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House of Representatives

The House was not in session today. Its next meeting will be held on Monday, June 19, 2000, at 12:30 p.m.

Senate

FRIDAY, JUNE 16, 2000

The Senate met at 9:31 a.m. and was called to order by the President pro tempore (Mr. THURMOND).

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Dear Father, the best of all fathers and the source of inspiration for what it means to be a father, we approach Father's Day on Sunday with a prayer that You will not only bless the fathers of our land but will call all of us to a renewed commitment to the awesome responsibilities You have entrusted to all fathers. May this be a day for the beginning of a great father movement in our Nation. More than a day for parties and gifts, we pray for a day when fathers accept the calling to become the spiritual, moral, and patriotic leaders of their families. Many fathers have abdicated this calling and are AWOL from the duty of being role models and the molders of character. The statistics of fatherless families in America are staggering. No less alarming are the number of families where fathers leave to their wives the total responsibility for forming strong spiritual development and the character traits of faithfulness, trustworthiness, caring, integrity, and citizenship. O Heavenly Father, draw the fathers of our land to Yourself and then inspire us with the realization that the destiny of our children and our society is dependent on God-loving, family-oriented, value-guided fathers who will teach their children about You, exemplify character strength, and show what it means to be morally accountable. In Your holy name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable LINCOLN CHAFEE, a Senator from the State of Rhode Island, led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER (Mr. L. CHAFEE). Under the previous order, the leadership time is reserved.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDING OFFICER. The Senator from Michigan is recognized.

SCHEDULE

Mr. ABRAHAM. Mr. President, I will begin with a brief statement on behalf of the majority leader. Today the Senate will immediately begin a vote on the conference report to accompany the digital signatures legislation. Following the vote, the Senate will be in a period of morning business with Senator CRAIG in control of the first hour.

For the information of all Senators, the Senate will resume consideration of the Department of Defense authorization bill on Monday at 3 p.m. By previous consent, Senators HATCH and KENNEDY will be recognized to offer their amendments regarding hate crimes. Those amendments will be debated simultaneously, with any votes

ordered to take place on Tuesday at 3:15 p.m.

I thank my colleagues for their attention.

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT—CONFERENCE REPORT—Resumed

The PRESIDING OFFICER. Under the previous order, the Senate will now proceed to vote on the conference report accompanying S. 761, which the clerk will report.

The legislative clerk read as follows:

The conference report on S. 761, an act to regulate interstate commerce by electronic means by permitting and encouraging the continued expansion of electronic commerce through the operation of free market forces, and for other purposes.

Mr. BURNS. Mr. President, I commend Senator ABRAHAM, Senator MCCAIN, and Chairman BLILEY for their hard work in the conference on the digital signatures bill, which grants online contracts and other transactions the same legal force as those conducted with pen-and-ink. I should add that Senator LEAHY and Senator WYDEN made significant positive contributions to the bill. I am an original cosponsor of this legislation and I am very pleased with the conference report before the Senate today.

Yesterday, the House of Representatives voted overwhelmingly in favor of the conference report by a vote of 426-4. I urge my colleagues to support the conference report, which is a bipartisan product that will allow businesses to

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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take advantage of the speed and efficiency of the Internet while also protecting consumers. I have no doubt that the passage of this legislation will help to make sure that electronic commerce can meet its full potential.

The issue of online authentication is one of the most important issues to the development of electronic commerce. Electronic commerce holds great promise, in particular, for states like my home state of Montana, where businesses and consumers have to deal with vast distances. E-commerce is expected to continue its upward surge to about \$1.6 trillion by 2003, up from \$500 billion last year. The explosion of information technology has created opportunities undreamed of by previous generations. In Montana, companies such as Healthdirectory.com and Vanns.com are taking advantage of the global markets made possible by the stunning reach of the Internet.

This bill allows for consumers to enter into binding contracts over the Internet and eliminates the need to engage in needless, burdensome exchanges of paper documents. This bill will create a uniform system where contracts have the same validity across all 50 states.

The bill is also technology-neutral and does not impose government mandates on what formats or software businesses or consumers choose to use to conduct online commerce.

Numerous consumer safeguards are included in the conference report, including the requirement that consumers confirm that they are able to read the format that companies use for online contracts. Also, safeguards are contained in the bill that will still require that critical notices such as insurance cancellation and mortgage foreclosure notices be sent on paper. Furthermore, consumers still have the right to receive any documents on paper if they so choose.

The passage of the digital signatures bill is a critical step in ensuring the continued growth of the Internet-driven economy. This legislation grants additional choice and convenience to consumers and will also translate into more efficient products and services.

Mr. President, I remind my colleagues of the work of Senator ABRAHAM and Senator MCCAIN, Chairman BLILEY in the other body, Senator LEAHY, and Senator WYDEN who had quite a lot to do with this. Of course, it came out of the Subcommittee on Communications. This is just one more of the digital dozen we set our goals to pass during this Congress.

So far, we are up around the eighth or ninth bill out of that digital dozen that will probably lend greater credence to the Internet and the way we use it as a tool in business and in our personal lives. I thank those Senators who were instrumental in passing this legislation. I congratulate them and I yield the floor.

CONSUMER CONSENT PROVISIONS

Mr. MCCAIN. Mr. President, I want to engage in a colloquy with the Sen-

ator from Michigan, who is the original sponsor of the electronic signatures legislation, to discuss the consumer consent provisions in the conference report.

Mr. ABRAHAM. Mr. President, I welcome the chance to participate in a colloquy about the consent provisions in the conference report.

Mr. MCCAIN. Is it the Senator's understanding that pursuant to subsection 101(c)(1)(C)(ii) of the conference report a consumer's affirmative consent to the receipt of electronic records needs to "reasonably demonstrate" that the consumer will be able to access the various forms of electronic records to which the consent applies?

Mr. ABRAHAM. Yes. The conference report requires a "reasonable demonstration" that the consumer will be able to access the electronic records to which the consent applies. By means of this provision, the conferees sought to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them.

Mr. MCCAIN. I agree. The conferees did not intend that the "reasonable demonstration" requirement would burden either consumers or the person providing the electronic record. In fact, the conferees expect that a "reasonable demonstration" could be satisfied in many ways. Does the Senator agree with me that the conferees intend that the reasonable demonstration requirement is satisfied if the consumer confirmed in an e-mail response to the provider of the electronic records that he or she can access information in the specified formats?

Mr. ABRAHAM. Yes. An e-mail response from a consumer that confirmed that the consumer can access electronic records in the specified formats would satisfy the "reasonable demonstration" requirement.

Mr. MCCAIN. Does the Senator also agree with me that the "reasonable demonstration" requirement would be satisfied, for instance, if the consumer responds affirmatively to an electronic query asking if he or she can access the electronic information or if the affirmative consent language includes the consumer's acknowledgement that he or she can access the electronic information in the designated format?

Mr. ABRAHAM. Yes. A consumer's acknowledgment or affirmative response to such a query would satisfy the "reasonable demonstration" requirement.

Mr. MCCAIN. Would the "reasonable demonstration requirement" be satisfied if it is shown that the consumer actually accesses records in the relevant electronic format?

Mr. ABRAHAM. Yes. The requirement is satisfied if it is shown that the consumer actually accesses electronic records in the relevant format.

Mr. MCCAIN. Mr. President, I appreciate my colleague's willingness to participate in this colloquy to clarify the

clear intent of the conference with respect to this provision.

LEGISLATIVE SCOPE

Mr. GRAMM. Mr. President, I would like to engage in a colloquy with the gentleman from Michigan, Senator ABRAHAM, who is the original sponsor of the legislation on electronic signatures, to discuss the scope of the legislation.

Mr. ABRAHAM. Mr. President, I would welcome the chance to participate in a colloquy about the scope of the electronic signature legislation.

Mr. GRAMM. Is it the understanding of the Senator from Michigan that the act is not intended to restrict the scope or availability of any other federal statute, regulation and other rule of law (whether currently in effect or becoming effective in the future) that requires, authorizes or otherwise allows for the use of electronic signatures or electronic records, to the extent such federal statute, regulation, or other rule of law is consistent with the provisions of the act? Any such other statute, regulation or other rule of law will continue to be fully and independently effective. Rather, this act is intended to operate as a uniform national baseline permitting electronic signatures and electronic records to be used with respect to certain activities notwithstanding other inconsistent statutes, regulations or other rules of law. Am I correct in my statement regarding the intent of this legislation?

Mr. ABRAHAM. Yes, the Senator, the chairman of the Banking Committee, is correct. This act is intended to facilitate e-commerce and to provide legal certainty for electronic signatures, contracts and records where such certainty does not exist today. It is not in any way intended to limit the effectiveness of any other statute, regulation or other rule of law which permits the use of electronic records, electronic delivery, and electronic signatures, and which is otherwise consistent with the provisions of the act.

Mr. GRAMM. As to its coverage, does the Senator agree that this act is intended to operate very broadly to permit the use of electronic signatures and electronic records in all business, consumer and commercial contexts? This breadth is accomplished through the use of the term "transaction," which is defined broadly to include any action or set of actions relating to the conduct of business, consumer or commercial affairs between two or more persons. For example, a unilateral action or set of actions by one of the parties to the underlying transaction, or by any other person with any interest in the underlying transaction, or a response by one party to the other's action, all are covered by the act. In this regard, it is the nature of the activity, rather than the number of persons or the identity or status of the person or entity involved in the activity, that determines the applicability of the act. Have I stated the matter correctly?

Mr. ABRAHAM. Yes, this act applies to all actions or sets of actions related

to the underlying business, consumer, or commercial relationship which is based on the nature of the activity and not the number of persons involved in the activity. The act is also intended to cover the related activities of those persons or entities who are counterparties to, or otherwise involved in or related to, the covered activity.

Mr. GRAMM. It is my understanding that this act, for example, covers any activity that would qualify as a financial activity, an activity incidental to a financial activity, or a complementary activity, under section 4(k) of the Bank Holding Company Act of 1956, as amended, whether or not such activity is conducted by, or subject to any limitations or requirements applicable to, a financial holding company.

In addition, it would cover all activities relating to employee benefit plans or any other type of tax-favored plan, annuity or account such as an IRA, a 403(b) annuity, or an education savings program, including all related tax and other required filings and reports. Is this correct?

Mr. ABRAHAM. Yes, and as a result, the act would apply to such activities as the execution of a prototype plan adoption agreement by an employer, the execution of an IRA application by an individual, and the waiver of a qualified joint and survivor annuity by a plan participant's spouse and the designation of any beneficiary in connection with any retirement, pension, or deferred compensation plan, IRA, qualified State tuition program, insurance or annuity contract, or agreement to transfer ownership upon the death of a party to a transaction.

Mr. GRAMM. Mr. President, I appreciate my colleague's willingness to participate in this colloquy to clarify the clear intent of the conference with respect to the scope of this act.

Mr. ABRAHAM. Mr. President, because the differences between the House and Senate passed bills required much careful contemplation on the part of the Conferees that may not be apparent in the final text of the Conference Report, and because the Conference did not produce an official interpretive statement regarding the Conference Report, as the primary author of S. 761, I have prepared an explanatory document that should serve as a guide to the intent behind the following provisions of S. 761.

Mr. President, I ask unanimous consent that a section-by-section explanation of S. 761 be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

EXPLANATORY STATEMENT OF S. 761,
THE "ELECTRONIC SIGNATURE IN
GLOBAL AND NATIONAL COMMERCE
ACT"

SHORT TITLE

Senate bill

Section 1 establishes the short title of the bill as the "Millennium Digital Commerce Act."

House amendment

Section 1 establishes the short title of the bill as the "Electronic Signature in Global and National Commerce Act."

Conference substitute

The conference report adopts the House provision.

ELECTRONIC RECORDS AND SIGNATURES IN
COMMERCE

GENERAL RULE OF VALIDITY

Senate bill

Section 5(a) of the Senate bill sets forth the general rules that apply to electronic commercial transactions affecting interstate commerce. This section provides that in any commercial transaction affecting interstate commerce a contract may not be denied legal effect or enforceability solely because an electronic signature or record was used in its formation.

Section 5(b) authorizes parties to a contract to adopt or otherwise agree on the terms and conditions on which they will use and accept electronic signatures and electronic records in commercial transactions affecting interstate commerce.

House amendment

Section 101(a) of the House amendment establishes a general rule that, with respect to any contract or agreement affecting interstate commerce, notwithstanding any statute, regulation or other rule of law, the legal effect, validity, and enforceability of such contract or agreement shall not be denied on the ground that: (1) the contract or agreement is not in writing if the contract or agreement is an electronic record; and (2) the contract or agreement is not signed or affirmed by written signature if the contract or agreement is signed or affirmed by an electronic signature.

Section 101(b) provides that with respect to contracts or agreements affecting interstate commerce, the parties to such contracts or agreements may establish procedures or requirements regarding the use and acceptance of electronic records and electronic signatures acceptable to such parties. Further, the legal effect, validity, or enforceability for such contracts or agreements shall not be denied because of the type or method of electronic record or electronic signature selected by the parties.

Nothing in section 101(b) requires a party to enter into any contract or agreement utilizing electronic signatures or electronic records. Rather, it gives the parties the option to enter freely into online contracts and agreements.

Conference Substitute

The House recedes to the Senate with an amendment.

The general rule provides that notwithstanding any statute, regulation, or other rule of law (other than titles one and two) with respect to any transaction in or affecting interstate or foreign commerce: (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

Section 101(a) establishes a basic federal rule of non-discrimination with respect to the use of electronic signatures and electronic records, including electronic contracts. Subject to the Act's consumer consent requirement (§101(c)) and specific exceptions (§103), this federal rule of non-discrimination means that a State generally cannot refuse to allow parties to use electronic sig-

natures and electronic records in lieu of paper records and handwritten signatures. This federal rule also means that if two parties agree with one another, electronically or otherwise, on the terms and conditions on which they will accept and use electronic signatures and electronic records in their dealings with one another and the parties could have entered into a comparable agreement regarding the use of signatures and records in the paper world, the State cannot refuse to give effect to the parties' agreement.

The term "solely" in section 101(a)(1) and 101(a)(2) is intended to prevent challenges to the legal effect, validity, or enforceability of an electronic signature, contract, or other record that are based on objections to the "electronic" quality of such signature, contract, or other record. In addition, Section 101 should not be interpreted to permit a challenge based on the combination of a signature, contract, or other record being in electronic form (Section 101(a)(1)) and having an electronic signature or electronic record used in its formation (Section 101(a)(2); in this sense, solely truly means "solely or in part").

The conferees agreed to strike title III of the House bill (HR 1714) with respect to electronic records, signatures or agreements covered under the federal securities laws because the title I provisions of the conference agreement are intended to encompass the House title III provisions. The reference in section 101(a) of the conference agreement to "any transaction in or affecting interstate or foreign commerce" is intended to include electronic records, signatures and agreements governed by the Securities Exchange Act of 1934 and all electronic records, signatures and agreements used in financial planning, income tax preparation, and investments. Therefore, the conference agreement did not need to single out or treat differently electronic records, signatures and agreements regulated by federal securities laws in a separate title.

In section 101(b), the conference report makes clear that title I of the conference substitute does not (1) limit, alter, or otherwise affect any requirements imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than requirements that contracts or other records be written, signed, or in non-electronic form; or (2) require any person, with respect to a record other than a contract, to agree to use or accept electronic records or electronic signatures.

Section 101(c) specifies consumer protections in e-commerce. If a statute, regulation, or other rule of law requires that a record relating to a transaction in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, an electronic record may be substituted if (1) the consumer affirmatively consents to receive an electronic record and has not withdrawn such consent, (2) the consumer, prior to consenting, is provided with a clear and conspicuous statement informing the consumer of rights or options to have the record provided or made available on paper, and the right of the consumer to withdraw the consent to electronic records and of any conditions, consequences (which may include termination of the parties' relationships), or fees in the event of withdrawal of consent. Further, the consumer is informed of whether the consent applies only to the initial transaction or to identified categories of records that follow the initial transaction. Disclosure must also be made describing the procedures the consumer must use to withdraw consent and to update information needed to contact the consumer electronically. The consumer must also be informed

of how after the consent, the consumer may, upon request, obtain a paper copy of electronic records, and whether any fee will be charged for such copy.

Section 101(c) honors the provisions of underlying law (except as to the specifics of writing and consent requirements); the Act does not create new requirements for electronic commerce but simply allows disclosures or other items to be delivered electronically instead of on paper. This means that if a consumer protection statute requires delivery of a paper copy of a disclosure or item to a consumer, then the consent and disclosure requirements of subsection (c)(1)(A–D) must be satisfied. Otherwise, subsection (c) does not disturb existing law.

Section 101(c)(1) refers to writings that are required to be delivered to consumers by some other law, such as the Truth-in-Lending Act. The reference to consumers is intentional: subsection (c) only applies to laws that are specifically intended for the protection of consumers. When a statute applies to consumers as well as to non-consumers, subsection (c)(1) should not apply. In this way, the subsection preserves those special consumer protection statutes enacted throughout this Nation without creating artificial constructs that do not exist under current law. At no time in the future should these “consent” provisions of 101(c), which are intended to protect consumers (as defined in this legislation), be permitted to migrate through interpretation so as to apply to business-to-business transactions.

Pursuant to subsection (c)(1)(C)(i), the consumer must be provided, prior to consenting, with a clear and conspicuous statement describing the hardware and software requirements to access and retain electronic records.

Subsection (c)(1)(C)(ii) requires that the consumer's consent be electronic or that it be confirmed electronically, in a manner that reasonably demonstrates that the consumer will be able to access the various forms of electronic records to which the consent applies. The requirement of a reasonable demonstration is not intended to be burdensome on consumers or the person providing the electronic record, and could be accomplished in many ways. For example, the ‘reasonable demonstration’ requirement is satisfied if the provider of the electronic records sent the consumer an e-mail with attachments in the formats to be used in providing the records, asked the consumer to open the attachments in order to confirm that he could access the documents, and requested the consumer to indicate in an e-mailed response to the provider of the electronic records that he or she can access information in the attachments. Similarly, the ‘reasonable demonstration’ requirement is satisfied if it is shown that in response to such an e-mail the consumer actually accesses records in the relevant electronic format. The purpose of the reasonable demonstration provision is to provide consumers with a simple and efficient mechanism to substantiate their ability to access the electronic information that will be provided to them.

Subsection (c)(1)(D) requires that after the consent of a consumer, if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record must provide the consumer with a statement of the revised hardware and software requirements for access to and retention of the electronic records, and the right to withdraw consent without the imposition of any fees for such withdrawal, and the

right to withdraw without the imposition of any condition or consequence that was not disclosed.

Subsection (c)(2) includes a savings clause making clear that nothing in this title affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law. Further, subsection (c)(2) provides that if a law that was enacted prior to this Act expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

Section 101(c)(3) makes clear that an electronic contract or electronic signature cannot be deemed ineffective, invalid, or unenforceable merely because the party contracting with a consumer failed to meet the requirements of the consent to electronic records provision.

Compliance with the consent provisions of section 101(c) is intended to address the effectiveness of the provision of information in electronic form, not the validity or enforceability of the underlying contractual relationship or agreement between the parties. In other words, a technical violation of the consent provisions cannot in and of itself invalidate an electronic contract or prevent it from being legally enforced. Rather, the validity and enforceability of the electronic contract is evaluated under existing substantive contract law, that is, by determining whether the violation of the consent provisions resulted in a consumer failing to receive information necessary to the enforcement of the contract or some provision thereof. For example, if it turns out that the manner in which a consumer consented did not ‘reasonably demonstrate’ that she could access the electronic form of the information at a later date, but at the time of executing the contract she was able to view its terms and conditions before signing, the contract could still be valid and enforceable despite the technical violation of the electronic consent provision.

Subsection (c)(4) provides that withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

Subsection (c)(5) makes clear that this subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this title to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

Subsection (c)(6) provides that an oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

It should be noted that Section 101(c)(6) does not preclude the consumer from using her voice to sign or approve that record. Proper voice signatures can be very effective in confirming a person's informed intent to be legally obligated. Therefore, the consumer could conceivably use an oral or voice signature to sign a text record that was required to be given to her “in writing”. More-

over, the person who originated the text record could authenticate it with a voice signature as well. The spoken words of the signature might be something like “I Jane Consumer hereby sign and agree to this loan document and notice of interest charges.”

By way of clarification, the intent of this clause is to disqualify only oral communications that are not authorized under applicable law and are not created or stored in a digital format. This paragraph is not intended to create an impediment to voice-based technologies, which are certain to be an important component of the emerging mobile-commerce market. Today, a system that creates a digital file by means of the use of voice, as opposed to a keyboard, mouse or similar device, is capable of creating an electronic record, despite the fact that it began its existence as an oral communication.

Section 101(d) addresses statutory and regulatory record retention requirements. It states that when a statute, regulation, or other rule of law requires that a record, including a contract, be retained that requirement is satisfied by the retention of an electronic record, if two criteria are met. First, the electronic record must accurately reflect the information set forth in the contract or record required to be retained. Second, that electronic record must remain accessible to all parties who by law are entitled to access the record for the period set out in that law. Moreover, the electronic record must be in a form capable of accurate reproduction for later reference. The reproduction may be by way of transmission, printing or any other method of reproducing records.

With respect to Section 101(d)(1)(B), this subsection only requires retained records to remain accessible to persons entitled to access them by statute. The subsection does not require the business to provide direct access to its facilities nor does it require the business to update electronic formats as technology changes—the records must, however, be capable of being accurately reproduced at the time that reference to them is required by law.

Section 101(e) addresses statutory and regulatory requirements that certain records, including contracts, be in writing. The statute of frauds writing requirement exemplifies one such legal requirement. The section states that an electronic record or contract may be denied legal effect and enforceability under section 101(a) of this Act, if such an electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties entitled to retain that contract or record. This provision is intended to reach two qualities of “a writing” in the non-electronic world. The first such quality of “a writing” is that it can be retained, e.g., a contract can be filed. The second such quality of “a writing” is that it can be reproduced, e.g., a contract can be copied.

With respect to Section 101(e), the actual inability of a party to reproduce a record at a particular point in time does not invoke this subsection. The subsection merely requires that if a statute requires a contract to be in writing, then the contract should be capable of being retained and accurately reproduced for later reference by those entitled to retain it. Thus if a customer enters into an electronic contract which was capable of being retained or reproduced, but the customer chooses to use a device such as a Palm Pilot or cellular phone that does not have a printer or a disk drive allowing the customer to make a copy of the contract at that particular time, this section is not invoked. The record was in a form that was capable of being retained and reproduced by the customer had it chosen to use a device allowing retention and reproduction.

Subsection (f) clarifies that nothing in title I affects the proximity requirement of any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.

Subsection (g) provides that if a statute, regulation, or other rule of law requires a signature or record to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record. This subsection permits notaries public and other authorized officers to perform their functions electronically, provided that all other requirements of applicable law are satisfied. This subsection removes any requirement of a stamp, seal, or similar embossing device as it may apply to the performance of these functions by electronic means.

It is my intent that no requirement for the use of a stamp, seal, or similar device shall preclude the use of an electronic signature for these purposes.

Subsection (h) provides legal effect, validity and enforceability to contracts and record relating to a transaction in or affecting interstate or foreign commerce that were formed, created or delivered by one or more electronic agents.

Subsection (i) makes clear that the provisions of title I and II cover the business of insurance.

Subsection (j) provides protection from liability for an insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature if: (1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct; (2) the agent or broker was not involved in the development or establishment of such electronic procedures; and (3) the agent or broker did not deviate from such procedures.

AUTHORITY TO ALTER OR SUPERSEDE GENERAL RULE

Senate bill

Section 5(g) of the Senate bill provides that section 5 does not apply to any State in which the Uniform Electronic Transaction Act is in effect.

House amendment

Section 102(a) of the House amendment provides that a State statute, regulation or other rule of law enacted or adopted after the date of enactment of H.R. 1714 may modify, limit, or supersede the provisions of section 101 (except as provided in section 102(b)) if that State action: (1) is an adoption or enactment of the UETA as reported by the NCCUSL or specifies alternative procedures or requirements recognizing the legal effect, validity and enforceability of electronic signatures; and (2) for statutes enacted or adopted after the date of enactment of this Act, makes specific reference to the provisions of section 101.

Section 102(b) provides that no State statute, regulation, or rule of law (including those pertaining to insurance), regardless of date of enactment, that modifies, limits, or supersedes section 101 shall be effective to the extent that such statute, regulation, or rule of law: (1) discriminates in favor of or against a specific technology, method, or technique; (2) discriminates in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic signatures and electronic records; (3) is based on procedures or require-

ments that are not specific and that are not publicly available; and (4) is otherwise inconsistent with the provisions of section 101.

Section 103(c) provides that a State may, by statute, regulation or rule of law enacted or adopted after the date of enactment of this Act, require specific notices to be provided or made available in writing if such notices are necessary for the protection of the public health or safety of consumers. A consumer may not, pursuant to section 101(b)(2) consent to the provision or availability of such notice solely as an electronic record.

Conference substitute

The conference report adopts a substitute provision. Section 102 of the conference report provides a conditioned process for States to enact their own statutes, regulations or other rules of law dealing with the use and acceptance of electronic signatures and records and thus opt-out of the federal regime. The preemptive effects of this Act apply to both existing and future statutes, regulations, or other rules of law enacted or adopted by a State. Thus, a State could not argue that section 101 does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act.

Section 102(a) provides that a State statute, regulation or other rule of law may modify, limit, or supersede the provisions of section 101 only if that State action: (1) constitutes an adoption or enactment of the Uniform Electronic Transactions Act (UETA) as reported and recommended for enactment by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1999; or (2) specifies alternative procedures or requirements (or both) for the use or acceptance of electronic signatures or electronic records for establishing the legal effect, validity and enforceability of contracts or records.

It is intended that any State that enacts or adopts UETA in its State to remove itself from Federal preemption pursuant to subsection (a)(1) shall be required to enact or adopt UETA as that document was reported and recommended for enactment by NCCUSL.

Subsection (a)(1) places a limitation on a State that attempts to avoid Federal preemption by enacting or adopting a clean UETA. Section 3(b)(4) of UETA, as reported and recommended for enactment by NCCUSL, allows a State to exclude the application of that State's enactment or adoption of UETA for any 'other laws, if any, identified by State.' This provision provides a potential loophole for a State to prevent the use or acceptance of electronic signatures or electronic records in that State. To remedy this, subsection (a)(1) requires that any exception utilized by a State under section 3(b)(4) of UETA shall be preempted if it is inconsistent with title I or II, or would not be permitted under subsection (a)(2)(ii) (technology neutrality). Requirements for certified mail or return receipt would not be inconsistent with title I or II, however, note that an electronic equivalent would be permitted.

As stated above, subsection (a)(2) is designed to cover any attempt by a State to escape Federal preemption by enacting or adopting specific alternative procedures or requirements for the use or acceptance of electronic signatures or records except a strict enactment or adoption of UETA (which would be covered by subsection (a)(1)). States that enact UETA in the manner specified in (a)(1) may supercede the provisions of section 101 with respect to State law. Thus, regulatory agencies within a state which complies with (a)(1) would interpret UETA, not section 101 of the federal act.

Further, some States are enacting or adopting a strict, unamended version of UETA as well as enacting or adopting a companion or separate law that contains further provisions relating to the use or acceptance of electronic signatures or electronic records. Under this Act, such action by the State would prompt both subsection (a)(1) (for the strict enactment or adoption of UETA) and subsection (a)(2) (for the other companion or separate legislation).

Subsection (a)(2) contains two important conditions that limit the extent to which a state could utilize it to opt-out of the federal regime. Specifically, when interpreting section 101, alternative procedures or requirements: (1) must be consistent with this title and title II; and (2) shall not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technological specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic signatures or records. It is not intended that the singular use of technology or technological specification in subsection (a)(2)(A)(ii) allows a State to set more than one technology at the expense of other technologies in order to meet this standard, unless only one form of the technology exists, in which case this act is not intended to preclude a technological solution. Further, inclusion of the 'or accord greater legal status or effect to' is intended to prevent a state from giving a leg-up or impose an additional burden on one technology or technical specification that is not applicable to all others, and is not intended to prevent a state or its subdivisions from developing, establishing, using or certifying a certificate authority system.

In addition, subsection (a)(2)(B) requires that a State that utilizes subsection (a)(2) to escape federal preemption must make a specific reference to this Act in any statute, regulation, or other rule of law enacted or adopted after the date of enactment of this Act. This provision is intended, in part, to make it easier to track action by the various States under this subsection for purposes of research.

Section 102(b) provides a specific exclusion to the technology neutrality provisions contained in subsection (a)(2)(A)(ii) for procurement by a state, or any agency or instrumentality thereof.

Section 102(c) makes clear that subsection (a) cannot be used by a State to circumvent this title or title II through the imposition of nonelectronic delivery methods under section 8(b)(2) of UETA. Any attempt by a State to use 8(b)(2) to violate the spirit of this Act should be treated as effort to circumvent and thus be void.

SPECIFIC EXCLUSIONS

Senate bill

Section 5(d) of the Senate bill excludes from the application of this section any statute, regulation or other rule of law governing: (1) the Uniform Commercial Code as in effect in any state, other than sections 1-107 and 1-206 and Articles 2 and 2A; (2) premarital agreements, marriage, adoption, divorce, or other matters of family law; (3) documents of title which are filed of record with a governmental unit until such time that a State or subdivision thereof chooses to accept filings electronically; (4) residential landlord-tenant relationships; and (5) the Uniform Health-Care Decisions Act as in effect in a State.

House amendment

Section 103(a) of the House amendment excludes from the application of section 101 any contract, agreement or record to the extent that it is covered by: (1) a statute, regulation or rule of law governing the creation

and execution of wills, codicils, or testamentary trusts; (2) a statute, regulation or other rule of law governing adoption, divorce, or other matters of family law; (3) the Uniform Commercial Code as in effect in any state, other than sections 1-107 and -206 and Articles 2 and 2A; (4) any requirement by a Federal regulatory agency or self-regulatory agency that records be filed or maintained in a specified standard or standards (except that nothing relieves any Federal regulatory agency of its obligation under the Government Paperwork Elimination Act, title XVII of Public Law 105-277); (5) the Uniform Anatomical Gift Act; or (6) the Uniform Health-Care Decisions Act.

Section 103(b) excludes from the application of section 101: (1) any contract, agreement or record between a party and a State agency if the State agency is not acting as a market participant in or affecting interstate commerce; (2) court orders or notices or official court documents (including briefs, pleading and other writings) required to be executed in connection with court proceedings; or (3) any notice concerning: (A) the cancellation or termination of utility services, (B) default, acceleration, repossession, foreclosure or eviction, or the right to cure under a credit agreement secured by, or a rental agreement for, a primary residence of an individual or the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities).

Conference substitute

The conference report adopts a substitute provision.

Section 103(a) excludes from the application of section 101 any contract, agreement or record to the extent that it is covered by: (1) a statute, regulation or rule of law governing the creation and execution of wills, codicils, or testamentary trusts; (2) a statute, regulation or other rule of law governing adoption, divorce, or other matters of family law; (3) the Uniform Commercial Code as in effect in any state, other than sections 1-107 and 1-206 and Articles 2 and 2A.

Section 103(b) excludes from the application of section 101: (1) court orders or notices or official court documents (including briefs, pleading and other writings) required to be executed in connection with court proceedings; or (2) any notice of: (A) the cancellation or termination of utility services, (B) default, acceleration, repossession, foreclosure or eviction, or the right to cure under a credit agreement secured by, or a rental agreement for, a primary residence of an individual or the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities).

The exclusion pertaining to utility services applies to essential consumer services including water, heat and power. This provision does not apply to notices for other broadly used important consumer services, such as telephone, cable television, and Internet access services, etc. Electronic cancellation or termination notices may be used in association with those other services, assuming all of the other elements of Section 101 are met. To clarify further, with respect to Section 103(b), the statement that "the provisions of section 101 shall not apply to" the listed items means only that Section 101 may not be relied upon to allow an electronic record or electronic signature to suffice. Section 103(b) does not prohibit use of electronic records or signatures, however. Whether such can be used is left to other law.

Section 103(c)(1) directs the Secretary of Commerce, acting through the Assistant Secretary for Communication and Information, to review the operation of the exclusions in subsections (a) and (b) over a period

of three years to determine if such exclusions are necessary for the protection of consumers. The Assistant Secretary shall submit the findings of this review to Congress within three years of the date of enactment of this Act.

Section 103(c)(2) provides that a Federal regulatory agency, with respect to matter within its jurisdiction, may extend, after proper notice and comment and publishing a finding that one or more of exceptions in subsections (a) or (b) are no longer necessary for the protection of consumers and eliminating such exceptions will not materially increase the risk of harm to consumers, the application of section 101 to such exceptions.

APPLICABILITY TO FEDERAL AND STATE GOVERNMENTS

Senate bill

The Senate bill contained no provision affecting the authority of Federal regulatory agencies.

House amendment

The House amendment provided in Section 103 that the authority of Federal regulatory agencies would be preserved over records filed or maintained in a specific standard or standards.

Conference substitute

The conference report adopts a substitute provision.

Section 104(a) provides that subject to section 104(a)(2), a Federal regulatory agency, a self-regulatory organization, or State regulatory agency may specify standards or formats for the filing of records with that agency or organization, including requiring paper filings or records. While the conference report preserves such authority to such agencies or organizations, it is intended that use of such authority is rarely exercised. Section 104(b)(1) provides that subject to section 104(b)(2) and section 104(c), a Federal regulatory agency or State regulatory agency that is responsible for rulemaking under any other statute may interpret section 101 with respect to such statute through (1) the issuance of regulations pursuant to a statute; or (2) to the extent such agency is authorized by statute to issue orders or guidance, the issuance of orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a Federal regulatory agency).

The conference report provides for more limited Federal and State interpretative authority over other functions related to records. This Act grants no additional or new rulemaking authority to any Federal or State agency. The conference report provides that if Federal or State regulators possessed specific rulemaking authority under their organic statutes, they could use that rulemaking authority to interpret section 101 subject to strict conditions. Those conditions include determinations that such regulation, order or guidance: (1) is consistent with section 101; and (2) does not add to the requirements of the section. Additionally, the conference report requires that any Federal agency show conclusively that: (a) there is a substantial justification for the regulation and the regulation is necessary to protect an important public interest; (b) the methods used to carry out that purpose are the least restrictive alternative consistent with that purpose; (c) the methods are substantially equivalent to the requirements imposed or records that are not electronic records; and (d) such methods will not impose new costs on the acceptance and use of electronic records. The conference report requires strict technological neutrality of any Federal or State regulation, order or guidance. Absent such technological neutrality,

any such regulation, order or guidance is void.

The conference report is designed to prevent Federal and State Regulators from undermining the broad purpose of this Act, to facilitate electronic commerce and electronic record keeping. To ensure that the purposes of this Act are upheld, Federal and State regulatory authority is strictly circumscribed. It is expected that Courts reviewing administrative actions will be rigorous in seeing that the purpose of this Act, to ensure the widest use and dissemination of electronic commerce and records are not undermined.

Subsection (b)(3)(A) provides authority to a Federal or State regulatory agency to interpret section 101(d) in a manner to specify specific performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Subsection (b)(3) extends this authority to override the technology neutrality provision contained in subsection (b)(2)(C)(iii) but only if doing so (1) serves an important governmental objective; and (2) is substantially related to the achievement of that objective. Further, subsection (b)(3)(A) does not allow a Federal or State regulatory agency to require the use of a particular type of software or hardware in order to comply with 101(d).

Subsection (b)(3)(B) provides authority to a Federal or State regulatory agency to interpret section 101(d) to require retention of paper records but only if (1) there is a compelling government interest relating to law enforcement or national security for imposing such requirement, and (2) imposing such requirement is essential to attaining such interest. It is important to note that the test in subsection (b)(3)(B) is higher and more stringent than in subsection (b)(3)(A). This is intentional as it is an effort to impose an extremely high barrier before a Federal or State regulatory agency will revert back to requiring paper records. However, this does not diminish the test contained subsection (b)(3)(A). It, too, is intended to be an extremely high barrier for a Federal or State regulatory agency to meet before the technology neutrality provision is violated. It is intended that use of either of these tests will be necessary in only a very, very few instances. It is expected that Federal and State agencies take all action and exhaust all other avenues before exercising authority granted in paragraph (3).

Subsection (b)(4) exempts procurement by a Federal or State government, or any agency or instrumentality thereof from the technology neutral requirements of subsection (b)(2)(C)(iii).

Subsection (c)(1) makes clear that nothing in subsection (b), except subsection (b)(3)(B), allows a Federal or State regulatory agency to impose or reimpose any requirement that a record be in paper form.

Subsection (c)(2) makes clear that nothing in subsection (a) or (b) relieves any Federal regulatory agency of its obligations under the Government Paperwork Elimination Act.

Subsection (d)(1) provides authority to a Federal or State regulatory agency to exempt without condition a specified category or type of record from the consent provisions in section 101(c) if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers. It is intended that the test under subsection (d)(1) not be read too limiting. There are vast numbers of instances when section 101(c) may not be appropriate or necessary and should be exempted by the appropriate regulator.

Subsection (d)(2) requires the Securities and Exchange Commission, within 30 days after date of enactment, to issue a regulation or order pursuant to subsection (d)(1)

exempting from the consent provision any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940, or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 2(a)(10)(A) of the Securities Act of 1933.

Section 104(e) provides that the Federal Communications Commission shall not hold any contract for telecommunications service or letter of agency for a preferred carrier change, that otherwise complies with the Commission's rules, to be legally ineffective, invalid or unenforceable solely because an electronic records or electronic signature was used in its formation or authorization.

The Federal Communications Commission (FCC) has been very slow, even reticent, to clearly authorize the use of an Internet letter of agency for a consumer to conduct a preferred carrier change. As a result of the Commission's repeated failure to act on this matter, the conference report provides specific direction to the Commission to recognize Internet letters of agency for a preferred carrier change.

STUDIES

Senate bill

Section 7 of the Senate bill directs each Federal agency shall, not later than 6 months after the date of enactment of this Act, to 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, including 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.

Section 7(b) requires a report to Congress by The Secretary of Commerce, in consultation with the Director of the Office of Management and Budget 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.

7(c) provides that 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.

7(d) 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.

House amendment

Section 104 of the House amendment directs the Secretary of Commerce (the Secretary), acting through the Assistant Secretary for Communications and Information, to conduct an inquiry regarding any State statute, regulation, or rule of law enacted or adopted after enactment on the extent to which such statute, regulation, or rule of law complies with section 102(b). Section 104(b) requires the Secretary to submit the report described in paragraph (a) at the conclusion of the five year period.

Section 104(c) requires the Secretary, within eighteen months after the date of enactment, to conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with the delivery of written records by the United States Postal Service and private express mail services. The Secretary shall submit a report to Congress regarding the results of such inquiry at the conclusion of the eighteen month period.

Conference substitute

The conference adopts a substitute provision. Specifically, the conference report retains subsection 7(a) of the Senate amendment and redesignates it as section 104(a) of the conference report. Further, the conference report includes a new subsection (b) that requires the Secretary of Commerce and the Federal Trade Commission, within one year after date of enactment, to submit a report to the Congress analyzing: (1) the benefits provided to consumers by the consumer access test of the consent provision (section 101(c)(1)(C)(ii)); (2) any burdens imposed on electronic commerce by the provision, whether the benefits outweigh the burdens; (3) whether the absence of such procedure would increase consumer fraud; and (4) any suggestions for revising the provision. In conducting the evaluation, the Secretary of Commerce and FTC shall solicit the comments of the public, consumer representatives, and electronic commerce businesses.

DEFINITIONS

Senate bill

Section 4 sets forth the definitions of terms used in the bill: 'electronic;' 'electronic agent;' 'electronic record;' 'electronic signature;' 'governmental agency;' 'record;' 'transaction;' and 'Uniform Electronic Transaction Act.'

House amendment

Section 104 of the House amendment defines the following terms: 'electronic record;' 'electronic signature;' 'electronic;' 'electronic agent;' 'record;' 'Federal regulatory agency;' and 'self-regulatory agency.'

Conference substitute

The conference report adopts a substitute provision adopting definitions for the following terms: 'consumer;' 'electronic;' 'electronic agent;' 'electronic record;' 'electronic signature;' 'Federal regulatory agency;' 'information;' 'person;' 'record;' and 'transaction.'

To clarify further the definition of "consumer," the definition is intended to be consistent with traditional interpretations of such definitions. This means that the party dealing with the consumer may rely on the consumer's intended use for the product or service as indicated when the transaction is entered into. Thus if an individual indicates at the time of the transaction that the online purchase of a heater is primarily for personal family or household use, then that individual is a consumer; the fact that the individual may later dedicate the actual use of the heater to the individual's business is not relevant. The opposite is also true: if an individual indicates that the intended use is pri-

marily for business purposes, then that individual is not a consumer even if the individual later uses the heater primarily for personal or family purposes.

EFFECTIVE DATES

Senate bill

The Senate bill contained no provision.

House amendment

The House amendment contained no provision.

Conference substitute

The conference report creates a general delayed effective date for the bill, and creates specific delayed effective dates for certain provisions of the bill. Subsection (a) establishes that, except as provided in subsections (b), the provisions of the bill are effective October 1, 2000. Subsection (b) delays the effective date of the records retention provision until March 1, 2001 unless an agency has initiated, announced, proposed but not completed an action under subsection 104(b)(3), in which case it would be extended until June 1, 2001. Subsection (b)(2) delays the effective date of this Act by one year with regards to any transaction involving a loan guarantee or loan guarantee commitment made by the United States Government. The one year delay was granted to permit the federal government time to institute safeguards necessary to protect taxpayers from risk of default on loans guaranteed by the federal government.

Subsection (d) delays the effective date of section 101(c) for any records provided or made available to a consumer pursuant to title IV of the High Education Act of 1965 until the Secretary of Education publishes revised promissory notes under section 432(m) of such Act or one year after the date of enactment, whichever is earlier.

TRANSFERABLE RECORDS

Senate bill

The Senate bill contained no provision.

House amendment

The House amendment contained no provision.

Conference substitute

The conference report adopts a new provision in recognition of the need to establish a uniform national standard for the creation, recognition, and enforcement of electronic negotiable instruments. The development of a fully-electronic system of negotiable instruments such as promissory notes is one that will produce significant reductions in transaction costs. This provision, which is based in part on Section 16 of the Uniform Electronic Transactions Act, sets forth a criteria-based approach to the recognition of electronic negotiable instruments, referred to as 'transferable records' in this section and in UETA. It is intended that this approach create a legal framework within which companies can develop new technologies that fulfill all of the essential requirements of negotiability in an electronic environment, and in a manner that protects the interests of consumers.

The conference report notes that the official Comments to section 16 of UETA, as adopted by the National Conference of Commissioners on Uniform State Laws, provide a valuable explanation of the origins and purposes of this section, as well as the meaning of particular provisions.

The conference report notes that, pursuant to sections 3(c) and 7(d) of the UETA, an electronic signature satisfies any signature requirement under Section 16 of the UETA. It is intended that an electronic signature shall satisfy any signature requirement under this provision, as well. The conference report further notes that the reference in

section 201(a)(1)(C) to loans secured by real property' includes all forms of real property, including single-family and multi-family housing.

TREATMENT OF ELECTRONIC SIGNATURES IN
INTERSTATE AND FOREIGN COMMERCE

Senate bill

Section 6 of the Senate bill sets out the principles that the United States Government should follow, to the extent practicable, in its international negotiations on electronic commerce as a means to facilitate cross-border electronic transactions.

Section 6 lists the principles as follows: (1) advocates the removal of paper-based obstacles to electronic transactions. This can be accomplished by taking into account the enabling provisions of the Model Law on Electronic Commerce adopted by the United Nations Committee on International Trade Law (UNCITRAL) in 1996. Paragraph (2) permits that parties to a transaction shall have the opportunity to choose the technology of their choice when entering into an electronic transaction. Paragraph (3) permits parties to a transaction the opportunity to prove in a court or other proceeding that their authentication approach and transactions are valid. Paragraph (4) adopts a nondiscriminatory approach to electronic signatures.

House amendment

Section 201(a) directs the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, to conduct an annual inquiry identifying: (1) any domestic or foreign impediments to commerce in electronic signature products and services and the manner and extent to which such impediments inhibit the development of interstate and foreign commerce; (2) constraints imposed by foreign nations or international organizations that constitute barriers to providers of electronic signature products and services; and (3) the degree to which other nations and international organizations are complying with the principles in section 201(b)(2).

Under subsection (a)(2), the Secretary is required to report to Congress the findings of each inquiry 90 days after completion of such inquiry.

Section 201(b) directs the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, to promote the acceptance and use of electronic signatures on an international basis in accordance with section 101 of the bill and with designated principles. In addition, the Secretary of Commerce is directed to take all actions to eliminate or reduce impediments to commerce in electronic signatures, including those resulting from the inquiries required pursuant to subsection (a).

The designated principles are as follows: free-markets and self-regulation, rather than government standard-setting or rules, should govern the development and use of electronic signatures and electronic records; neutrality and nondiscrimination should be observed among providers of and technologies for electronic records and electronic signatures; parties to a transaction should be allowed to establish requirements regarding the use of electronic records and electronic signatures acceptable to the parties; parties to a transaction should be permitted to determine the appropriate authentication technologies and implementation for their transactions with the assurance that the technology and implementation will be recognized and enforced; the parties should have the opportunity to prove in court that their authentication approaches and transactions are valid; electronic records and signatures in a form acceptable to the parties should not be denied legal effect, validity, or enforce-

ability because they are not in writing; de jure or de facto imposition of electronic signature and electronic record standards on the private sector through foreign adoption of regulations or policies should be avoided; paper-based obstacles to electronic transactions should be removed.

Section 201(c) requires the Secretary of Commerce to consult with users and providers of electronic signatures and products and other interested parties in carrying out actions under this section.

Section 201(d) clarifies that nothing requires the Secretary or Assistant Secretary to take any action that would adversely affect the privacy of consumers.

Section 201(e) provides that the definitions in section 104 apply to this title.

Conference substitute

The House recedes to the Senate with an amendment. Section 301(a)(1) directs the Secretary of Commerce to promote the acceptance and use of electronic signatures on an international basis in accordance with section 101 of the bill and with the set principles listed in subsection (a)(2). In addition, the Secretary of Commerce is directed to take all actions to eliminate or reduce impediments to commerce in electronic signatures.

Section 301(a)(2) lists the principles as follows: (1) Removal of paper-based obstacles to electronic transactions. This can be accomplished by taking into account the enabling provisions of the Model Law on Electronic Commerce adopted by the United Nations Committee on International Trade Law (UNCITRAL) in 1996; (2) Parties to a transaction shall have the opportunity to choose the technology of their choice when entering into an electronic transaction. Parties to a commercial transaction should be able to choose the appropriate authentication technologies and implementation models for their transactions. Unnecessary regulation of commercial transactions distorts the development and efficient operation of markets, including electronic markets. Moreover, the rapid development of the electronic marketplace is resulting in new business models and technological innovations. This is an evolving process. Therefore, government attempts to regulate may impede the development of newer alternative technologies; (3) Parties to a transaction the opportunity to prove in a court or other proceeding that their authentication approach and transactions are valid. Parties should have the opportunity to prove in court that the authentication methods that they select are valid and reliable; and (4) Adoption of a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

Section 301(c) directs the Secretary to consult with users and providers of electronic signature products and services and other interested parties. Section 301(d) applies the definitions of 'electronic signature' and 'electronic record' in section 107 to this title.

Increasingly, online transactions are not just interstate but international in nature and this creates a clear need for international recognition of electronic signatures and records that will not create barriers to international trade. Title III directs the Secretary of Commerce to take an active role in bilateral and multilateral talks to promote the use and acceptance of electronic signatures and electronic records worldwide. It is intended that the Secretary promote the principles contained in this Act internationally. However, it is possible that some foreign nations may choose to adopt their own approach to the use and acceptance of electronic signatures and electronic records. In such cases, the Secretary should encourage

those nations to provide legal recognition to contracts and transactions that may fall outside of the scope of the national law and encourage those nations to recognize the rights of parties to establish their own terms and conditions for the use and acceptance of electronic signatures and electronic records.

There is particular concern about international developments that seek to favor specific technologies of processes for generating electronic signatures and electronic records. Failure to recognize multiple technologies may create potential barriers to trade and stunt the development of new and innovative technologies.

Unfortunately, international developments on recognizing electronic signatures are troubling. The German Digital Signature Law of July 1997 runs counter to many of the widely accepted principles of electronic signature law in the United States. For example, the German law provides legal recognition only to signatures generated using digital signature technology, establishes licensing for certificate authorities, and sets a substantial role for the government in establishing technical standards. Further, a position paper on international recognition of electronic signatures released by the German government (International Legal Recognition of Digital Signatures, August 28, 1998) seeks to apply these principles internationally. This policy statement reemphasizes the principle that uniform security standards are necessary for all uses of digital signatures regardless of their use, supports mutual recognition of digital signatures only to those nations which have a similar regulatory structure for certification authority, and fails to provide legal effect to electronic signatures generated by other technologies.

The European Community is considering a framework for the use and acceptance of electronic signatures for its member countries. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for electronic signatures' lays out the European Community's approach to electronic signature legislation. Of particular interest is Article 7, International Aspects, which recognizes the legal validity of digital certificates issued in a non-European Community country. While international recognition of electronic signatures is important, there is concern that this approach will not recognize non-certificate based electronic signatures, such as those based on biometric technologies. The conference report notes that negotiations with the European Union on electronic signatures is a top priority.

COMMISSION ON CHILD ONLINE PROTECTION
AUTHORITY TO ACCEPT GIFTS

Senate bill

The Senate bill contains no similar provision.

House amendment

The House amendment contains no similar provision.

Conference substitute

The conference report adopts a provision to amend section 1405 of the Child Online Protection Act by adding a new subsection (h), which allows the Commission on Online Child Protection to accept, use and dispose of gifts, bequests or devises of services or property for the purpose of aiding or facilitating the work of the Commission.

Mr. WARNER. Mr. President, I want to offer my strong support for the Electronic Signatures in Global and National Commerce Act. This legislation removes legal barriers to electronic commerce by establishing important legal standards for electronic contracts and signatures.

With the passage of this important legislation, businesses will have the legal certainty that they require and consumers will have the assurance of safety and security that they need. The measure represents a balanced approach. It ensures that protections in the digital world equal those in the paper world.

Mr. President, E-commerce offers tremendous benefits for businesses and consumers in terms of efficiency, choice, convenience, and lower costs. The measure will ensure the continued expansion of electronic commerce, the roots and future of which lie in Virginia. It will take electronic business-to-business and business-to-consumer commerce to the next level.

Mr. BENNETT. Mr. President, I rise to praise the hard work, commitment and diligence of Senator SPENCER ABRAHAM of Michigan. He navigated truly treacherous legislative and political waters to bring this legislation to shore. Were it not for his steadfast guidance of this legislation, there would be no E-Sign bill before us today. From the outset, Senator ABRAHAM had the vision and initiative to call to life a law which will allow American consumers and businesses to do transactions over the Internet with a greater confidence in their legal rights and responsibilities. And let me say this to my colleague, Senator ABRAHAM, this bill is much like the Internet in that almost instantaneously all kinds of people will come out of the woodwork to claim credit for your great achievement. Savor it, because those of us who worked by your side know well that the credit lies with you.

Throughout the conference I kept one goal in mind. We must make every effort to have a digital signature be equal to a paper signature both in the ease of use and in the eyes of the law. And while we did not fully succeed in that regard, this legislation is clearly a worthwhile step in the right direction and I intend to support its passage.

Mr. President, let me take one more moment to express, generally, some of my concerns about provisions that were added in the name of providing greater consumer protection and which were outside of the scope of the bills passed in the House and the Senate. I fear that the lack of clarity of several terms and phrases which were added in the conference and which are strewn throughout the bill will create the opportunity for misunderstandings and lawsuits. Greater consultation among the conferees could have resolved these issues, because I know that we all share the same hopes for the success of this legislation. I sincerely hope that my concerns about the use of these terms is misplaced and that they will not come back to haunt us.

Finally, Mr. President, pursuant to the Government Paperwork Elimination Act passed by the previous Congress, the Office of Management and Budget has adopted regulations to per-

mit individuals to obtain, submit and sign government forms electronically. These regulations direct Federal agencies to recognize that different security approaches offer varying levels of assurance in an electronic environment and that deciding which to use in an application depends first upon finding a balance between the risks associated with the loss, misuse or compromise of the information, and the benefits, costs and effort associated with deploying and managing the increasingly secure methods to mitigate those risks.

The OMB regulations recognize that among the various technical approaches, in an ascending level of assurance, are (1) "shared secrets" methods (e.g., personal identification numbers or passwords), (2) digitized signatures or biometric means of identification, such as fingerprints, retinal patterns and voice recognition, and (3) cryptographic digital signatures, which provide the greatest assurance. Combinations of approaches (e.g., digital signatures with bio-metrics) are also possible and may provide even higher levels of assurance. The technical competence and experience of the service provider should be of paramount concern as we step into this brave new world. A positive first step in this regard is the General Services Administration's development of the ACES, or Access Certification for Electronic Services, Program for all federal agencies.

Mr. President, in developing this legislation, we recognized that certain technologies are more secure than others and that consumers and businesses must, just as the government, select and weigh which technology is most appropriate for their particular needs taking into account the importance of the transaction and its corresponding need for assurance.

Mr. ABRAHAM. Mr. President, I ask for the yeas and nays on the conference report accompanying S. 761.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The question is on agreeing to the conference report. The clerk will call the roll.

The legislative clerk called the roll.

Mr. NICKLES. I announce that the Senator from Kentucky (Mr. BUNNING), the Senator from Colorado (Mr. CAMPBELL), the Senator from Utah (Mr. HATCH), the Senator from Oklahoma (Mr. INHOFE), the Senator from Kentucky (Mr. MCCONNELL), the Senator from Wyoming (Mr. THOMAS), and the Senator from Virginia (Mr. WARNER) are necessarily absent.

I further announce that if present and voting, the Senator from Kentucky (Mr. BUNNING), the Senator from Kentucky (Mr. MCCONNELL), the Senator from Utah (Mr. HATCH), and the Senator from Colorado (Mr. CAMPBELL) would each vote "aye."

Mr. REID. I announce that the Senator from California (Mrs. BOXER), the Senator from North Dakota (Mr. CON-

RAD), the Senator from North Dakota (Mr. DORGAN), the Senator from Iowa (Mr. HARKIN), the Senator from Vermont (Mr. LEAHY), and the Senator from Virginia (Mr. ROBB) are necessarily absent.

I further announce that, if present and voting, the Senator from Vermont (Mr. LEAHY) and the Senator from Iowa (Mr. HARKIN) would each vote "aye."

The PRESIDING OFFICER (Mr. HAGEL). Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 87, nays 0, as follows:

[Rollcall Vote No. 133 Leg.]

YEAS—87

Abraham	Feingold	Lugar
Akaka	Feinstein	Mack
Allard	Fitzgerald	McCain
Ashcroft	Frist	Mikulski
Baucus	Gorton	Moynihan
Bayh	Graham	Murkowski
Bennett	Gramm	Murray
Biden	Grams	Nickles
Bingaman	Grassley	Reed
Bond	Gregg	Reid
Breaux	Hagel	Roberts
Brownback	Helms	Rockefeller
Bryan	Hollings	Roth
Burns	Hutchinson	Santorum
Byrd	Hutchison	Sarbanes
Chafee, L.	Inouye	Schumer
Cleland	Jeffords	Sessions
Cochran	Johnson	Shelby
Collins	Kennedy	Smith (NH)
Coverdell	Kerrey	Smith (OR)
Craig	Kerry	Snowe
Crapo	Kohl	Specter
Daschle	Kyl	Stevens
DeWine	Landrieu	Thompson
Dodd	Lautenberg	Thurmond
Domenici	Levin	Torricelli
Durbin	Lieberman	Voinovich
Edwards	Lincoln	Wellstone
Enzi	Lott	Wyden

NOT VOTING—13

Boxer	Harkin	Robb
Bunning	Hatch	Thomas
Campbell	Inhofe	Warner
Conrad	Leahy	
Dorgan	McConnell	

The conference report was agreed to.

Mr. LOTT. Mr. President, today the Senate has taken a momentous step in promoting and facilitating the growth of electronic commerce with the passage of the conference report to S. 761—the Electronic Signatures in Global and National Commerce Act.

It was a long and difficult road to get to this point, following the bill's introduction in the Senate last March by my colleague and champion of E-signatures, Senator ABRAHAM. Many roadblocks had to be overcome along the way. In the end, many compromises were agreed to. This bill could have been done months ago; however, some wanted to make this a partisan issue. I am personally very pleased though that the sustained efforts of Congress resulted in a conference report supported by a meaningful majority of conferees, and by a majority of the business world.

S. 761 will establish legal certainty and validity for electronic signatures and electronic records. When engaging in business online, consumers and companies should feel secure and confident that their contracts and agreements will be honored. This bill recognizes and addresses those real needs now,

rather than waiting for all 50 States to adopt uniform laws. S. 761 will provide the basic foundation, or the rules of the road, for the future of electronic commerce in America. It will foster the continued expansion of electronic commerce. More importantly, it will empower consumers to take part in a vibrant segment of our economy. It will afford consumers from all across America the real opportunity, if they so choose, to take advantage of electronic commerce. This, to me, is the crux of this legislation. The ability of our citizens in all 50 States to improve the quality of their lives. S. 761 provides that ability.

Some have expressed concern that this measure places a higher standard and unnecessary burdens on the on-line world than those in effect for the off-line world. I hope it does not. I believe a good-faith effort was made to provide the flexibility necessary for those with that great entrepreneurial spirit and imaginative ability to advance the Internet and electronic commerce. If, over time, bureaucracy does indeed impede the bill's intent, I expect that Congress will again assume responsibility and take corrective action.

The participation of several Members of Congress was integral to this bill's enactment. They include the chairmen of both the House and Senate Commerce Committees, Chairman BLILEY and Chairman MCCAIN, Chairman GRAMM of the Senate Banking Committee, and Chairman HATCH of the Senate Judiciary Committee. I extend my thanks to them and to all of the members of the conference for their attentiveness and commitment to this important issue.

I also want to take a few moments to express my special appreciation to my colleague and good friend, Senator ABRAHAM. Senator ABRAHAM recognized early on the extreme importance of electronic signatures. It was his initiative that led to the 105th Congress' enactment of the Government Paperwork Elimination Act, a significant first step toward the eventual broad use and acceptance of electronic signatures. Senator ABRAHAM's continued stewardship, vision, and tireless efforts have led to the next logical step of now affording secure and accessible opportunities in electronic commerce for the private sector and millions of consumers. I believe no other Senator worked as hard on, or knows as much about, this issue as Senator ABRAHAM. Without his hard work, keen judgment, and persistence, I do not believe we would be voting on this conference report today. Senator ABRAHAM is to be commended for his leadership in this area, and I look forward to working with him on other important technology issues facing Congress.

It goes without saying that Congress could not operate without the dedicated efforts of staff. I want to identify those Senate staffers who worked hard to prepare this legislation for consideration: Renee Bennett, Moses Boyd,

Jeanne Bumpus, Cesar Conda, Robert Cresanti, Makan Delrahim, Geoff Gray, Martin Gruenberg, Carole Grunberg, Dave Hoppe, Jack Howard, Jim Hippe, Kevin Kolevar, Chase Hutto, Jim Hyland, Julie Katzman, Maureen McLaughlin, Paul Margie, Mike Rawson, Dena Ellis Rochkind, Lisa Rosenberg and Jim Sartucci, as well as my former Congressional Fellow, Steven Apicella. I thank them all.

Electronic signatures is an innovative technology whose time has come. S. 761 will remove barriers to their use in a timely and useful manner. S. 761 will make it easier for millions of Americans to use electronic commerce. S. 761 will help stimulate our nation's economy. And S. 761 will preserve America's leadership in the global marketplace. I am proud that the 106th Congress has taken this action.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. ABRAHAM. Mr. President, I thank my colleagues on both sides of the aisle for their work on the legislation which has just passed. This is an extraordinarily important bill which will essentially open up opportunities in e-commerce that have previously not been existent for Americans. It will be a tremendous incentive to our economy. I express to all my colleagues my appreciation for their hard work on the legislation. It is a significant accomplishment for the Congress.

The PRESIDING OFFICER. The Senator from Nevada.

LEAVE OF ABSENCE

Mr. REID. Mr. President, on behalf of Senator LEAHY, I ask unanimous consent that he be permitted to be absent from the service of the Senate today, Friday, June 16.

The PRESIDING OFFICER. Without objection, it is so ordered.

EXECUTIVE SESSION

NOMINATION OF BEVERLY B. MARTIN, OF GEORGIA, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA

NOMINATION OF JAY A. GARCIA-GREGORY, OF PUERTO RICO, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF PUERTO RICO

NOMINATION OF LAURA TAYLOR SWAIN, OF NEW YORK, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session and proceed to the nominations of Beverly B. Martin, of Georgia; Jay A. Garcia-Gregory, of Puerto Rico; and Laura Taylor

Swain, of New York, which the clerk will report.

The legislative clerk read the nominations of Beverly B. Martin, of Georgia, to be U.S. District Judge for the Northern District of Georgia; Jay A. Garcia-Gregory, of Puerto Rico, to be U.S. District Judge for the District of Puerto Rico; and Laura Taylor Swain, of New York, to be U.S. District Judge for the Southern District of New York.

The PRESIDING OFFICER. Under the previous order, the nominations are confirmed, the motions to reconsider are laid upon the table, and the President will immediately be notified of the Senate's actions.

The nominations were considered and confirmed.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

MORNING BUSINESS

The PRESIDING OFFICER. There will now be a period for the transaction of morning business with Senators permitted to speak therein for up to 5 minutes each.

The Senator from Idaho.

Mr. CRAIG. Mr. President, I have reserved an hour of that time. I know there are other Senators who wish to speak. I will not use the whole hour. I would like to change the order. My colleague from Montana has a couple of minutes on an issue. My colleague from Minnesota wishes to speak for 10 minutes. Then I would assume my hour. We will not take all that hour. The Senator from Washington has comments she wants to make during this period of time. I ask unanimous consent that it follow in that order.

The PRESIDING OFFICER. Without objection, it is so ordered.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

THE DAIRY INDUSTRY

Mr. GRAMS. Mr. President, I will take a few minutes this morning to talk about an industry that is very important to the State of Minnesota, and that is our dairy industry.

June is National Dairy Month, and I come to the floor today to pay tribute to the family farmers who rise early every morning to supply fresh milk to our Nation. We as consumers assume there will always be dairy products in our grocery stores, without considering the hard work that is a daily requirement to get them there.

I grew up on a dairy farm myself, and I can remember those early morning milkings before going to school and again, of course, when I got home. I don't take for granted the hard work required of dairy farmers to make a living. Unfortunately, for Minnesota dairy producers, it is becoming harder