

**SUBJECT:** Revising the Uniform Commercial Code

**COMMITTEE:** Business and Industry — favorable, without amendment

**VOTE:** 8 ayes — Giddings, Elkins, Kolkhorst, Bohac, J. Moreno, Oliveira,  
Solomons, Zedler

0 nays

1 absent — Martinez Fischer

**WITNESSES:** For — Roger A. Bartlett, Texas Business Law Foundation

Against — None

**BACKGROUND:** The Uniform Commerce Code (UCC) comprises Business and Commerce Code, chapters 1-11. Its stated purpose is to allow for the expansion of commercial practices by clarifying and modernizing the law governing commercial transactions and making the law uniform across jurisdictions.

Chapter 1 includes the code's general provisions that govern all transactions under the UCC, unless the parties agree to modify the provisions. Such modifications are permitted provided that the parties not renounce their obligations of good faith, diligence, reasonableness, and care, or unless otherwise prohibited by the UCC.

Under Chapter 1, Texas law governs the rights and duties of parties unless otherwise specified by the contracting parties, who may choose the law of any other state to govern their rights and duties only if the transaction is related reasonably to the state chosen for jurisdiction.

An aggrieved party is required to sign and deliver a "written waiver or renunciation" in order to waive a claim or right arising out of an alleged breach.

A person “receives” notice of a fact when the notice is delivered to that person’s place of business or other place where that person specified communications should be sent.

A contract in writing is required to enforce the sale of real property or personal property greater than \$5,000, except in cases specified by other UCC chapters, including Business and Commerce Code Chapter 26 dealing with several types of promises and agreements.

Chapter 2 introduces “course of performance” between parties with respect to contracts for the sale of goods and states its relevance in showing “waiver or modification of any term inconsistent with such course of performance.”

Chapters 2A and 4A govern leases and funds transfers. Chapters 3 and 8 govern negotiable instruments and investment securities.

**DIGEST:**

HB 1394 would repeal and amend portions of UCC chapters 1-4A and 8. It would reorganize large portions of Chapter 1, including moving the authorization for parties to choose applicable law for their contracts from sec. 1.105, to sec. 1.301, as well referencing “course of performance” in Chapter 1, while maintaining existing language in Chapter 2.

The bill also would amend a number of definitions, including:

- allowing an aggrieved party to waive a claim or right “by agreement” in an “authenticated record” rather than requiring an aggrieved party to sign and deliver a writing to that effect;
- defining “record” as information inscribed on a “tangible medium” or stored in an electronic or other medium that can be retrieved in “perceivable form;” and
- changing the requirement by which a party could be deemed to “receive” notice to include the delivery of notice “in a form reasonable under the circumstances.”

HB 1394 would repeal the UCC’s general provision requiring parties to have a writing to establish an enforceable agreement.

An obligation of “good faith, defined as “observance of reasonable commercial standards of fair dealing,” would have to be observed by all parties governed by any chapter of the UCC. This would replace all other references to good faith in the UCC, except that the particular definition of good faith in Chapter 5, governing letters of credit, would remain.

HB 1394 would make other conforming changes. It would take effect September 1, 2003.

**SUPPORTERS  
SAY:**

HB 1394 would enact a range of minor modifications crafted carefully to update portions of state law to conform with the recommendations of a national commission as well as committees of Texas practitioners and experts. This would further the purpose of the UCC — the facilitation of commerce.

HB 1394 would update the UCC to accommodate new technology and practices. As electronic mail and commerce grow more important each year, related legal definitions must recognize these new means of doing business. This bill would accommodate new electronic communications technology by broadening the definition for receiving notice.

In regard to the authentication of documents, UCC Sec. 9.102 already contemplates electronic transactions by allowing authentication of records by adopting a symbol or encrypting a record. Using this provision and similar guides, parties would develop standards for authenticating records passed by electronic means.

HB 1394 appropriately would preserve a workable standard for choice of law among states. If parties were allowed to choose any state law to govern an agreement with no regard to whether the transaction was related reasonably to that state, Texas courts increasingly would be burdened by the requirement to apply foreign law if litigation resulted from the agreement. There is no reason to change this proven standard governing choice of law that has worked well over the past 10 years.

The bill would not encumber Chapter 1 with lengthy explanations or cautions. It properly would repeal the requirement of sec. 1.206 that parties must have a contract in writing to enforce an agreement, because it already appears in

several chapters of the UCC and Business and Commerce Ch. 26. Likewise, the “course of performance” provision that HB 1394 would include in Chapter 1 is appropriate in length and detail for this section.

**OPPONENTS  
SAY:**

The changes made by HB 1394 would require additional statutory clarification to avoid increased litigation and to protect contracting parties from unintended consequences. By amending sec. 1.107 to allow an aggrieved party to waive a claim or right “by agreement” in an “authenticated record,” the bill would make it more likely that a party inadvertently could waive a claim or right arising from a contract. HB 1394 would liberalize the meaning of “record” to the extent that a non-encrypted electronic mail message would qualify, and the term “authenticated record” would not be defined at all. As a result, the bill could introduce new conflicts over the authenticity of an alleged waiver of claim or right by an aggrieved party. Current law properly requires an aggrieved party to sign and deliver a writing in order to waive a claim or right.

Similarly, HB 1394 would not describe adequately in Chapter 1 the potent effect of “course of performance” on all transactions governed by the UCC. For example, by accepting payment 10 days late for several consecutive pay periods, a party might have waived a right to enforce timely payment as required under contract. The possible effect of course of performance in waiving or modifying agreements between parties necessitates an explanation of its effects in Chapter 1, which HB 1394 would not contain.

**OTHER  
OPPONENTS  
SAY:**

In regard to choice of law, HB 1394 would fail to enact a better rule to govern choice of law by businesses. The American Law Institute and the Uniform Law Commissioners advise that non-consumer parties should have flexibility to agree to have their contracts interpreted under the law of another state, “whether or not the transaction bears a relation to the State designated.” By contrast, HB 1394 would preserve current law that requires a transaction to have a “reasonable relation” to the state chosen to have jurisdiction over an agreement. Lawmakers should allow Texas businesses more flexibility in contracting to allow the continued expansion of commercial practices, a basic purpose of the UCC.

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**NOTES:** The companion bill, SB 994 by Williams, has been referred to the Senate Business and Commerce Committee.