GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

October 19, 1999

The Honorable Tom Bliley
Chairman, Committee on Commerce
House of Representatives
Washington, DC 20515-6115

Dear Mr. Chairman:

This letter sets forth the Administration's position regarding the version of H.R. 1714 that was reported by the House Commerce Committee. I hope this information will be useful to you as the legislation moves toward the House floor.

The Administration believes that federal legislation is appropriate to ensure the validity under state law of electronic transactions entered into by private parties before the States have an opportunity to enact the Uniform Electronic Transactions Act (UETA), which was produced by representatives of the States and addresses these issues in a comprehensive manner. But any such legislation must be crafted carefully to ensure that public interest protections now applicable to private paper-based transactions cannot be circumvented simply by conducting the same transaction electronically. Also in recognition of the fact that commercial transactions law is an area traditionally entrusted to the States, preemption should be tailored narrowly so as to preserve state authority to the greatest degree possible. Finally, because the standards applicable to private contracts are not readily transferable to government transactions, the bill should be limited to private transactions.

The version of H.R. 1714 reported by the House Commerce Committee does not satisfy these tests, and the Administration therefore strongly opposes the bill as reported.

First, the bill would overturn numerous state and federal laws and regulations designed to protect consumers and the general public.

To begin with, we do not believe it is necessary or desirable to override existing federal laws governing commercial transactions. The purpose of this legislation has always been explained as the elimination of antiquated requirements for physical contracts and pen-and-ink signatures. Because those legal principles are embodied in state law, it is understandable that some limited preemption of state law is necessary to accomplish that goal pending the States' adoption of the UETA. The federal rules applicable to these transactions are grounded in regulatory obligations, not basic contract law principles. We do not believe it is appropriate to sweep away these requirements on an across-the-board basis. To the extent that federal regulatory rules need updating to address the new reality of electronic transactions, this should be done on a case-by-case basis, to ensure that the public policy concerns that underlie the existing measures are fully addressed in the electronic world. Accordingly, we believe only state law standards should be affected by federal legislation in this area.

State law public interest provisions affected by the bill fall into several categories, including notice and disclosure standards, filing requirements, and recordkeeping provisions. Section 101(b) would allow private parties to override all of these requirements through contract. Thus, businesses, including financial services providers, could vitiate disclosure and notification requirements by, for example, requiring consumers to contract away mandatory legal protections contained in federal and state consumer protection law. And regulated entities, such as insurance companies, could by contract eliminate their obligation to maintain the records needed to ensure effective oversight.*

Section 102 does not provide any real authority to preserve these essential public interest protections. Because it does not expressly preserve existing Federal regulatory authority, it raises questions concerning the authority of Federal agencies to address these issues. (As already discussed, we believe the appropriate solution is to exclude federal law, including regulatory requirements, from the scope of the bill.)

With respect to state law, the authority provided by Section 102 appears illusory. For example, Section 102(a) permits laws or other measures that "modify, limit, or supersede" the rules set out in Section 101, but Section 102(b)(4) renders ineffective a law or other measure that is "inconsistent with the provisions of section 101." And the four-year limit imposed by Section 102(a)(2) makes no sense in view of the ever-evolving nature of electronic commerce: States would be deprived of the ability to respond to new concerns as they arise. The requirement of Section 102(a) that state laws be reenacted after adoption of H.R. 1714 would impose a heavy burden on States, and create a gap in public interest protection, without serving any useful purpose.**

In order to promote the use of electronic transactions, we should strive to ensure that the public interest protections applicable in the off-line world also apply to the electronic environment.

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*These provisions are similar to some contained in S. 761, as reported by the Senate Commerce Committee. I expressed support for that measure because it ensured that contracts could not be invalidated because they were in electronic form or because they were signed electronically. At the time the bill was reported, the spillover effect of these provisions on existing consumer protection and regulatory standards had not been identified. Now that this effect has become clear, and it is equally clear that enactment of this measure is desired by some precisely because of this spillover effect, we must oppose these provisions as currently drafted.

** The weight of that burden is demonstrated by California's adoption of the UETA. The State legislature excluded dozens of laws from the scope of the UETA, determining that further study was required to decide how to accommodate those measures to the electronic environment. H.R. 1714 apparently would have required the reenactment of all of those measures (of course, even then, those state laws probably would be invalid because of the broad preemption standard of the federal bill). The UETA enactment process will require all States to examine their laws, as California did, and begin the process of updating them to enable electronic contracting. There is no need for federal oversight of that process.

Otherwise, electronic contracting will become an unsafe environment, consumers will shy away, and this remarkable new medium will not realize its potential.

Second, we believe that this legislation should be limited to a temporary federal rule to ensure the validity of electronic transactions and contracts entered into before the States have a chance to enact the Uniform Electronic Transactions Act. Once a State adopts a law that is "substantially similar" to the UETA as reported to the States, the federal rule is unnecessary and should "sunset," leaving the transaction to be governed by state law. We note that a number of business community representatives have testified in favor of this approach.

Under the bill as reported, however, preemption continues indefinitely. And, as discussed above, the standard of preemption is confusing and is likely to spawn the very uncertainty the bill is designed to prevent.

Third, H.R. 1714 as reported appears to encompass government transactions (Federal and State), not simply agreements between private entities. For example, Section 101(a)(1) appears to deprive governments of the power to decide that certain types of government transactions – extremely large procurements or sales of real property, for example – should be conducted through paper agreements. And Section 101(a)(2) appears to require government entities to accept any form of electronic signature when used by the other party in a transaction. Sections 102(b)(1) and (2) seems to confirm that a State that engages in electronic contracting cannot determine for itself the appropriate procedures (including level of security) for the transaction. With respect to the Federal government, the absence of any authority in Section 102(a) to supersede the rules set forth in Section 101, seems to mean that the Federal government lacks any ability to select the types of electronic signatures that it will accept in transactions where it is a party. We do not understand why government entities' discretion should be curtailed in this manner; governments should be free – like any other market participant – to choose the means by which they will engage in electronic contracting.[***]

Fourth, we believe that the concerns discussed above with respect to the effect of Title I also apply to Title III of the bill. We suggest that Title III be amended to conform to Title I to ensure, among other things, that the public interest rules applicable to off-line transactions also apply in the electronic environment.

[***] The scope of Section 101 as applied to government transactions is somewhat unclear. For example, does "any contract or agreement" encompass dealings with governmental entities concerning regulatory activities such as grants of licenses or payments of fees, or is it limited to the activities of governmental entities as marketplace participants? Even if it were limited to the latter situation, however, it would create the anomalies described above.

We would also note that the Federal government's transactions already are addressed in the Government Paperwork Elimination Act, and that OMB has been working with federal agencies to define a set of procedures that address issues, including those identified above that arise from federal agency use of electronic transactions and processes.

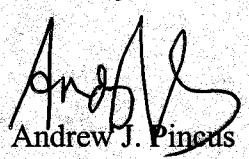
Finally, we have significant concerns with the manner in which some provisions of the bill are drafted. Section 101(a)(2), for example, could be read to require a court to hold an agreement binding based upon the presence of any type of electronic signature. We strongly suggest instead the formulation used in the UETA (Section 7, formerly Section 106 in the draft) that a signature "may not be denied legal effect or enforceability solely because it is in electronic form." That language prevents discrimination against electronic signatures but preserves a court's ability to hold that a particular electronic signature does not bind a party in view of the circumstances of the case.

We also believe that Section 102(c), "ACTIONS TO ENJOIN," would be counterproductive. Section 101 is self-executing and enforceable in litigation by private parties. The existence of the injunctive authority would tend to validate the conformity of any state law against which enforcement action was not taken.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

We look forward to continuing to work with your Committee on this important legislation.

Sincerely,



Andrew J. Pincus

cc: The Honorable John D. Dingell
Ranking Minority Member