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

August 4, 1999

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

Dear Mr. Chairman:

This is to convey the views of the Department of Commerce and the Administration regarding H.R. 1714, the "Electronic Signatures in Global and National Commerce Act," as reported by the relevant subcommittees of your Committee.

We support the overall goal of this legislation, shared by both the Administration and many Members of Congress, of promoting a predictable, minimalist legal environment for electronic commerce and encouraging prompt state adoption of uniform legislation assuring the legal effectiveness of electronic transactions and signatures. Despite our agreement with its purposes, however, we must oppose the bill in its present form.

Since July 1997 when President Clinton and Vice President Gore issued the *Framework for Global Electronic Commerce*, our Department has been implementing the President's directive 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 have focused upon four fundamental objectives: (1) eliminating paper-based legal barriers to electronic transactions; (2) affirming the rights of parties to determine for themselves the appropriate technological means of authenticating their transactions; (3) ensuring any party the opportunity to prove in court that a particular authentication technique is sufficient to create a legally binding agreement; and (4) treating technologies and providers of authentication services in a non-discriminatory manner.

In achieving the above objectives domestically, the Administration is committed to giving significant deference to state law and to the processes of the National Conference of Commissioners on Uniform State Laws (NCCUSL). The legal rules governing contracts and commercial transactions have traditionally been established by the states, generally working through NCCUSL. That process has given the United States a commercial law framework that is the envy of the world and that has been able to adapt to technological innovations as they occur. Last week, NCCUSL approved the Uniform Electronic Transactions Act (UETA) and sent it to the states for adoption. This measure, the product of several years' consideration, adjusts legal standards governing private commercial transactions to the new reality of electronic commerce.

In our view, the UETA -- which takes a minimalist "enabling" approach -- will provide an excellent domestic legal model for electronic transactions, as well as a strong model for the rest of the world. We understand that NCCUSL plans to make the adoption of this law a high priority, and some legislatures are already considering the measure.

Although limited federal preemption is appropriate to provide basic certainty for commercial electronic transactions while the states move to adopt the UETA, we do not believe that long-term federal oversight of state law in this area is necessary or desirable.

Unfortunately, a number of significant problems with H.R.1714 in its present form cause it to fall far short of achieving its goal. The bill goes beyond private transactions to cover those involving the government, which were treated fully and appropriately by the Government Paperwork Elimination Act passed by the last Congress and which have been excluded from coverage under the UETA. Additionally, the bill's party autonomy provisions, coupled with the specificity of its "non-discrimination" language, would place excessive limits on state and federal authority to impose minimum standards upon certain types of private transactions when the public interest so requires. Most importantly, the bill in its present form would do far more than fill a short-term gap by preempting state laws; its preemption provisions are not only permanent, but they would create significant legal uncertainty and likely spawn costly and time-consuming litigation. These and other issues are discussed below.

Need to Exclude Government Transactions. The Administration believes strongly that governments must use electronic commerce to the maximum extent feasible in their dealings with citizens. That is why we supported -- and are working hard to implement -- the Government Paperwork Elimination Act (GPEA), title XVII of Public Law 105-277, the goal of which was to increase the ability of citizens to interact with the Federal Government electronically. In addition, the Administration has adopted a comprehensive program to utilize electronic commerce in federal procurement. State governments are also working hard to use electronic commerce in their dealings with citizens.

We do not believe that additional legislation is needed at this time to promote the use of electronic commerce by governments. And we are extremely concerned that the provisions of H.R. 1714, which are designed principally to eliminate legal barriers to electronic transactions between private parties, would be counterproductive if applied to the marketplace activities of governments. For example, the GPEA recognizes that the Federal Government should not dictate authentication standards to the private sector and guards against this possibility by specifically requiring that government standards be compatible with those used by commerce and industry. The GPEA also requires that agencies, where practicable, adopt multiple optional means whereby citizens and businesses can transact business with them. The agencies, under OMB guidance, are working diligently to implement these mandates. But government should not be forced to transact its business and accept records by any means, and according to any standard, that may be available to someone at a given moment. Such a requirement, which could be read into H.R.1714 in its present form, would be extremely expensive and inefficient, as well as inconsistent with the

fulfillment of important goals involving the security and permanence of government information and records. The GPEA recognizes this important consideration, while at the same time ensuring that the government cannot dictate its preferred standards or methods to the private sector or use its substantial information technology purchasing power to dominate the private marketplace.

Scope of the Bill Should be Focused on "Commercial Transactions" Affecting Interstate Commerce. As indicated above, the coverage of section 101 is stated in terms of "any contract or agreement" affecting interstate commerce. While ensuring the validity of contracts signed or recorded electronically is very important, contractual arrangements do not encompass the broad range of daily commercial "transactions" involving electronic signatures and records. On the other hand, we believe it is essential to limit the bill's scope to "commercial" transactions. Limitation of the bill's regulatory provisions (especially section 101(b)) to commercial transactions is important in order to preserve the flexibility of governments to provide appropriate public interest regulation of consumer transactions. As just one example, we note that real estate sales involve state and federally imposed written notices of various types to both buyers and sellers, and as real estate transactions (unlike family law matters and wills) are not specifically excluded from the coverage of section 101, the validity of those requirements would come immediately into question upon passage of the bill.

Preemption and Due Deference to the States. Deference to state law in the area of commercial transactions -- particularly in the law of contracts -- has been the hallmark of the legal system in this country, as evidenced by the development by NCCUSL and adoption by all fifty states of the Uniform Commercial Code (UCC). Moreover, experts in commercial law have now produced a uniform law (UETA) to support electronic transactions and are moving speedily to encourage its adoption nationwide. We see no reason not to trust the states to adopt uniform rules consistent with the principles promoted internationally by the Administration and set out in H.R. 1714 -- particularly as the UETA is fully consistent with those principles. Section 102 of H.R. 1714, however, places significant, and we believe inappropriate, limits upon states' ability to alter or supersede the federal rule of law that the bill would impose. Even when states adopt the UETA, their laws would remain subject to federal preemption "to the extent" that any State rule -- including the UETA -- fails to meet a number of criteria, which in themselves are not clearly defined.

Most significantly, section (b) of section 102, "Effect on Other Laws," takes away the authority of states to avoid federal preemption that is granted by subsection (a) of that section. 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." Similarly, section 102(a)(1)(B) allows measures that specify particular procedures for use of electronic signatures to establish an agreement's legal validity, but sections 102(b)(1) and (2) bar discrimination in favor of particular authentication approaches.

Section 102 raises a number of additional problems. Specifically, section 102 (a)(2) places a basic four-year limit upon the time in which states may adopt laws or regulations to supersede the federal rule. We see no justification for any such time limitation. Problems needing legislative resolution may not necessarily surface within any given time, and new technologies and implementations that may call for legislative or regulatory change may also emerge after the time contemplated by the statute. For similar reasons, we see no justification for limiting (as does section 102(a)) the ability of states to override the federal rule only in the context of laws "enacted or adopted after the date of enactment of this Act."

Also, we believe that section 102(c), authorizing the Secretary of Commerce to bring actions to enjoin non-conforming state laws, would be counterproductive. Absent such a provision section 102 would be self-executing and enforceable defensively by parties affected by the non-conforming laws. The mere existence of this injunctive authority, on the other hand, would tend to validate the conformity of any state law against which enforcement action were not taken or were not taken promptly.

Overbroad Limits on Governmental[1] Authority. While party autonomy and non-discrimination among technologies are important principles, they are not absolute. It is important to ensure the continued ability of governments to engage in limited regulation of certain private party transactions in the public interest. For example, both federal and state financial regulatory agencies impose limited but important requirements upon financial institutions to ensure the safety and soundness of their transactions. At the federal level these include the Office of the Comptroller of the Currency within the Treasury Department, the FDIC, the Office of Thrift Supervision and the Federal Reserve. Also the Federal Reserve Board imposes certain requirements on private interbank transactions under the Expedited Funds Availability Act, which is designed to expedite customers' access to their bank deposits. Minimum standards for computer security and interoperability are also potentially affected. Finally, protective rules may be found necessary to prevent unfairness to consumers.

As indicated above, the bill's party autonomy and non-discrimination provisions taken together also contribute to the overbreadth of the bill's limitations upon the ability of government to impose limited regulation upon commercial transactions to promote the public interest. The party autonomy provision in itself may not curtail these limited but essential government functions, particularly if appropriate legislative report language were to clarify this point. However, the specificity of sections 102(b)(1) and (2), concerning non-discrimination as to technologies and methods, would appear to preclude any regulation of private parties' authentication or record-keeping practices -- even where the transactions involved may be significantly affected with a public interest.

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[1] The non-discrimination provisions of section 102(b) apply only to states. However, given that the non-discrimination principle is applied to other national governments via section 201(b)(2)(B), we interpret the 102(b) non-discrimination principle as being intended to apply to the Federal Government as well as the states.

Title II - Department of Commerce Study, and Actions to Eliminate Barriers to the Use of Electronic Signatures. The thrust of section 201 is consistent with the Administration's commitment to ensure the careful review of possible legal and regulatory barriers to electronic commerce. However, we believe that the study required by this section should not be repeated on an annual basis. A biennial update of such a study, if not a periodic update as needed, would be more appropriate given the general speed of legal developments in this area. Also, we note that the Department of Commerce would need to depend in large part upon information provided by the private sector or developed by other agencies and even foreign governments as to regulatory developments within their jurisdiction or particular knowledge.

Finally, we note that there are other parts of the bill with which we have technical drafting concerns.

In summary, we believe that H.R. 1714 contains a number of significant flaws that would have to be addressed before the Administration could support this legislation. In its present form we believe the bill would undermine, rather than promote, certainty in electronic commerce. We do stand ready 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 D. Dingell