

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2416

SPONSOR: Judiciary Committee and Senator Brown-Waite

SUBJECT: Electronic Commerce

DATE: April 5, 2000

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

This bill provides a discretionary statutory framework substantially equivalent to the proposed Uniform Electronic Transaction Act of 1999 (UETA) by the National Commission on Uniform State Laws for the validation and effect of records and signatures in specific types of electronically-conducted transactions. The bill specifically does the following:

- Sets forth requirements for the validation and effect of electronic records and electronic signatures and provides for agreement variation in order to facilitate but not require the use of electronic means in conducting transactions,
- Excludes applicability of the Act to the creation and execution of wills, codicils, or trusts; the Uniform Commercial Code, with the exception of specified sections and chapters relating to sales and leases; the Uniform Computer Information Transactions Act (UCITA); rules relating to judicial procedure; with other exceptions, to the extent electronic records and signatures are governed by provisions of law other than the ones specified,
- Specifies notarization and acknowledgment requirements,
- Requires first-time notary public applicants to satisfy specific course requirements, and
- Authorizes state governmental entities to implement electronic filing systems for creating, converting, and retaining electronic records.

The bill also requires each county recorder to provide and make available on a publicly accessible website an index of publicly recorded records by January 1, 2002, and a hyperlink access point for obtaining images or copies of those records via the website by January 1, 2006.

This bill creates yet unnumbered sections of the Florida Statutes.

**II. Present Situation:**

With the advent of electronic communications and information transfer, the traditional business and commercial models and methods of transactions are evolving to take advantage of the speed, efficiency and costs benefits associated with the rapidly changing technology. One of the basic legal barriers to electronic commerce has been the requirement that information or an agreement or contract must be in writing as a means of minimizing or deterring fraud, or otherwise risk unenforcement based on the statute of frauds. The issue of making electronic records and signatures the equivalent of writings and manual signatures has been the subject of recent state and federal legislation. In addition, there has been debate about whether this type of legislation falls expressly within the realm of interstate and international commerce subject to federal jurisdiction or imposes substantive federal rules of law upon the body of contract law that is historically based in state statutory and common law.

There is currently pending in Congress two major bills relating to interstate electronic commerce, both of which have passed their respective houses: "The Electronic Signatures in Global and National Commerce Act" (H.R.1714) and "The Millennium Digital Commerce Act" (S.761). However, s. 761 was taken up by the House of Representatives and amended with a strike-all amendment based on H.R. 1714. On March 29, 2000, the Senate refused to concur and conferenced s.761 to resolve the conflicts between the Senate and House bills. Although the language varies for both bills, both bills essentially provide for the validity of electronic records and signatures for commerce, for the development and adoption of electronic signature products and services, and for the use of electronic records and signatures under the federal securities law. They also contain provisions either authorizing states to modify, limit or supersede a part of the federal law or exempting states if those states enact or adopt the Uniform Electronic Transaction Act.

The UETA is an uniform law proposed, approved and recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>1</sup> for enactment in all states. According to NCCUSL, the purpose of the Act is to remove barriers to electronic commerce by validating and effectuating electronic records and electronic signatures. At least two states (California and Pennsylvania) have enacted and another twenty states have proposed legislation identical or similar to the Uniform Electronic Transaction Act of 1999 (UETA).

The UETA is represented as not being 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. Florida enacted a digital signature law in 1996. *See* ch. 96-224, L.O.F., Part III, ch. 282 (ss. 282.70-282.75). The expressed legislative intent included facilitating economic development and providing efficient delivery of government services through electronic

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<sup>1</sup>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.

messaging, promoting public confidence in the use of electronic signatures<sup>2</sup>, deterring fraudulent use of electronic signatures and electronic commerce, fostering development of electronic commerce, and assuring proper management oversight and accountability for agency-conducted electronic commerce. *See* s. 282.71, F.S. The head of each agency is responsible for adopting and implementing security and confidentiality measures for electronically-conducted transactions. *See* s.282.75, F.S. In addition, each agency head is responsible and accountable for the security of data and information technology resources.<sup>3</sup> *See* s. 282.318, F.S.

### **Notary Public**

Notaries public are governed by chapter 117, Florida Statutes. Notaries public are appointed by the Governor, must be at least 18 years of age, reside in the state and be able to read, write and understand English. A permanent resident alien can be appointed as a notary public if she or he files a recorded Declaration of Domicile. The notary public must retain residency in the state throughout the appointment period which is 4 years. A \$25 application fee along with a \$10 commission fee (s. 113.01, F.S., relating to commissions issued by the Governor) must be paid. There is also a \$4 surcharge that is appropriated to educate and assist notaries public. The Department of State and the Executive Office of the Governor (EOG) have interrelated roles over notaries public. The Notary Section of the Executive Office of the Governor educates and assists the notaries public. The Notary Commissions and Certifications Section of the Department of State performs ministerial functions such processing as notary applications and issuing the commission once the appointments are approved.

### **Clerks of the Court**

Clerks of the circuit courts are elected constitutional officials. *See* art. VIII, s. 1, *Florida Constitution*. Although the *Florida Constitution* provides for the establishment of the clerks of the courts in each county, the duties of the clerks are set forth by special or general law. *See* art V, s. 16, *Florida Constitution*. The duties of the clerk may be divided as if between two officers, one serving as the clerk and the other serving as the county financial officer (i.e., clerk for the board of county commissioners, auditor, recorder and custodian of all county funds).

Although the duties of the clerk of the circuit court are set out through numerous statutory chapters to include issuances of marriage licenses, recordings of plats, and collection or administration of fines and court charges imposed for a variety of criminal and noncriminal violations, their primary duties are set forth in chapter 28, F.S. The clerk of the court is the

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<sup>2</sup>Electronic signature is defined as any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing. *See* s. 282.72(3), F.S. A digital signature is defined to be a type of electronic signature that transforms a message using an asymmetric crypto system such that a person having the initial message and the signer's public key can accurately determine whether the transformation was created using the private key that corresponds to the signer's public key and whether the initial message has been altered since the transformation was made. *See* s. 282.72(3), F.S.

<sup>3</sup>Additionally, sections 282.303-282.322, F.S., sets forth the responsibility of the Department of Management Services through various entities such as the State Technology Council and the State Technology Office to develop and implement resources systems that assist state governmental entities to maximize public access and exchange of public records and information to the extent not otherwise protected by law from disclosure.

official recorder of all instruments<sup>4</sup> to be recorded in the county which can occur at branch offices as well. *See* § 28.222, F.S.; *See* § 1, art. VIII, Fla. Const. (1998).

In addition to noting the time of filing, the kind of instrument and the names of the parties to the instrument, the clerk is required to maintain an alphabetical index of all recorded instruments. The register of Official Records must be available at each office. The Official Records must be open to the public, under the supervision of the clerk.

### III. Effect of Proposed Changes:

The primary cumulative effect of section 1 of the bill is to provide a discretionary statutory framework for the validation and effect of records and signatures in electronically-conducted transactions substantially equivalent to the proposed Uniform Electronic Transaction Act (UETA) proposed and adopted in 1999 by the National Commission on Uniform State Laws. A subsection-by-subsection analysis of section 1 of the bill follows:

Subsection 1 provides a popular name by which the act may be cited, i.e., the Uniform Electronic Transaction Act.

Subsection 2 provides definitions for application under the Act, including “agreement,” “automated transaction,” “computer program,” “contract,” “electronic,” “electronic agent,” “electronic record,” “electronic signature<sup>5</sup>,” “governmental agency,” “information,” “information processing system,” “person,” “record,” “security procedure,” “state,” and “transaction.” The term “transaction” has been limited to actions between people taken in the context of business, commercial or governmental activities and excludes unilateral or non-transactional actions.

Subsection 3 clarifies specific conduct and certain circumstances that constitute, and those transactions that do not constitute, an electronic transaction subject to the Act. The Act will not apply to affect the writing and signature requirements in transactions governed by:

- Laws relating to wills, codicils or testamentary trusts,
- The Uniform Commercial Code except for ss. 671.107 (relating to waiver or renunciation of claim or right after an alleged breach) and 617.206 (relating to statutes of fraud requiring written contract for sale of personal property over \$5,000) and chapter 672 (relating to sales) and chapter 680 (relating to leases),
- The Uniform Computer Information Transactions Act, and
- Rules relating to judicial procedure.

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<sup>4</sup>The following instruments are to be recorded by the clerk upon presentation and payment for services: Deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and lien; and powers of attorney relating to any of the instruments; notices of lis pendens; judgments, including certified copies of judgments, and assignments, releases, and satisfactions of the judgments; that portion of a certificate of military, air force or naval force discharge, separation, or service; notices of liens for taxes payable to the United States and other liens in favor of the United States, and certificates discharging, partially discharging, or releasing the liens; certified copies of bankruptcy petitions, decrees of adjudication in the proceedings, and orders approving the bonds of trustees appointed in the proceedings; certified copies of death certificates authorized for issuance by the Department of Health and Rehabilitative Services, and certified copies of death certificates issued by another state; and any other instruments required or authorized by law to be recorded. *See* s. 282.222, F.S.

<sup>5</sup>Definition varies from the definition for electronic signature contained in the Electronic Signature Act of 1996.

Subsection 4 provides for prospective application of the law to any electronic record or electronic signature on or after July 1, 2000.

Subsection 5 provides for the discretionary use of this section to facilitate the use of electronic records and electronic signature. The provisions may be varied as long as the parties agree.

Subsection 6 sets forth the construction and application of this section governing electronic commerce.

Subsection 7 provides for the legal recognition of records and signatures in electronic format.

Subsection 8 provides for the method and manner of displaying, transmitting and formatting information in writing and for presentation of records in electronic form.

Subsection 9 provides that an electronic record or electronic signature will be attributed to a person by his or her action which may be shown in any manner, including any security procedures determined by the parties, actions by human agents of the person, as well as actions of electronic agents. This does not alter existing rules of law regarding attribution.

Subsection 10 addresses the appropriate course of conduct in the event of a change or error in an electronic record during a transmission between the parties as follows:

(a) If 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 may avoid the effect of the changed or erroneous electronic record.

(b) In an automated transaction, an individual may avoid the effect of an electronic record that resulted from an error made by an individual in dealing with the electronic agent of that 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, the individual:

- ▶ Promptly notifies the other person of the error and that she or he did not intend to be bound by the record received;
- ▶ Takes reasonable steps to conform to the recipients instruction to return or destroy the record received; and
- ▶ Has not used or received any benefit or value from the consideration, if any, as a result of the erroneous record.

Subsection 11 authorizes a notary public and other authorized persons to electronically perform notarization and acknowledgments with the requisite seal or rubber stamp. It also requires first-time notary public applicants to complete within one year prior to application a three hour interactive or classroom course on the duties of a notary public, including electronic notarization, through the Executive Office of the Governor.

Subsection 12 provides that electronic retention shall meet any requirement that a record be retained although this does not preclude a governmental agency from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

Subsection 13 provides that evidence of a record or signature may not be excluded solely because the record or signature is in electronic form.

Subsection 14 gives effect to automated transactions which result in contracts formed between an electronic agent and the parties where one or both of the parties to an agreement do not necessarily review the electronic record, or between an electronic agent and an individual (e.g., ordering from bookseller off its Website) who knows or has reason to know his or her action will cause the electronic agent to complete the transaction. In all other respects the contract as created by the transaction is subject to substantive contract law.

Subsection 15 provides rules for determining when an electronic record is "sent" and "received."

Subsection 16 implements the concept of control versus possession of a record in an electronic form for purposes of defining a "transferable record."

Subsections 17 through 19 authorize governmental agencies, upon their discretion, to implement electronic filing systems for creating, converting, and retaining electronic records. These sections also provide the parameters for government agencies to accept and distribute electronic records and the standards to be used by the governmental agencies to allow for consistency and interoperability with other similar requirements and systems on the state and federal level.

Subsection 20 provides a severability clause in the event specific provisions are invalidated.

**Section 2** includes a legislative finding of legitimate state purpose for providing public access to public records via the Internet. By January 1, 2002, each county recorder must provide an electronic index via the Internet to that county's public documents recorded no later than January 1, 1990. By January 1, 2006, each county recorder must include a requisition point (presumably a hyperlink) on the statewide website for obtaining images or copies of the documents reflected in the index. Each county recorder will be responsible for Internet security measures to maintain the integrity of the public record. However, no information received electronically from the website will be admissible in court as an authenticated document.

**Section 3** provides that the act shall take effect July 1, 2000.

**IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

V. **Economic Impact and Fiscal Note:**

A. **Tax/Fee Issues:**

None.

B. **Private Sector Impact:**

The bill may encourage and facilitate electronic commerce<sup>6</sup> by validating and effectuating the legal recognition of electronic records and electronic signatures.

The bill will benefit the public by increasing accessibility and inspection of public records via the Internet website.

C. **Government Sector Impact:**

According to the Florida Association of Court Clerks and Comptroller, only one outstanding county (Liberty County) does not keep its lists in electronic format. The bill makes no appropriation for any costs incurred by each county recorder necessitated by the requirements for specific services and for the county recorder's participation in the creation, conversion, retention, and security of publicly recorded records into a publicly accessible website.

State agencies are already increasingly opting for the creation, conversion and retention of public records in an electronic format either to comply with state law requirements or to benefit from the cost benefit and efficiency of the electronic medium.

The Department of Management Services reports that there is no immediate impact from the bill but there are varied implications for programs such as the Information Technology Program (ITP) and the Integrated Financial Management System (or State Purchasing System). For example, there may be an impact on applications maintained and created by the ITP in such areas as Electronic Data Interchange, electronic signatures (i.e., Time Direct, One-Stop Permitting), and credit card acceptance (record retention and privacy issues). According to the department, if there is to be uniformity across state agencies, ITP will have to establish new policy and procedures for maintaining electronic security, web site management, telecommunications infrastructure, Internet access, database management and record retention. Similarly, the bill may impact the State Purchasing System's archiving facilities, methodology for digital signatures, and ability for ad hoc public retrieval and printing. These considerations implicate substantial time and resources.

The Department of State has not yet issued an impact statement regarding the impact of this bill, particularly as it relates to the notary public provisions and the exclusion of transactions arising under the uniform rules of administrative procedure pursuant to chapter 120, F.S.

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<sup>6</sup>For example, state law already gives statutory authority to the private nonprofit corporation known as The International Trade Data Resource and Research Center (created by Enterprise Florida, Inc., and the Florida Seaport Transportation and Economic Development Council) to develop an Internet based electronic commerce system to facilitate international trade in the Americas. See s. 282.8155, F.S.

The Notary Division of the Executive Office of the Governor has taken no position on the bill at this time regarding the new educational requirements for first-time notary public applicants.

The Department of Banking and Finance reports that the bill will have an indeterminate fiscal impact on the department.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Subsection (2) of section 1 refers to excluded transactions governed by the Uniform Computer Information Transactions Act (UCITA)<sup>7</sup> which appears to govern primarily software licenses. However, Florida has not enacted an act formally entitled as such nor does there appear to be a comparable act. This section also excludes transactions subject to the rules of judicial procedure but does not mention whether transactions subject to the rules of administrative procedures under chapter 120, F.S., would be exempt.

Subsection (10) of section 1 addresses notarization and acknowledgments of electronic signatures and electronic records. It requires only first-time applicants as notaries public to satisfy a 3-hour course to include electronic notarization and approved by the Executive Office of the Governor. It does not impose a similar requirement on existing notaries public to comply upon renewal or subsequent commission (as notaries public must reapply for appointment every 4 years or less if they resign before their term expires). *See* s. 117.01(6), F.S.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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<sup>7</sup>The UCITA was originally proposed and referred to as article 2B of the UCC. It appears to be a controversial uniform law which the NCCUSL failed to adopt.