would help bring down the barriers to electronic transactions. It would allow for the legal recognition of electronic signatures. It would validate electronic transactions that would normally be paper transactions. UETA would apply existing rules about agreements between consumers and businesses to electronic commerce.

OPPONENTS SAY:

No apparent opposition.

NOTES:

The companion bill, HB 1201 by Brimer, was set on the House General State Calendar for May 8. SB 393 was laid out in lieu of HB 1201, then was postponed.

The only difference between the House and Senate bills is that SB 393 added the Texas State Library and Archives Commission, along with the Department of Information Resources, to specify the conditions for acceptance and distribution of electronic records by governmental agencies.