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

October 12, 1999

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
House of Representatives
Washington, DC 20515-6216

Dear Mr. Chairman:

This is to convey the views of the Administration regarding Title I of H.R. 1714, the "Electronic Signatures in Global and National Commerce Act," as reported by your Subcommittee on Courts and Intellectual Property ("Subcommittee").

We support the overall goal of H.R. 1714 of promoting a predictable, minimalist legal environment for electronic commerce, including the encouragement of prompt state adoption of uniform legislation assuring the legal effectiveness of electronic transactions and signatures. We also appreciate the desire and the work of the Subcommittee on Courts and Intellectual Property to put forward a bill that addresses the concerns of the Administration as explained in Commerce and Justice Department testimony before that Subcommittee.

In particular, we note that section 103 of the reported bill, titled "Interstate Contract Certainty," is directed to "any commercial transaction affecting interstate commerce" and that "transaction" is defined to exclude activity involving federal or State governments as parties. We endorse these features of the bill, which make the scope of the legislation broad enough to encompass most day-to-day commercial electronic transactions without interfering with the orderly adoption by governments of electronic means for transacting their public business. We also are pleased that the reported bill omits any provision for federal agency initiatives to enjoin state laws not conforming to the requirements of this statute.

We continue to support strongly the principles for the use of electronic signatures in international transactions set out in section 102. These are fully consistent with the principles we have been actively promoting internationally since July, 1997, when President Clinton and Vice President Gore issued the *Framework for Global Electronic Commerce* charging our Department to "work with the private sector, state and local governments, and foreign governments to support the development, both domestically and internationally, of a uniform commercial legal framework that recognizes, facilitates, and enforces electronic transactions worldwide."

We nevertheless believe that the bill, as reported, would still preempt state law unnecessarily, both in degree and duration; invalidate numerous state and federal laws and regulations designed

to protect consumers and the general public; and otherwise create legal uncertainty where predictability is the goal. We therefore must strongly oppose the measure in its current form.

To begin with, we do not understand why it is necessary 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 Uniform Electronic Transactions Act (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.

Section 103 of H.R. 1714 as reported to your Committee continues to place significant, and we believe inappropriate, limits upon the States' ability to alter or supersede the federal rule of law that the bill would impose. As I indicated in my testimony before the Courts and Intellectual Property Subcommittee, this legislation should be limited to a temporary federal rule to ensure the validity of electronic agreements entered into before the States have a chance to enact the UETA. Once the UETA is adopted by a State, the federal rule is unnecessary, and it should "sunset." The reported bill would maintain a strong federal hand in the commercial law of electronic signatures and records within a State even after it adopts the UETA. This is true because the bill would lift its preemptive effect only to the extent that the UETA "as in effect in such State," or *any other law of the State*, is "not inconsistent, in any significant manner" with the provisions of this Act.

The pervasiveness and strength of this continuing federal influence over States' laws is shown by the broad and unqualified wording of some of the substantive provisions of section 103. For example, subsection 103(a)(3) provides: "If a law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies the law." Similarly, subsection (a)(4) provides that wherever a law "requires a signature, or provides consequences in the absence of a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature," and subsection (a)(5) provides highly specific requirements for ensuring that a legal record-retention requirement will be satisfied by an electronic record. With such provisions in section 103, the bill's continuing preemption of all State laws which are "not inconsistent in any significant manner" with the provisions of this Act would perpetuate federal law as the core of the commercial law of electronic signatures and records in every state. As emphasized in our Department's testimony before the Subcommittee, deference to state law in

the area of commercial transactions has been the hallmark of the legal system in this country. The reported bill remains inconsistent with this important tradition which has produced a system of commercial law widely considered the best in the world.

Subsections 103(a)(3), (4) and (5), which I have just mentioned, coupled with the broad party autonomy language of section 103(b), would also place excessive limits on governmental authority. In particular, these provisions would appear to preclude virtually any regulation of private parties' authentication or recordkeeping practices in the sphere of electronic commerce, as is common and recognized as appropriate with respect to paper-based transactions.* But these regulations, including consumer protection laws, laws governing financial transactions, and others, are essential to ensure that the public interest is protected.

For example, raising concerns similar to those noted in this Department's testimony on H.R. 1714, Banking Committee Chairman Leach recently wrote to Commerce Committee Chairman Bliley noting that the federal financial regulatory agencies have raised a concern about the language of the section of H.R. 1714 (section 103(b) of the version before your Committee) relating to the autonomy of parties to a contract to set their own requirements with respect to electronic records and signatures. Specifically, he noted the need to ensure that the bill's party autonomy provisions would not limit government authority to engage in limited regulation of authentication- or records-related matters in certain private party transactions in the public interest. We agree; for example, given the unqualified authorization provided by subsection 103(b) to private parties to determine the "methods" as well as the "terms and conditions" under which they will use and accept electronic signatures and records, banks would be free to adopt methods that could result in the absence of adequate records or sound authentications of transactions when the bank examiner arrives.

Chairman Leach also noted that the Federal Reserve Board has raised concerns regarding the application of H.R. 1714 to negotiable instruments, such as checks and notes. He pointed out that the National Conference of Commissioners on Uniform State Laws recognized some of these concerns and therefore excluded transactions covered by the Uniform Commercial Code from coverage under UETA. We agree with the concerns raised by Chairman Leach and believe that amendments or clarifications along the lines he has suggested continue to be needed in the context of H.R. 1714 as reported to your Committee.

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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.

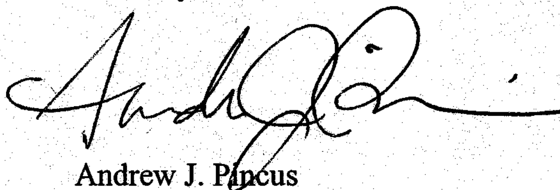
Consumer protection is another important area where the public interest has been found to require government oversight. States, as well as the Federal government, must not be shackled in their ability to provide safeguards in this area. Yet this is precisely what this legislation would do.

Section 104, "Study of Legal and Regulatory Barriers to Electronic Commerce," is consistent with the Administration's commitment to ensure the careful review of possible legal and regulatory barriers to electronic commerce. Indeed, this provision in the bill as reported focuses upon barriers to electronic commerce, as such, rather than more narrowly upon commerce in electronic signature products and services. We believe this focus is appropriate. However, to avoid duplication of agency reporting, we would recommend against inclusion of the Office of Management and Budget as an agency to receive initial agency reports under the provision.

In summary, we believe that the bill as reported by the Subcommittee addresses some important concerns of the Administration that were set out in our earlier testimony. However, H.R. 1714 in the form reported to your Committee retains significant flaws that would have to be addressed before the Administration could support the bill. We would be pleased to continue to work with your Committee on this important legislation.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



Andrew J. Pincus

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

The Honorable Howard Coble
Chairman, Subcommittee on Courts and
Intellectual Property

The Honorable Howard L. Berman
Ranking Minority Member
Subcommittee on Courts and Intellectual Property