



June 22, 1999

The Honorable Ernest F. Hollings
Committee on Commerce,
Science, and Transportation
United States Senate
Washington, D.C. 20510-6125

Dear Senator Hollings:

This letter conveys the views of the Department of Commerce on the substitute version of S. 761, the "Millennium Digital Signature Act," that we understand will be marked-up by the Senate Commerce Committee. A copy of the substitute that serves as the basis for these views is attached to this letter.

In July 1997 the Administration issued *The Framework for Global Electronic Commerce*, wherein President Clinton and Vice President Gore recognized the importance of developing a predictable, minimalist legal environment in order to promote electronic commerce. President Clinton directed Secretary Daley "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."

Since July 1997, we have been consulting with countries to encourage their adoption of an approach to electronic authentication that will assure parties that their transactions will be recognized and enforced globally. Under this approach, countries would: (1) eliminate paper-based legal barriers to electronic transactions by implementing the relevant provisions of the 1996 UNCITRAL Model Law on Electronic Commerce; (2) reaffirm the rights of parties to determine for themselves the appropriate technological means of authenticating their transactions; (3) ensure any party the opportunity to prove in court that a particular authentication technique is sufficient to create a legally binding agreement; and (4) state that governments should treat technologies and providers of authentication services from other countries in a non-discriminatory manner.

The principles set out in section 5 of S. 761 mirror those advocated by the Administration in international fora, and we support their adoption in federal legislation. In October 1998, the OECD Ministers approved a Declaration on Authentication for Electronic Commerce affirming these principles. In addition, these principles have also been incorporated into joint statements between the United States and Japan, Australia, France, the United Kingdom and South Korea.

Congressional endorsement of the principles would greatly assist in developing the full potential of electronic commerce as was envisioned by the President and Vice President Gore in *The Framework for Global Electronic Commerce*.

On the domestic front, the National Conference of Commissioners of Uniform State Law (NCCUSL) has been working since early 1997 to craft a uniform law for consideration by State legislatures that would adapt standards governing private commercial transactions to cyberspace. This model law is entitled the "Uniform Electronic Transactions Act" (UETA), and I understand that it will receive final consideration at the NCCUSL Annual Meeting at the end of July. In the view of the Administration, the current UETA draft adheres to the minimalist "enabling" framework advocated by the Administration, and we believe that UETA will provide an excellent domestic legal model for electronic transactions, as well as a strong model for the rest of the world.

Section 6 of the substitute ("Interstate Contract Certainty") addresses the concern that several years will elapse before the UETA is enacted by the states. It fills that gap temporarily with federal legal standards, but ultimately leaves the issue to be resolved by each state as it considers the UETA.

With regard to commercial transactions affecting interstate commerce, this section eliminates statutory rules requiring paper contracts, recognizes the validity of electronic signatures as a substitute for paper signatures, and provides that parties may decide for themselves, should they so choose, what method of electronic signature to use.

Another important aspect of the substitute is that it would provide for the termination of any federal preemption as to the law of any state that adopts the UETA (including any of the variations that the UETA may allow) and maintains it in effect. We note that this provision would impose no overarching requirement that the UETA or individual state laws be "consistent" with the specific terms of this Act; this provision, and its potential effect, will be closely monitored by the Administration as the legislation progresses. There is every reason to believe that the States will continue to move, as they consistently have moved, toward adopting and maintaining an "enabling" approach to electronic commerce consistent with the principles stated in this Act. We therefore believe that any preemption that may ultimately result from this legislation can safely be allowed to "sunset" for any state upon its adoption of the eventual uniform electronic transactions legislation developed by the states.

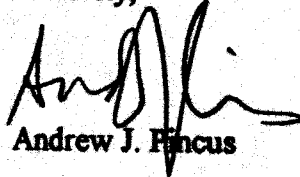
We also support limiting the scope of this Act to commercial transactions, which is consistent with the current approach of the draft UETA, and utilizing definitions in the Act that mirror those of the current draft UETA, which we consider appropriate in light of the expert effort that has been directed to the development of the UETA provisions under the procedures of NCCUSL.

With regard to section 7(a), the Administration requests that the Committee delete the reference to the Office of Management and Budget ("OMB"); there is no need for agencies to file duplicate reports. The report that the Secretary of Commerce is directed to prepare pursuant to section 7(b) will, of course, be coordinated with OMB.

The substitute version of S. 761 would in our view provide an excellent framework for the speedy development of uniform electronic transactions legislation in an environment of partnership between the federal government and the states. We look forward to working with the Committee on the bill as it proceeds through the legislative process.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew J. Fencus". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew J. Fencus

Attachment

GUIDELINE

BILL NO. OVERLAYS. 761 Amdt.

Star Print_

AMENDMENT NO.

CAL. NO.

COMMITTEE AMENDMENT

[Staff Working Draft]

June 22, 1999

Purpose: To conform the definitions to those used in the Uniform Electronic Transactions Act, and for other purposes.

IN THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION_ 106 th Cong., 1 st Sess.

S. 761, 106 th Congress, 1 st Session

DATELINE June 23, 1999

Intended to be proposed by Mr. Abraham

Viz: Strike out all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Third Millennium Electronic Commerce Act''.

SEC. 2. FINDINGS.

The Congress makes the following findings:

(1) The growth of electronic commerce and electronic government transactions represent a powerful force for economic growth, consumer choice, improved civic participation and wealth creation.

(2) The promotion of growth in private sector electronic commerce through federal legislation is in the national interest because that market is globally important to the United States.

(3) A consistent legal foundation, across multiple jurisdictions, for electronic commerce will promote the growth of such transactions, and that such a foundation should be based upon a simple, technology neutral, non-regulatory, and market-based approach.

(4) The nation and the world stand at the beginning of a large scale transition to an information society which will require innovative legal and policy approaches, and therefore, States can serve the national interest by continuing their proven role as laboratories of innovation for quickly evolving areas of public policy, provided that States also adopt a consistent, reasonable national baseline to eliminate obsolete barriers to electronic commerce such as undue paper and pen requirements, and further, that any such innovation should not unduly burden inter-jurisdictional commerce.

(5) To the extent State laws or regulations do not provide a consistent, reasonable national baseline or in fact create an undue burden to interstate commerce in the important burgeoning area of electronic commerce, the national interest is best served by Federal preemption to the extent necessary to provide such consistent, reasonable national baseline eliminate said burden, but that absent such lack of consistent, reasonable national baseline or such undue burdens, the best legal system for electronic commerce will result from continuing experimentation by individual jurisdictions.

(6) With due regard to the fundamental need for a consistent national baseline, each jurisdiction that enacts such laws should have the right to determine the need for any exceptions to protect consumers and maintain consistency with existing related bodies of law within a particular jurisdiction.

(7) Industry has developed several electronic signature technologies for use in electronic transactions, and the public policies of the United States should serve to promote a dynamic marketplace within which these technologies can compete. Consistent with this Act, States should permit the use and development of any authentication technologies that are appropriate as practicable as between private parties and in use with State agencies.

SEC. 3. PURPOSES.

The purposes of this Act are_

(1) to permit and encourage the continued expansion of electronic commerce through the operation of free market forces rather than proscriptive governmental mandates and regulations;

(2) to promote public confidence in the validity, integrity and reliability of electronic commerce and online government under Federal law;

(3) to facilitate and promote electronic commerce by clarifying the legal status of electronic records and electronic signatures in the context of writing and signing requirements imposed by law;

(4) to facilitate the ability of private parties engaged in interstate transactions to agree among themselves on the terms and conditions on which they use and accept electronic signatures and electronic records; and

(5) to promote the development of a consistent national legal infrastructure necessary to support of electronic commerce at the Federal and state levels within existing areas of jurisdiction.

SEC. 4. DEFINITIONS.

In this Act:

(1) **Electronic.**_ The term ``electronic'' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) **Electronic agent.**_ The term ``electronic agent'' means a computer program or an electronic or other automated means used to initiate an action or respond to electronic records or performances in whole or in part without review by an individual at the time of the action or response.

(3) **Electronic record.**_ The term ``electronic record'' means a record created, generated, sent, communicated, received, or stored by electronic means.

(4) **Electronic signature.**_ The term ``electronic signature'' means an electronic sound, symbol, or process attached

to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(5) **Governmental agency.**_ The term ``governmental agency'' means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the Federal government or of a State or of any county, municipality, or other political subdivision of a State.

(6) **Record.**_ The term ``record'' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(7) **Transaction.**_ The term ``transaction'' means an action or set of actions relating to the conduct of commerce between 2 or more persons, neither of which is the United States Government, a State, or an agency, department, board, commission, authority, institution, or instrumentality of the United States Government or of a State.

(8) **Uniform Electronic Transactions Act.**_ The term ``Uniform Electronic Transactions Act'' means the Uniform Electronic Transactions Act as reported to State legislatures by the National Conference of

Commissioners on Uniform State Law in the form or any variation thereof that is authorized or provided for in such report.

SEC. 5. PRINCIPLES GOVERNING THE USE OF ELECTRONIC SIGNATURES IN INTERNATIONAL TRANSACTIONS.

To the extent practicable, the Federal Government shall observe the following principles in an international context to enable commercial electronic transaction:

(1) Remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law (UNCITRAL).

(2) Permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced.

(3) Permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid.

(4) Take a non-discriminatory approach to electronic signatures and authentication methods from other jurisdictions.

SEC. 6. INTERSTATE CONTRACT CERTAINTY.

(a) In General._ The following rules apply to any commercial transaction affecting interstate commerce:

(1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(3) If a law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies the law.

(4) If 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.

(b) **Methods.**_ The parties to a contract may agree on the terms and conditions on which they will use and accept electronic signatures and electronic records, including the methods therefor, in commercial transactions affecting interstate commerce. Nothing in this subsection requires that any party enter into such a contract.

(c) **Intent.**_ The following rules apply to any commercial transaction affecting interstate commerce:

(1) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be established in any manner, including a showing of the efficacy of any security procedures applied to determine the person to which the electronic record or electronic signature was attributable.

(2) The effect of an electronic record or electronic signature attributed to a person under paragraph (1) 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.

(d) **Formation of Contract.**_ A contract relating to a commercial transaction affecting interstate commerce may not be denied legal effect solely because its formation involved_

(1) the interaction of electronic agents of the parties; or

(2) the interaction of an electronic agent of a party and an individual who acts on that individual's own behalf or for another person.

(e) **Application in UETA States.**_ This section does not apply in any State in which the Uniform Electronic Transactions Act is in effect.

SEC. 7. STUDY OF LEGAL AND REGULATORY BARRIERS TO ELECTRONIC COMMERCE.

(a) **Barriers.**_ Each Federal agency shall, not later than 6 months after

the date of enactment of this Act, provide a report to the Director of the Office of Management and Budget and the Secretary of Commerce identifying any provision of law administered by such agency, or any regulations issued by such agency and in effect on the date of enactment of this Act, that may impose a barrier to electronic transactions, or otherwise to the conduct of commerce online or by electronic means. Such barriers include, but are not limited to, barriers imposed by a law or regulation directly or indirectly requiring that signatures, or records of transactions, be accomplished or retained in other than electronic form. In its report, each agency shall identify the barriers among those identified whose removal would require legislative action, and shall indicate agency plans to undertake regulatory action to remove such barriers among those identified as are caused by regulations issued by the agency.

(b) Report to Congress._ The Secretary of Commerce, in consultation with the Director of the Office of Management and Budget, shall, within 18 months after the date of enactment of this Act, and after the consultation required by subsection (c) of this section, report to the Congress concerning_

(1) legislation needed to remove barriers to electronic transactions or otherwise to the conduct of commerce online or by electronic means; and

(2) actions being taken by the Executive Branch and individual Federal agencies to remove such barriers as are caused by agency regulations or policies.

(c) Consultation._ In preparing the report required by this section, the Secretary of Commerce shall consult with the General Services Administration, the National Archives and Records Administration, and the Attorney General concerning matters involving the authenticity of records, their storage and retention, and their usability for law enforcement purposes.

(d) Include Findings If No Recommendations._ If the report required by this section omits recommendations for actions needed to fully remove identified barriers to electronic transactions or to online or electronic commerce, it shall include a finding or findings, including substantial reasons therefor, that such removal is impracticable or would be inconsistent with the implementation or enforcement of applicable laws.