

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 393
By: Carona
Business & Commerce
3/28/2001
Committee Report (Substituted)

DIGEST AND PURPOSE

Currently, there is not a comprehensive state law for electronic commerce and electronic transactions. C.S.S.B. 393 permits electronic records and electronic signatures in electronic transactions and electronic commerce to be legally enforceable.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Title 4, Business & Commerce Code, by adding Chapter 43 as follows:

Chapter 43. UNIFORM ELECTRONIC TRANSACTIONS ACT

Sec. 43.001. SHORT TITLE. Authorizes this chapter to be cited as the Uniform Electronic Transactions Act.

Sec. 43.002. DEFINITIONS. Defines “agreement,” “automated transaction,” “computer program,” “contract,” “electronic,” “electronic Agent,” “electronic record,” “electronic signature,” “governmental agency,” “information,” “information processing system,” “record,” “security procedure,” “state,” and “transaction.”

Sec. 43.003. SCOPE. (a) Provides that this chapter applies, except as otherwise provided in Subsection (b), to electronic records and electronic signatures relating to a transaction.

(b) Makes this chapter inapplicable to a transaction to the extent it is governed by certain other provisions.

(c) Provides that this chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) Provides a transaction subject to this chapter is also subject to other applicable substantive law.

Sec. 43.004. PROSPECTIVE APPLICATION. Provides this chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2002.

Sec. 43.005. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES; VARIATION BY AGREEMENT. (a) Provides that this chapter does not require a record or signature to be created, generated, sent, communicated, received, stored or otherwise

processed or used by electronic means or in electronic form.

- (b) Provides that this chapter only applies to transactions between parties each of which has agreed to conduct transactions by electronic means. Provides that whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.
- (c) Authorizes a party that agrees to conduct a transaction by electronic means to refuse to conduct other transactions by electronic means. Prohibits the right granted by this subsection from being waived.
- (d) Authorizes the effect of any of its provisions, except as otherwise provided in this chapter, to be varied by agreement. Provides that the presence on certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.
- (e) Provides that whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.

Sec. 43.006. CONSTRUCTION AND APPLICATION. Requires this chapter to be construed and applied to bring about certain requirements.

Sec. 43.007. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS. (a) Prohibits a record or signature from being denied legal effect or enforceability solely because it is in electronic form.

- (b) Prohibits a contract from being denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) Provides that if a law requires a record to be in a writing, an electronic record satisfies the law.
- (d) Provides that if a law requires a signature, an electronic signature satisfies the law.

Sec. 43.008. PROVISION OF INFORMATION IN WRITING; PRESENTATION OF RECORDS. (a) Provides if parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. Provides that an electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

- (b) Provides if a law, other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following certain rules apply.
- (c) Provides that if a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.
- (d) Prohibits the requirements of this section from being varied by agreement, but to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement that the information be in the form of an electronic record capable of

retention may also be varied by agreements, and a requirement under a law other than this chapter to send, communicate, or transmit a record by first-class mail, may be varied by agreement to the extent permitted by the other law.

Sec. 43.009. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND

ELECTRONIC SIGNATURE. (a) Provides that an electronic record of electronic signature is attributable to a person if it was the act of the person. Authorizes the act of the person to be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) Provides that the effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

Sec. 43.010. EFFECT OF CHANGE OR ERROR. (a) Provides that if a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) Provides that if the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party is authorized to avoid the effect of the changed or erroneous record.

(c) Provides that in an automated transaction involving an individual, the individual is authorized to avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual takes certain steps.

(d) Provides that if neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by the other law, including the law of mistake, and the parties' contract, if any.

(e) Prohibits Subsections (c) and (d) from being varied by agreement.

Sec. 43.011. NOTARIZATION AND ACKNOWLEDGMENT. Provides that if a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

Sec. 43.012. RETENTION OF ELECTRONIC RECORDS; ORIGINALS. Provides that if a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which meets certain criteria.

(b) Makes a requirement to retain a record in accordance with Subsection (a) in applicable to any information the sole purpose of which is to enable to be sent, communicated, or received.

(c) Authorizes a person to satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) Provides that if a law requires a record to be presented or retained in its original

form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with Subsection (a).

(e) Provides that if a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with Subsection (a).

(f) Provides that a record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) Prohibits this section from precluding a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Sec. 43.013. **ADMISSIBILITY IN EVIDENCE.** Prohibits evidence in a proceeding from being excluded solely because it is in electronic form.

Sec. 43.014. **AUTOMATED TRANSACTION.** (a) Provides that in an automated transaction, the rules provided by this section apply.

(b) Authorizes a contract to be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agent's actions or the resulting terms and agreements.

(c) Authorizes a contract to be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) Provides that the terms of the contract are determined by the substantive law applicable to it.

Sec. 43.015. **TIME AND PLACE OF SENDING AND RECEIPT.** (a) Provides that unless otherwise agreed between the sender and the recipient, an electronic record is sent when it meets certain criteria.

(b) Provides that unless otherwise agreed between the sender and the recipient, an electronic record is received when it meets certain criteria.

(c) Provides that Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under Subsection (d).

(d) Provides that unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. Provides that, for the purposes of this subsection, the following rules apply: if the sender or the recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and if the sender or the recipient does not have a place of business, the place of business is the sender's or the recipient's residence, as the case may be.

(e) Provides that an electronic record is received under Subsection (b) even if no individual is aware of its receipt.

(f) Provides that receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) Provides that if a person is aware that an electronic record purportedly sent under Subsection (a), or purportedly received under Subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Prohibits the requirements of this subsection from being varied by agreement, except to the extent permitted by the other law.

Sec. 43.016. TRANSFERABLE RECORDS. (a) Defines “transferable record.”

(b) Provides that a person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) Provides that a system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that it meets certain criteria.

(d) Provides that except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code (UCC), including, if the applicable statutory requirements under Section 3.302(a) (Holder in Due Course), 7.501 (Form of Negotiation and Requirements of “Due Negotiation”), or 9.308 (Purchase of Chattel Paper and Instruments) are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Provides that delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Provides that except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the UCC.

(f) Requires that if requested by a person against which enforcement is sought, the person seeking to enforce the transferable record is required to provide reasonable proof that the person is in control of the transferable record. Authorizes proof to include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Sec. 43.017. ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES. (a) Requires that each state agency, except as otherwise provided by Section 43.012(f), to determine whether, and to the extent to which, the agency will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) Authorizes, to the extent that a state agency uses electronic records and electronic signatures under Subsection (a), the Department of Information Resources and Texas

State Library and Archives commission, pursuant to their rulemaking authority under other law and giving due consideration to security, to specify certain procedures to be followed.

(c) Provides that except as otherwise provided in Section 43.012(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.

Sec. 43.018. INTEROPERABILITY. Authorizes the Department of Information Resources to encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. Authorizes, if appropriate, those standards to specify differing levels of standards from which governmental agencies of this state are authorized to choose in implementing the most appropriate standard for a particular application.

Sec. 43.019. EXEMPTION TO PREEMPTION BY FEDERAL ELECTRONIC SIGNATURES ACT. Provides that this chapter modifies, limits, or supercedes the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et. seq.) as authorized by Section 102 of that Act (15 U.S.C. Section 7002).

SECTION 2. Amends Section 191.009(a), Local Government Code to provide that such an instrument is an electronic record, as defined by Section 43.002, Business and Commerce Code.

SECTION 3. Amends Section 195.002, Local Government Code, by adding Subsection (e) to provide that a county clerk, notwithstanding Sections 43.017 and 43.018, Business & Commerce Code, may accept any filed electronic record, as defined by Section 43.002, Business and Commerce Code, and may electronically record that record if the filing and recording of that record complies with rules adopted by the commission under this section.

SECTION 4. Amends Chapter 195, Local Government Code, by adding Section 195.009, as follows:

Sec. 195.009. FILING. Provides that for purposes of this chapter, an instrument is filed with the county clerk when it is received by the county clerk, unless the county clerk rejects the filing within the time and manner provided by this chapter and rules adopted under this chapter.

SECTION 5. Repealer: Section 2.108 (Digital Signature) and 2A.110 (Digital Signature), Business & Commerce Code.

SECTION 6. (a) Provides that, notwithstanding Section 43.019, Business & Commerce Code, as added by this Act, Chapter 43, Business & Commerce Code, as added by this Act, does not modify, limit or supersede the provisions of Section 101(c) or Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sections 7001 and 7003), as amended from time to time.

(b) Authorizes a regulatory agency of this state, with respect to matters within its jurisdiction, by rule or order issued after notice and an opportunity for public comment, to exempt without condition a specified category or type of record from the requirements relating to consent in Section 101(c), Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001), if that exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

(c) Provides that if a regulatory agency of this state, with respect to matters within its jurisdiction, determines after notice and an opportunity for public comment, and publishes a finding, that one or more of the exceptions contained in Section 103(b), Electronic Signatures in

Global and National Commerce Act (15 U.S.C. Section 7003), are no longer necessary for the protection of consumers and that eliminating those exceptions will not increase the material risk of harm to consumers, the regulatory agency may extend the application of Chapter 43, Business & Commerce Code, as added by this Act, to the exceptions identified in that finding.

SECTION 7. Provides that Chapter 43, Business & Commerce Code, as added by this Act, does not modify, limit or supercede Chapter 15, Civil Practice and Remedies Code (Venue), or Section 35.531 (Law Applicable to Contract Made Over Internet), Business and Commerce Code.

SECTION 8. Effective date: January 1, 2002.

SUMMARY OF COMMITTEE CHANGES

SECTION 1. Amends As Filed S.B. 393, in proposed Section 43.017(b), to include a reference to the Texas State Library and Archives Commission pursuant to its rulemaking authority under other law.

Adds SECTIONS 2 through 7 and rennumbers SECTION 2 of the As Filed S.B. 393 as SECTION 8.