

STORAGE NAME: h1891s2.jud

DATE: April 7, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: CS/CS/HB 1891

RELATING TO: Electronic Commerce

SPONSOR(S): Committee on Judiciary, Committee on Utilities & Communication and Rep. Arnall

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) UTILITIES AND COMMUNICATIONS YEAS 9 NAYS 0
 - (2) JUDICIARY YEAS 8 NAYS 0
 - (3) GOVERNMENTAL OPERATIONS
 - (4) CRIMINAL JUSTICE APPROPRIATIONS
 - (5)
-

I. SUMMARY:

CS/CS/HB 1891 codifies the Uniform Electronic Transaction Act (the "Act") adopted by the National Conference of Commissioners on Uniform State Laws in 1999. The Act is intended to:

- Facilitate electronic transactions consistent with other applicable provisions of law;
- Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of the practices; and
- Effectuate its purpose of making uniform the law among states enacting similar legislation.

As the National Conference of Commissioners on Uniform State Laws noted in its comments to the draft, the Act's ultimate purpose is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. The Act is not a general contracting statute or a digital signature statute – it is designed to complement current law in these and related areas.

The Act will apply prospectively to electronic records or signatures created, generated, sent, communicated, received, or stored on or after July 1, 2000.

The bill also requires county recorders to produce a current index of documents recorded in the official records of the county beginning with those documents filed on or after January 1, 1990, by January 1, 2002. In addition the documents reflected in the index website must have the capability to electronically connect to a central statewide search site. Moreover, the county recorders are required to make images available of those official documents that are indexed electronically by January 1, 2006.

It is not clear whether the bill will have a fiscal impact on state or local government.

The act shall be effective July 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes No N/A

The bill requires first-time applicants for notary commission to take certain courses approved by the Governor's Office, and directs county recorders to make official documents available online.

2. Lower Taxes Yes No N/A

3. Individual Freedom Yes No N/A

The bill imposes a course requirement on first-time applicants for notary commission.

4. Personal Responsibility Yes No N/A

5. Family Empowerment Yes No N/A

B. PRESENT SITUATION:

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is now in its 108th year. The organization is comprised of more than 300 lawyers, judges, and law professors, appointed by the states as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The group drafts proposals for uniform and model laws for consideration and enactment in state legislatures. Since its inception in 1892, the group has promulgated more than 200 acts, among them the Uniform Commercial Code, the Uniform Probate Code, and the Uniform Partnership Act.

The NCCUSL drafted, approved and recommended for enactment in all states at its July 1999 Annual Conference the Uniform Electronic Transactions Act, (UETA).

According to NCCUSL, the purpose of the Act is to remove barriers to electronic commerce by validating and effectuating electronic records and signatures. It is not a general contracting statute or a digital signature statute. To the extent that a state has a Digital Signature Law, the UETA is designed to support and compliment that statute.

In Florida, the laws governing digital or electronic signatures are found in Chapter 282, Part III, Florida Statutes, Electronic Signatures. Pursuant to s. 282.71, Florida Statutes, it is the legislative intent of the act to:

- (1) Facilitate economic development and efficient delivery of government services by means of reliable electronic messages.
- (2) Enhance public confidence in the use of electronic signatures.
- (3) Minimize the incidence of forged electronic signatures and fraud in electronic commerce.
- (4) Foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to writings in any electronic medium.
- (5) Assure that proper management oversight and accountability are maintained for agency-conducted electronic commerce.

Section 282.73, Florida Statutes, provides that:

Unless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature.

Further, s. 282.75, Florida Statutes, states:

The head of each agency shall be responsible for adopting and implementing control procedures to ensure adequate security, confidentiality, and audit ability of business transactions conducted using electronic commerce.

Chapter 117, Florida Statutes, outlines the provisions for notaries public. Section 117.01, Florida Statutes provides in part that:

(1) The Governor may appoint as many notaries public as he or she deems necessary, each of whom shall be at least 18 years of age and a legal resident of the state. A permanent resident alien may apply and be appointed and shall file with his or her application a recorded Declaration of Domicile. The residence required for appointment must be maintained throughout the term of appointment. Notaries public shall be appointed for 4 years and shall use and exercise the office of notary public within the boundaries of this state. An applicant must be able to read, write, and understand the English language.

(2) The application for appointment shall be signed and sworn to by the applicant and shall be accompanied by a fee of \$25, together with the \$10 commission fee required by s. 113.01, and a surcharge of \$4, which \$4 is appropriated to the Executive Office of the Governor to be used to educate and assist notaries public. The Executive Office of the Governor may contract with private vendors to provide the services set forth in this section. . .

Article V, Section 16, Florida Constitution, provides for the establishment of the clerk of the circuit court in each county of the state. The duties of the clerk are to be established by special or general law.

Section 28.222, Florida Statutes, provides in part that:

(1) The clerk of the circuit court shall be the recorder of all instruments that he or she may be required or authorized by law to record in the county where he or she is clerk.

(2) The clerk of the circuit court shall record all instruments in one general series called "Official Records." He or she shall keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument. The clerk shall maintain a general alphabetical index, direct and inverse, of all instruments filed for record. The register of Official Records must be available at each office where official records may be filed.

According to the National Conference of State Legislators (NCSL), two states, California and Pennsylvania have enacted the Act and 20 states have legislation pending.

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill codifies the substantive provisions of the UETA.

Definitions

Provides definitions of "agreement," "automated transaction," "computer program," "contract," "electronic," "electronic agent," "electronic record," "electronic signature," "governmental agency," "information," "information processing system," "person," "record," "security procedure," "state," and "transaction."

Scope

The bill will apply to electronic records and electronic signatures relating to a transaction, but will not apply to a transaction to the extent that it is governed by:

- Provisions of law governing the creation and execution of wills, codicils, or testamentary trusts;
- The Uniform Commercial Code other than Section 1-107 (s. 671.107, F.S.) and 1-206 (s.671.206, F.S.), Article 2 (Chapter 672, F.S.) and Article 2A (Chapter 680, F.S.);
- The Uniform Computer Information Transactions Act; or
- Rules relating to judicial procedure.

The bill will apply to an electronic record or signature that might otherwise be excluded under this section to the extent that it is governed by a provision of law other than those specified above. The bill provides that a transaction subject to the Act will also be subject to other applicable provisions of substantive law.

Prospective Application

The bill will apply to electronic records or signatures created, generated, sent, communicated, received, or stored on or after July 1, 2000.

Use of Electronic Records and Electronic Signatures

The bill only applies to transactions between parties that have agreed to conduct transactions by electronic means, as determined by the context of the circumstances surrounding the agreement and by the parties' conduct. The bill 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. A party has the right to agree to conduct certain transactions by electronic means and to refuse to conduct other transactions by electronic means, and the provisions of the bill, unless expressly mandatory, may be modified by agreement of the parties. The legal consequences of an electronic record or electronic signature will be governed by the provisions of the bill and of substantive law.

Construction and Application

The bill is intended to facilitate electronic transactions consistent with other applicable provisions of law, be consistent with reasonable practice concerning electronic transactions and with the continued expansion of the practices, and effectuate its purpose of making uniform the law created by the bill among states enacting similar legislation.

Legal Recognition of Electronic Records, Signatures, and Contracts

The bill prohibits a record or signature from being denied legal enforceability solely on the basis that the record or signature is in electronic form, and provides that a contract may not be denied legal enforceability solely because an electronic record was used in its formation. If a provision in law requires a record to be in writing or a signature, an electronic record or electronic signature will satisfy the requirement.

Provision of Information in Writing/Presentation of Records

In a transaction by electronic means, a requirement in law that a person provide, send, or deliver information in writing to another person is satisfied if the information is provided, sent,

or delivered in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or the sender's information processing system inhibits the ability of the recipient to print or store the electronic record.

In addition, if a provision in law requires the posting, display, communication or formatting of information in a certain manner, the information must be posted, communicated, or formatted according to the law.

An electronic record will not be enforceable against a recipient who cannot store or print an electronic record if the sender inhibits the recipient's ability to do so.

A provision in law allowing the parties to vary by agreement the manner of providing information be permitted under the bill to the same extent.

Attribution and Effect of Electronic Records and Electronic Signature

The bill provides that an electronic record or electronic signature is attributable to a person if the record or signature was the act of the person. The act of the person may 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.

The effect of an electronic record or signature attributed to a person under this section 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.

Effect of Change or Error

The bill establishes that, for changes or errors in an electronic record that occur in a transmission between parties to a transaction, the party that conforms to a security procedure that detects changes or errors may avoid the effect of the change or error if the other party did not conform to the procedure and would have detected the change or error had it so conformed.

In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with an 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 learns of the error, he or she promptly notifies the other person of the error and that he or she did not intend to be bound by the record received by the other person; takes reasonable steps to return to the other person or, on the other person's instructions, to destroy the consideration received, if any, as a result of the error; and has not used or received any benefit or value from the consideration, if any, received from the other person. If none of these provisions apply, the change or error will have the effect provided by any other applicable provision in law, including the law of mistake, and the parties' contract, if any.

Notarization and Acknowledgment

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 by applicable law 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.

Neither a rubber stamp or an impression-type seal is required for an electronic notarization.

The bill requires a first-time applicant for a notary commission to submit proof that he or she has completed at least 3 hours of interactive or classroom instruction, including electronic notarization, and covering the duties of the notary public. It also requires that courses satisfying this provision may be offered by any public or private person or entity registered with the Executive Office of the Governor and must include a core curriculum approved by the Governor.

Retention of Electronic Records

The bill provides that an appropriate electronic record of any document will satisfy any law requiring the record to be retained, if it accurately reflects the information set forth in the record after the record was first generated in final form as an electronic record or otherwise and if it remains accessible for later reference. Such records include records that are required to be presented or retained in their original form and records of checks. In addition, the bill provides that a record retained as an electronic record satisfies a provision of law requiring a person to retain a record for evidentiary, audit, or similar purposes, unless a provision of law enacted after July 1, 2000 specifically prohibits the use of an electronic record for a specified purpose. However, a government agency of the state may specify additional requirements for the retention of a record subject to the agency's jurisdiction.

Admissibility in Evidence

The bill provides that the evidence of a record or signature may not be excluded solely because the record or signature is in electronic form.

Automated Transactions

The bill allows for the creation of a contract by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements. In addition, a contract may be formed between an individual and an electronic agent, including a contract created where the individual performs actions that he or she 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. Terms of any contract created under this provision shall be determined by the substantive law applicable to the contract.

Time and Place of Sending and Receiving

The bill provides that, unless otherwise agreed between the sender and the recipient, an electronic record is sent when the record:

- ▶ Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and form which the recipient is able to retrieve the electronic record;
- ▶ Is in the form capable of being processed by that system; and
- ▶ Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information

processing system designated or used by the recipient which is under the recipient's control.

Unless otherwise agreed by the sender and the recipient, an electronic record is received when the record enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record, in a form capable of being processed by that system.

In addition, the bill deems that the electronic records sent between a sender and recipient are sent from and to the parties' businesses, and provides for rules defining which place of business is the appropriate location or whether a residence will qualify as a place of business. However, applicable substantive law will control whether electronic records were actually sent or received.

Transferable Records

The bill defines a "transferable record" as a record that would be a note under Article 3 of the UCC (Chapter 673, F.S.) or a document of title under Article 7 of the UCC (Chapter 677, F.S.) if the record was in writing, and the issuer of the electronic record expressly agrees that the record is transferable.

The bill defines how a person may be in control of a transferable record, and confers on the holder of such a record the same rights and defenses as a holder of an equivalent record or writing under the UCC, including 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, is the applicable statutory requirements under the UCC are satisfied. In addition, and except as otherwise agreed by the parties, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the UCC. The bill additionally provides for determinations of control of a document under this section, which may include access to the authoritative copy of the transferable record and business related records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

Creation and Retention of Electronic Records by the State

The bill allows each governmental agency to determine whether, and to what extent it will create and retain electronic records and convert written records to electronic records.

Acceptance and Distribution of Electronic Records by Governmental Agencies

The bill allows each governmental agency to determine whether and the extent to which it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely on these records and signatures. The bill allows the state technology office, in consultation with those agencies that use electronic records or signatures, to specify the manner and format in which the records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes; the types of electronic signatures that may be required, the manner and format in which the signature must be affixed to the record, and the identity of or criteria that must be met by any third party used by a person filing a document to facilitate the process; control processes to ensure integrity and security of the records; and other reasonable necessary requirements.

The bill makes clear that it does not require a governmental agency to use or permit the use of electronic records or electronic signatures, and further provides that the fees that may be imposed for the filing of nonelectronic records shall apply in kind to the filing of electronic records.

Interoperability

The bill allows a governmental agency to encourage and promote consistency and interoperability with similar requirements adopted by other government agencies of this state, other states, and the federal government as well as those private entities that interact with government.

Severability

The bill provides a standard severability clause with respect to Section 1.

Section 2 of the bill requires clerks of circuit court, referred to as "county recorders," to make official records available online.

County Records

The bill requires the county recorder of each county of the state to provide a current index of documents recorded in the official records of the county for the period beginning no later than January 1, 1990 on a publicly available Internet website, effective on January 1, 2002. The bill also requires that the website contain a document requisition point for obtaining images or copies of the documents reflected in the index which has the capability of electronically providing the index data to a central statewide search site.

The bill requires the county recorder to use appropriate security measures to ensure that no person has the ability to alter or to modify any public record, and prohibits all information retrieved electronically pursuant to this section from admission in court as an authenticated document.

The bill also requires each county recorder to provide for the electronic retrieval, at a minimum, of images of the documents referenced in the index by January 1, 2006.

Section 3. Provides and effective date.

D. SECTION-BY-SECTION ANALYSIS:

Please see "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

To the extent that the state receives filings in electronic format, the bill will allow the state to charge a fee on the same basis for electronic filings as it may for hard copy filings.

2. Expenditures:

The Governor's Office will be required to review and approve course providers and course curricula for notary public courses under the bill. The costs of undertaking the review and approval is indeterminate.

In addition, the state technology office is required to work with state agencies on policies for ensuring the integrity of electronic records kept and used by the state. The state technology office reports that its costs of implementing the bill will be minimal. However, the Department of Management Services notes that the impact on the state will be "significant and time consuming." The Department has not provided a financial estimate of this impact however.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill allows assessment of fees on an in-kind basis for filing electronic records, based on the fees required for filing analogous hard copy records.

2. Expenditures:

The clerks of court will be required to make indexes and images of official documents available online by 2003 and 2006, respectively, and will bear the costs for these requirements. The Department of Management Services notes that the fiscal impact may be significant to the extent that local agencies are required to re-tool their operations to take advantage of electronic transactions. The Department has not provided a financial estimate of this impact however.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will require applicants for notary commission to take courses relating to electronic notarization and the duties of a notary. These applicants will bear the costs of such courses.

D. FISCAL COMMENTS:

According to the Florida Association of Court Clerks & Comptroller, each clerk has a website provided free of charge by the Department of Management Services. The Association reports that 35-40 clerks have existing web pages, and 13 clerks' offices have their own web sites. There are 13 clerks that have indexes of official records available online, and 9 that have images online or are in the process of bringing images online. The cost to implement the bill's requirements that the clerks have indexes and images is indeterminate, and will depend on a given clerk's information systems capability and staff, its relationship with the county, and the availability of software and hardware.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds, but it may require counties to take action requiring the expenditures of funds, in that it requires the provision of indexes and images of official records on the Internet. The cost of implementation is indeterminate however, and likely is insignificant.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

COMMENTS BY STAFF OF THE COMMITTEE ON UTILITIES AND COMMUNICATIONS

According to the Florida Association of Court Clerks and Comptroller, only one county in Florida does not keep these lists in an electronic format.

It is unclear whether there is an additional cost implication in the provision requiring that a first-time applicant for a notary commission complete a core curriculum through a public or private sector person or entity registered with the Executive Office of the Governor.

COMMENTS BY THE STAFF OF THE COMMITTEE ON JUDICIARY

The bill exempts from its application "rules relating to judicial procedure." It is unclear what purpose this exemption has. Moreover, this language does not appear in the Act as adopted by NCCUSL.

It is not clear what steps will need to be taken by court clerks to make official records available online, nor what the cost of that process will be. This should be determined for purposes of Revision 7 to Article V of the State Constitution.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 28, 2000, the Committee on Utilities and Communications unanimously voted to incorporate amendments 1, 2, 3, and 4 into the bill as a committee substitute. The committee substitute provides the short title "Uniform Electronic Transaction Act." The committee substitute further provides that the state technology office in consultation with governmental agencies shall establish coordinated procedures for acceptance, distribution, preservation, and signatures for electronic records used by these agencies. The committee substitute provides that the county recorder's website must be capable of making an electronic connection to a central statewide search site. The committee substitute also deleted the provision that allowed the Florida Association of Court Clerks to charge a reasonable fee to support the development, maintenance, and operation of the statewide official records website.

The Committee on Judiciary adopted one strike-everything amendment on April 4, 2000, and made the bill a committee substitute. The amendment clarifies the definition of "governmental agency," corrects internal cross-references, and corrects references to the Uniform Commercial Code as codified in the Florida Statutes.

VII. SIGNATURES:

COMMITTEE ON UTILITIES AND COMMUNICATIONS:

Prepared by:

Staff Director:

Wendy G. Holt

Patrick L. "Booter" Imhof

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

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Michael W. Carlson, J.D.

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