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106TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPT. 106–341 Part 2

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

OCTOBER 15, 1999.—Ordered to be printed

Mr. COBLE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1714]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1714) to facilitate the use of electronic records and signatures in interstate or foreign commerce, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Electronic Signatures in Global and National Commerce Act".

TITLE I—VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES FOR COMMERCE

SEC. 101. FINDINGS.

The Congress makes the following findings:

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

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

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

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

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

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

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

SEC. 102. PURPOSES.

The purposes of this Act are—

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

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

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

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

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

SEC. 103. DEFINITIONS.

In this Act:

(1) ELECTRONIC.—The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) ELECTRONIC AGENT.—The term "electronic agent" means a computer program or an electronic or other automated means used to initiate an action or respond to electronic records or performances in whole or in part without review by an individual at the time of the action or response.

(3) ELECTRONIC RECORD.—The term "electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(4) ELECTRONIC SIGNATURE.—The term "electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(5) RECORD.—The term "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) TRANSACTION.—The term "transaction" means an action or set of actions relating to the conduct of commerce between 2 or more persons, neither of which is the United States Government, a State, or an agency, department, board, commission, authority, institution, or instrumentality of the United States Government or of a State.

(7) UNIFORM ELECTRONIC TRANSACTIONS ACT.—The term "Uniform Electronic Transactions Act" means the Uniform Electronic Transactions Act as en-

acted by a State based on the form provided by the National Conference of Commissioners on Uniform State Law in the form or any substantially similar variation thereof.

SEC. 104. PRINCIPLES GOVERNING THE USE OF ELECTRONIC SIGNATURES IN INTERNATIONAL TRANSACTIONS.

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

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

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

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

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

SEC. 105. INTERSTATE CONTRACT CERTAINTY.

(a) IN GENERAL.—In any commercial transaction affecting interstate commerce, a contract may not be denied legal effect or enforceability solely because an electronic signature or electronic record was used in its formation.

(b) METHODS.—In commercial transactions affecting interstate commerce, the parties to a contract may agree on the terms and conditions on which they will use and accept electronic signatures and electronic records, except to the extent a law or regulation governing the record provides otherwise.

(c) RECORD RETENTION.—When a law requires that a contract be in writing, that requirement is satisfied by an electronic record of the information in the record provided to the parties which—

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains capable of retention in a form that can be accessed for later reference and used to prove the terms of the agreement.

(d) FORMULATION OF CONTRACT.—A contract relating to a commercial transaction affecting interstate commerce may not be denied legal effect solely because its formation involved—

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

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

(e) APPLICATION IN UETA STATES.—This section does not apply in any State in which the Uniform Electronic Transactions Act is in effect.

SEC. 106. STUDY OF LEGAL AND REGULATORY BARRIERS TO ELECTRONIC COMMERCE.

(a) BARRIERS.—Each Federal agency shall, not later than 6 months after the date of enactment of this Act, provide a report to the Director of the Office of Management and Budget and the Secretary of Commerce identifying any provision of law administered by such agency, or any regulations issued by such agency and in effect on the date of enactment of this Act, that may impose a barrier to electronic transactions, or otherwise to the conduct of commerce online or by electronic means. Such barriers include, but are not limited to, barriers imposed by a law or regulation directly or indirectly requiring that signatures, or records of transactions, be accomplished or retained in other than electronic form. In its report, each agency shall identify the barriers among those identified whose removal would require legislative action, and shall indicate agency plans to undertake regulatory action to remove such barriers among those identified as are caused by regulations issued by the agency.

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

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

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

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

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

SEC. 107. STUDY OF EFFECTS OF ELECTRONIC COMMERCE.

(a) IN GENERAL.—The Federal Trade Commission and the Secretary of Commerce shall conduct a study of electronic commerce issues.

(b) RESPONSIBILITY OF EACH AGENCY.—

(1) FTC.—The Federal Trade Commission, in consultation with the Secretary of Commerce, shall conduct a portion of the study to determine the effectiveness of Federal and State consumer protection laws with respect to electronic transactions involving consumers.

(2) COMMERCE DEPARTMENT.—The Secretary of Commerce, in consultation with the Federal Trade Commission, shall conduct a portion of the study to determine the extent to which a uniform commercial legal framework would facilitate and enforce interstate electronic transactions.

(c) REPORT.—Not later than 2 years after the date of the enactment of this Act, the Federal Trade Commission and the Secretary of Commerce shall transmit a report to Congress containing —

(1) findings from the study required under subsection (a); and

(2) such recommendations for legislation or administrative actions as the Federal Trade Commission and the Secretary of Commerce, respectively, deem appropriate.

(d) BIENNIAL UPDATES.—The Federal Trade Commission and the Secretary of Commerce shall update the report every 2 years thereafter and transmit the updated report to the Congress.

TITLE II—DEVELOPMENT AND ADOPTION OF ELECTRONIC SIGNATURE PRODUCTS AND SERVICES

SEC. 201. TREATMENT OF ELECTRONIC SIGNATURES IN INTERSTATE AND FOREIGN COMMERCE.

(a) INQUIRY REGARDING IMPEDIMENTS TO COMMERCE.—

(1) INQUIRIES REQUIRED.—Within 90 days after the date of the enactment of this Act, and annually thereafter, the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall complete an inquiry to—

(A) identify any domestic and foreign impediments to commerce in electronic signature products and services and the manners in which and extent to which such impediments inhibit the development of interstate and foreign commerce;

(B) identify constraints imposed by foreign nations or international organizations that constitute barriers to providers of electronic signature products or services; and

(C) identify the degree to which other nations and international organizations are complying with the principles in subsection (b)(2).

(2) SUBMISSION.—The Secretary shall submit a report to the Congress regarding the results of each such inquiry within 90 days after the conclusion of such inquiry.

(b) PROMOTION OF ELECTRONIC SIGNATURES.—

(1) REQUIRED ACTIONS.—The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 105 of this Act. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic sig-

natures, including those identified in the inquiries under subsection (a) for the purpose of facilitating the development of interstate and foreign commerce.

(2) PRINCIPLES.—The principles specified in this paragraph are the following:

(A) Free markets and self-regulation, rather than government standard-setting or rules, should govern the development and use of electronic records and electronic signatures.

(B) Neutrality and nondiscrimination should be observed among providers of and technologies for electronic records and electronic signatures.

(C) Parties to a transaction should be permitted to establish requirements regarding the use of electronic records and electronic signatures acceptable to such parties.

(D) Parties to a transaction—

(i) should be permitted to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced; and

(ii) should have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid.

(E) Electronic records and electronic signatures in a form acceptable to the parties should not be denied legal effect, validity, or enforceability on the ground that they are not in writing.

(F) De jure or de facto imposition of standards on private industry through foreign adoption of regulations or policies with respect to electronic records and electronic signatures should be avoided.

(G) Paper-based obstacles to electronic transactions should be removed.

(c) FOLLOWUP STUDY.—Within 5 years after the date of enactment of this Act, the Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall conduct an inquiry regarding any State statutes, regulations, or other rules of law enacted or adopted after such date of enactment. The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 5-year period and such report shall identify any actions taken by the Secretary pursuant to subsection (b) of this section.

(d) CONSULTATION.—In conducting the activities required by this section, the Secretary shall consult with users and providers of electronic signature products and services and other interested persons.

(e) PRIVACY.—Nothing in this section shall be construed to require the Secretary or the Assistant Secretary to take any action that would adversely affect the privacy of consumers.

(f) DEFINITIONS.—As used in this section, the terms "electronic record" and "electronic signature" have the meanings provided in section 103 of the Electronic Signatures in Global and National Commerce Act.

TITLE III—USE OF ELECTRONIC RECORDS AND SIGNATURES UNDER FEDERAL SECURITIES LAW

SEC. 301. GENERAL VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES.

Section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c) is amended by adding at the end the following new subsection:

"(h) REFERENCES TO WRITTEN RECORDS AND SIGNATURES.—

"(1) GENERAL VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES.—Except as otherwise provided in this subsection—

"(A) if a contract, agreement, or record (as defined in subsection (a)(37)) is required by the securities laws or any rule or regulation thereunder (including a rule or regulation of a self-regulatory organization), and is required by other Federal or State statute, regulation, or other rule of law to be in writing, the legal effect, validity, or enforceability of such contract, agreement, or record shall not be denied on the ground that the contract, agreement, or record is not in writing if the contract, agreement, or record is an electronic record;

"(B) if a contract, agreement, or record is required by the securities laws or any rule or regulation thereunder (including a rule or regulation of a self-regulatory organization), and is required by other Federal or State

statute, regulation, or other rule of law to be signed, the legal effect, validity, or enforceability of such contract, agreement, or record shall not be denied on the ground that such contract, agreement, or record is not signed or is not affirmed by a signature if the contract, agreement, or record is signed or affirmed by an electronic signature; and

"(C) if a broker, dealer, transfer agent, investment adviser, or investment company enters into a contract or agreement with, or accepts a record from, a customer or other counterparty, such broker, dealer, transfer agent, investment adviser, or investment company may accept and rely upon an electronic signature on such contract, agreement, or record, and such electronic signature shall not be denied legal effect, validity, or enforceability because it is an electronic signature.

"(2) IMPLEMENTATION.—

"(A) REGULATIONS.—The Commission may prescribe such regulations as may be necessary to carry out this subsection consistent with the public interest and the protection of investors.

"(B) NONDISCRIMINATION.—The regulations prescribed by the Commission under subparagraph (A) shall not—

"(i) discriminate in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; or

"(ii) discriminate in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic records or electronic signatures.

"(3) EXCEPTIONS.—Notwithstanding any other provision of this subsection—

"(A) the Commission, an appropriate regulatory agency, or a self-regulatory organization may require that records be filed in a specified electronic format or formats if the records are required to be submitted to the Commission, an appropriate regulatory agency, or a self-regulatory organization, respectively; and

"(B) the Commission may require that contracts, agreements, or records relating to purchases and sales, or establishing accounts for conducting purchases and sales, of penny stocks be manually signed, and may require such manual signatures with respect to transactions in similar securities if the Commission determines that such securities are susceptible to fraud and that such fraud would be deterred or prevented by requiring manual signatures.

"(4) RELATION TO OTHER LAW.—The provisions of this subsection apply in lieu of the provisions of title I of the Electronic Signatures in Global and National Commerce Act to a contract, agreement, or record (as defined in subsection (a)(37)) that is required by the securities laws.

"(5) DEFINITIONS.—As used in this subsection:

"(A) ELECTRONIC RECORD.—The term 'electronic record' means a writing, document, or other record created, stored, generated, received, or communicated by electronic means.

"(B) ELECTRONIC SIGNATURE.—The term 'electronic signature' means information or data in electronic form, attached to or logically associated with an electronic record, that is intended by a party to signify agreement to a contract or agreement.

"(C) ELECTRONIC.—The term 'electronic' means of or relating to technology having electrical, digital, magnetic, optical, electromagnetic, or similar capabilities regardless of medium.".

PURPOSE AND SUMMARY

The purpose of H.R. 1714, the "Electronic Signatures in Global and National Commerce (E–SIGN) Act," is to facilitate the continued success of electronic commerce by enabling parties to agree to use electronic signatures and electronic records in commercial transactions affecting interstate commerce. This will provide uniformity among State and Federal laws and give parties engaged in electronic commerce certainty that electronic signatures and electronic contracts will have the same legal effect and enforceability as paper signatures and contracts.

BACKGROUND AND NEED FOR THE LEGISLATION

In the past few years, the use of the Internet to conduct business, or e-commerce, has exploded beyond prediction. And, it is expected that the near future will see even more growth in e-commerce as more and more people go online to buy, sell, trade, or make other business arrangements. Important to the success of e-commerce is the ability to enter into a contract online that is legally binding. Therefore, it has become necessary to update contract laws which require a physical document to be signed by the party to signify an intent to be bound by the terms of the contract in order to allow electronic signatures to have the same legal effect as a physically signed piece of paper.

In the United States, the law of contracts has traditionally been within the province of State law. Many States have enacted laws to give legal effect to electronic signatures. However, these laws are not identical, and many not even similar, posing a problem in a borderless distribution system. The differences in legislation among States and an absence of legislation in this area poses an impediment to the growth of e-commerce because many consumers and businesses are unwilling to risk entering into a contract online without certainty regarding its legality. This has led many to support Federal legislation creating uniform Federal and State laws regarding electronic signatures in order to promote e-commerce in the United States and to provide a model for other countries.

In 1996, the National Conference of Commissioners on Uniform State Laws (NCCUSL) began researching these issues. After more than three years of research, input from all interested parties, and numerous revisions, the NCCUSL adopted a final draft entitled the "Uniform Electronic Transactions Act" (UETA) in July, 1999, and recommended it to the States for adoption. This model law has widespread support and would achieve a baseline level of certainty and uniformity in regard to laws on electronic signatures and electronic records. However, until the UETA is adopted by all fifty States, the lack of uniformity and certainty still poses a barrier to the growth of e-commerce. To provide for certainty and uniformity during the interim, two pieces of legislation were introduced in the 106th Congress, S. 761, the "Millennium Digital Commerce Act" and H.R. 1714, the "Electronic Signatures in Global and National Commerce (E–SIGN) Act".

In the 105th Congress, legislation was adopted into law to promote the use of electronic signatures and records by the Federal Government. Senator Abraham introduced legislation to require Federal agencies to use digital signatures, which are compatible with standards and technology for electronic signatures that are generally used in commerce and industry and State Governments. This served as a basis for the Government Paperwork Elimination Act (GPEA), title XVII of Public Law 105–277.

HEARINGS

The committee's Subcommittee on Courts and Intellectual Property held a hearing on H.R. 1714 on September 30, 1999. Testimony was received from Andrew Pincus, General Counsel, Department of Commerce; Ivan K. Fong, Deputy Associate Attorney Gen-

eral, United States Department of Justice; Pamela Meade Sargent, National Conference of Commissioners on Uniform State Laws; Scott Cooper, Manager, Technology Policy, Hewlett Packard; David Peyton, Director, Technology Policy, National Association of Manufacturers; and Margot Freeman Saunders, Managing Attorney, National Consumer Law Center, Inc.

COMMITTEE CONSIDERATION

On October 7, 1999, the Subcommittee on Courts and Intellectual Property met in open session and ordered favorably reported the bill H.R. 1714, as amended, by a voice vote, a quorum being present. On October 13, 1999, the committee met in open session and ordered favorably reported the bill H.R. 1714, with amendment, by a voice vote, a quorum being present.

VOTE OF THE COMMITTEE

The vote of the committee was as follows:

On the Amendment offered by Mr. Berman, Mr. Conyers, Ms. Lofgren, and Mr. Delahunt to Title I of the Amendment in the Nature of a Substitute to H.R. 1714 as reported by the Subcommittee on Courts and Intellectual Property to provide that in commercial transactions affecting interstate commerce, the parties may agree on the terms and conditions on which they will use electronic signatures and records except to the extent a law or regulation provides otherwise: The Amendment was adopted by a recorded vote of 15 yeas to 14 nays.

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly		X	
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr	X		
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease			
Mr. Cannon			
Mr. Rogan		X	
Mr. Graham	X		
Ms. Bono		X	
Mr. Bachus			
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman	X		
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		

	Ayes	Nays	Present
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	15	14	

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budget authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 1761, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 15, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1714, the Electronic Signatures in Global and National Commerce Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Shelley Finlayson (for the State and local impact), who can be reached at 225–3220, and Mark Hadley (for Federal costs), who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 1714—Electronic Signatures in Global and National Commerce Act.

SUMMARY

CBO estimates that H.R. 1714 would cost about $2 million annually to implement, subject to the availability of appropriated funds. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. The legislation does contain

intergovernmental mandates as defined by the Unfunded Mandates Reform Act (UMRA), however we estimate that the cost of these mandates would not be significant. H.R. 1714 contains no new private-sector mandates as defined in UMRA.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Title I would require Federal agencies to identify laws and regulations that impose barriers to electronic commerce. The title would require the Office of Management and Budget and the Department of Commerce to submit a report within 18 months recommending legislation to remove barriers to electronic commerce and detailing actions by the Federal Government to remove such barriers through regulation. Under title I, the Federal Trade Commission and the Department of Commerce would submit a biennial report on the impact of electronic signatures on consumer protection laws and interstate transactions.

Title II would require the Department of Commerce to submit an annual report detailing foreign and domestic impediments to commerce in electronic signature products and services. This title also would direct the department to promote the international acceptance and use of electronic signatures, and to submit a report within three years after enactment regarding actions by States to allow electronic signatures in commerce. Finally, title III would amend the Securities and Exchange Act of 1934 to allow the use of electronic signatures under Federal securities law.

Based on information from the Department of Commerce, the Federal Trade Commission, and the Securities and Exchange Commission, CBO estimates that implementing the bill would cost about $2 million a year, subject to the availability of appropriated funds.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1714 would preempt State laws in two ways, both of which would constitute intergovernmental mandates as defined by the Unfunded Mandates Reform Act (UMRA). However, CBO estimates that the costs of these preemptions would not be significant and would not exceed the threshold established by the act ($50 million in 1996, adjusted annually for inflation). The bill contains no new private-sector mandates as defined in UMRA.

The bill would preempt State laws that regulate interstate commercial transactions conducted via electronic means (such as contracts with electronic signatures), unless States enact a uniform standard specified in the bill. As defined by the bill, the term "transaction" would specifically exempt any contract to which a governmental entity is a party. As a result, CBO estimates that this preemption would not significantly affect the budgets of State, local, or tribal governments.

The bill would also preempt State securities laws that regulate the signature and storage of contracts to allow the use of electronic records and signatures. Based on information from the Securities and Exchange Commission and groups representing State Governments, CBO estimates that this preemption would not impose significant costs on State, local, or tribal governments.

PREVIOUS CBO ESTIMATES

On August 20, 1999, CBO transmitted a cost estimate for H.R. 1714, as ordered reported by the House Committee on Commerce on August 5, 1999. On June 30, 1999, CBO transmitted a cost estimate for S. 761, the Third Millennium Digital Commerce Act, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on June 23, 1999. CBO estimated that implementing H.R. 1714 would cost about $1 million a year and S. 761 would cost about $500,000 a year. The difference in these cost estimates are due to the difference in the scope and length of the studies required under the bills.

ESTIMATE PREPARED BY:

Federal Costs: Mark Hadley (226–2860)
Impact on State, Local, and Tribal Governments: Shelley Finlayson (225–3220)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of the rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title. This section states that H.R. 1714 may be cited as the "Electronic Signatures in Global and National Commerce (E–SIGN) Act".

Title I—Validity of Electronic Records and Signatures for Commerce

Sec. 101. Findings. This section outlines the importance of electronic commerce, the benefits of uniformity in electronic transactions and the need for the Federal Government and States to promote and not hinder this new market.

Section 102. Purposes. This section sets forth Congress' goals that a consistent national baseline for electronic commerce, including the clarification of the legal status of electronic records and signatures, be established in order to increase the public's confidence in, and the reliability of, electronic commerce. This section also states that it is Congress' desire that the marketplace, and not proscriptive Government mandates, should direct the continued expansion of electronic commerce growth; and that private parties should be able to agree among themselves as to the terms and conditions on which they use electronic signatures and electronic records.

Section 103. Definitions. This section provides definitions for terms used in the bill. In referring solely to commercial use, the definition of transaction provided in this legislation is intentionally narrower than is provided in the UETA, written by the NCCUSL.

Section 104. Principles Governing the Use of Electronic Signatures in International Transactions. Section 104 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. The principles in this section are consistent with those adopted by the OECD Ministers in a Declaration on Authentication for Electronic Commerce, and proposals for multilateral and bilateral arrangements that are being discussed. These principles are included in order to support the efforts of the Departments of State and Commerce in advocating a technology neutral, market-based approach to electronic transactions and authentication technology. The principles are: 1) Remove paper based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law; 2) Permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that they will be recognized and enforced; 3) Permit parties to a transaction to have the opportunity to prove in court or other proceeding that their authentication approaches are transactions are valid; and 4) Take a non-discriminatory approach to electronic signatures and authentication methods from other jurisdictions.

Section 105. Interstate Contract Certainty. This section sets out the rules governing the legality and enforceability of electronic signatures and electronic records used in commercial transactions affecting interstate commerce in the absence of uniform State laws providing for the legality and enforceability of such electronic signatures and electronic records. It is the intention of the committee that this section serve as a "gap filler" until the States have enacted the UETA. In other words, this section preempts State law until a State adopts the UETA based on the form provided by the NCCUSL or any substantially similar variation thereof.

The bill reported by the Committee on Commerce preempted State law regardless of a State's adoption of the UETA. Further, the bill reported by the Committee on Commerce contained a definition of UETA that is narrower than the definition contained in the Committee on the Judiciary reported bill. The Committee on the Judiciary reported bill's definition, combined with section 105 (e), "Application in UETA States," clarifies that in any State that adopts the UETA, this section shall not apply. It is the committee's view that this definition provides States greater deference.

The rules of good faith and fair dealing apply to electronic commerce. This Act should not be interpreted to allow for terms and conditions which are unreasonable under current law.

105(a) states that in any commercial transaction affecting interstate commerce, a contract may not be denied legal effect or enforceability solely because an electronic signature or electronic record was used in its formation. A contract cannot be denied enforceability that it otherwise has solely because an electronic signature or electronic record was used in its formation. This section is modified by section 105(c), which outlines the rules for electronic contracts when other laws require them to be in writing. Pursuant

to section 103(4), for an electronic signature to be valid under this Act, a person must have intended to sign a contract in order for such contract to be valid.

105(b) provides that in commercial transactions affecting interstate commerce the parties to a contract may agree on the terms and conditions on which they will use and accept electronic signatures and electronic records, except to the extent a law or regulation governing the record provides otherwise. The intent of this Act is to facilitate electronic commerce over the Internet. This legislation is not to be the basis for unfair or deceptive practices to avoid providing mandated information, disclosures, notices or content.

This section creates legal certainty by establishing a default rule in support of the parties' agreement. This default rule would not apply, however, when another law or regulation applies to the record, such as a law or regulation relating to notices, disclosures, mailing or other delivery requirements or those promulgated by a Government entity addressing records used in the entities oversight, supervisory, or regulatory capacity.

105(c) describes the rules regarding retention of records in an electronic format. It states that when a law requires that a contract be in writing, that requirement is satisfied by an electronic record of the information in the record provided to the parties which: 1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and 2) remains capable of retention in a form that can be accessed for later reference and used to prove the terms of the agreement. This section provides that when a contract may be provided electronically, it shall be provided to each party to the contract in a manner in which it can be retained and used at a later time to prove the terms of the contract.

105(d) states that a contract relating to a commercial transaction may not be denied legal effect solely because its formation involved the interaction of electronic agents of the parties or the interaction of an electronic agent of a party and an individual who acts on that individual's own behalf for another person.

105(e) states that this section does not apply in any State in which UETA is in effect. Once a State has adopted the UETA, the Federal preemption is lifted.

Section 106. Study of Legal and Regulatory Barriers to Electronic Commerce. This section directs the Department of Commerce and Office of Management and Budget (OMB) to report to Congress withing 18 months on Federal laws and regulations that might pose barriers to electronic commerce, including suggestions for reform. It is important to note that in conducting this study, the Department of Commerce and the Office of Management and Budget must consult with the Attorney General concerning matters involving the authenticity of records, their storage and retention and their usability for law enforcement purposes.

Section 107. Study of Effects of Electronic Commerce. This section directs the Federal Trade Commission and the Secretary of Commerce to report to Congress not later than two years and every two years after the date of enactment of this Act containing findings regarding the effectiveness of Federal and State consumer protection laws with respect to electronic transactions involving consumers

and the extent to which a uniform commercial legal framework would facilitate and enforce interstate electronic transactions.

Title II-Development and Adoption of Electronic Signature Products and Services. Title II remains unchanged as reported from the Committee on Commerce on August 5, 1999. A section-by-section analysis is contained in Part I of this report. H. Rpt. 106–341.

Title III—Use of Electronic Records and Signatures Under Federal Securities Law. Title III remains unchanged as reported from the Committee on Commerce on August 5, 1999. A section-by-section analysis is contained in Part I of this report. H. Rpt. 106–341

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

SECTION 3 OF THE SECURITIES EXCHANGE ACT OF 1934

DEFINITIONS AND APPLICATION OF TITLE

SEC. 3. (a) * * *

* * * * * * *

(h) REFERENCES TO WRITTEN RECORDS AND SIGNATURES.—

(1) GENERAL VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES.—Except as otherwise provided in this subsection—

(A) if a contract, agreement, or record (as defined in subsection (a)(37)) is required by the securities laws or any rule or regulation thereunder (including a rule or regulation of a self-regulatory organization), and is required by other Federal or State statute, regulation, or other rule of law to be in writing, the legal effect, validity, or enforceability of such contract, agreement, or record shall not be denied on the ground that the contract, agreement, or record is not in writing if the contract, agreement, or record is an electronic record;

(B) if a contract, agreement, or record is required by the securities laws or any rule or regulation thereunder (including a rule or regulation of a self-regulatory organization), and is required by other Federal or State statute, regulation, or other rule of law to be signed, the legal effect, validity, or enforceability of such contract, agreement, or record shall not be denied on the ground that such contract, agreement, or record is not signed or is not affirmed by a signature if the contract, agreement, or record is signed or affirmed by an electronic signature; and

(C) if a broker, dealer, transfer agent, investment adviser, or investment company enters into a contract or agreement with, or accepts a record from, a customer or other counterparty, such broker, dealer, transfer agent, investment adviser, or investment company may accept and

rely upon an electronic signature on such contract, agreement, or record, and such electronic signature shall not be denied legal effect, validity, or enforceability because it is an electronic signature.

(2) IMPLEMENTATION.—

(A) REGULATIONS.—The Commission may prescribe such regulations as may be necessary to carry out this subsection consistent with the public interest and the protection of investors.

(B) NONDISCRIMINATION.—The regulations prescribed by the Commission under subparagraph (A) shall not—

(i) discriminate in favor of or against a specific technology, method, or technique of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; or

(ii) discriminate in favor of or against a specific type or size of entity engaged in the business of facilitating the use of electronic records or electronic signatures.

(3) EXCEPTIONS.—Notwithstanding any other provision of this subsection—

(A) the Commission, an appropriate regulatory agency, or a self-regulatory organization may require that records be filed in a specified electronic format or formats if the records are required to be submitted to the Commission, an appropriate regulatory agency, or a self-regulatory organization, respectively; and

(B) the Commission may require that contracts, agreements, or records relating to purchases and sales, or establishing accounts for conducting purchases and sales, of penny stocks be manually signed, and may require such manual signatures with respect to transactions in similar securities if the Commission determines that such securities are susceptible to fraud and that such fraud would be deterred or prevented by requiring manual signatures.

(4) RELATION TO OTHER LAW.—The provisions of this subsection apply in lieu of the provisions of title I of the Electronic Signatures in Global and National Commerce Act to a contract, agreement, or record (as defined in subsection (a)(37)) that is required by the securities laws.

(5) DEFINITIONS.—As used in this subsection:

(A) ELECTRONIC RECORD.—The term "electronic record" means a writing, document, or other record created, stored, generated, received, or communicated by electronic means.

(B) ELECTRONIC SIGNATURE.—The term "electronic signature" means information or data in electronic form, attached to or logically associated with an electronic record, that is intended by a party to signify agreement to a contract or agreement.

(C) ELECTRONIC.—The term "electronic" means of or relating to technology having electrical, digital, magnetic, optical, electromagnetic, or similar capabilities regardless of medium.

DISSENTING VIEWS

These are the dissenting views of Howard Coble to H.R. 1714, the "Electronic Signatures in Global and National Commerce (E–SIGN) Act," as reported by the Committee on the Judiciary:

Section 105 of Title I of H.R. 1714, the "Electronic Signatures in Global and National Commerce (E–SIGN) Act" as reported by the Committee on the Judiciary leaves the bill incapable of accomplishing its purpose which is to facilitate the continued success of electronic commerce by enabling parties to agree to use electronic signatures and records in commercial transactions affecting interstate commerce. The success of electronic commerce has exceeded all predictions and is positioned to continue to grow. The United States stands only to gain by fostering an environment in which e-commerce can boom and to be an example for foreign countries. While I believe we must carefully balance the interests of the States in enacting State law with the need for national uniformity and certainty, I believe section 105 of title I places too large a road block in front of electronic commerce that threatens to stifle its growth.

First, section 105(a) does nothing. Unlike section 103(a) of the Amendment in the Nature of a Substitute as reported by the Subcommittee on Courts and Intellectual Property, the Berman Amendment in section 105(a) does not make it clear that no "record" or "signature" can be denied legal effect or enforceability solely because it is electronic. It says only that, if in the course of forming a contract, one or more of the parties "used" an electronic signature or electronic record the "usage" is not a ground for denying the legal effectiveness of the contract. It does not address the legal status of records that are wholly electronic or that are signed only by electronic signature. It doesn't change current law. In other words, this section does nothing and provides no more uniformity or certainty than exists today.

Second, section 105(b) contains an exception clause which assures that the provision does literally nothing. This need for a "methods" section is to clarify the essential freedom of contract notion that parties may agree on the kinds of documents they will use or the kinds of contracts they will enter into—including the use of electronic signatures and electronic records. Uncertainty as to when parties are able to use electronic signatures and electronic records is only created by laws or regulations that can be understood to provide otherwise. If there isn't a law that says parties can't make certain agreements or contracts, including the use of electronic signatures and electronic records, then parties already have the freedom to contract to use and accept them. Section 105(b), as amended by the Berman Amendment, says that parties can rely on an agreement to use and accept electronic signatures

and electronic records unless there is some law that says they cannot. This ensures that no law is either changed or clarified.

The exception contained in section 105(b) is apparently intending to prevent parties' agreements from overriding important consumer and other laws. However, the Amendment to H.R. 1714 as reported from the Subcommittee on Courts and Intellectual Property merely allowed electronic records and signatures to substitute for the pen and ink equivalents. All other legal requirements—such as that notices or disclosures be "made," "delivered" or "actually received," that consumers be able to "retain" those notices or disclosures, or that particular statements be "clear and conspicuous"—would be retained, unchanged. The obligation of businesses to demonstrate that they have satisfied those requirements would continue. It also would not change any of the substantive requirements of any consumer disclosure statute. These statutes require "reasonable notice." This could not be satisfied by sending notices and disclosures to a location where the consumer is not. A business could not claim that it satisfied the law by sending a notice to a physical address where the consumer does not reside. Similarly, a business could not satisfy "reasonable notice" requirements by sending an electronic notice to an email address that the consumer does not have.

Third, section 105(c) imposes extreme conditions on contracts that do not exist today under current law. It requires that when a contract is required to be in writing, the requirement that is satisfied by an electronic record of the information in the record provided to *each* party which accurately reflects the information *and* is capable of retention in a form that can be accessed for later reference and used to prove the terms of the agreement. This is not required under current law for written contracts. These requirements could result in contracts that are valid initially becoming invalid because of some later event. For example, section 105(c) seems to require any valid electronic contract to be immutable. If at some point in time, the electronic record (or some copy of it) no longer accurately reflects the original, the legal effectiveness of the contract would be called into question. These additional requirements impede, not facilitate, the use of electronic records.

Fourth, section 105(e) provides such broad latitude to the States in enacting the UETA that the allowable exceptions will result in greater uncertainty and less uniformity than exist today. This is because this section states that the Act "would not apply" in any State in which the UETA is in effect. This, coupled with the expansive definition of the UETA in section 103(7), would give result in the patchwork of State laws that H.R. 1714 originally intended to prevent. There is no requirement for consistency with the federal rule established by the bill. Of course, since there is no new rule established here, there is nothing much with which to be inconsistent.

To the extent that the section has any effect at all, States can alter Federal law by adopting the UETA. Because the Federal rule would simply cease to apply in a State, even federal laws that currently require writings or written signatures would be revived in States that adopt the UETA. Also, in interstate transactions (which is all that the Act would govern), it is difficult to know what it means for a law to cease to apply "in" a State. Each interstate

transaction will involve at least two States. If the UETA is law in one, but not in another, what is the Federal rule? This seems to promote confusion, not uniformity.

I am including in this dissenting view a copy of title I of H.R. 1714 as it would have been reported had the Berman Amendment not been adopted. This would have been a fair and reasonable approach to balancing the need for uniformity and certainty with regard to laws on electronic signatures and electronic regards so as to promote e-commerce and the need for States to retain the ability to require certain contracts and agreements to be in writing. My proposal, which I hope will be what is finally enacted into law, is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Electronic Signatures in Global and National Commerce Act''.

TITLE I—VALIDITY OF ELECTRONIC RECORDS AND SIGNATURES FOR COMMERCE

SEC. 101. DEFINITIONS.

In this Act:

(1) ELECTRONIC.—The term ''electronic'' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

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

(3) ELECTRONIC RECORD.—The term ''electronic record'' means a record created, generated,

sent, communicated, received, or stored by electronic means.

(4) ELECTRONIC SIGNATURE.—The term ''electronic signature'' means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(5) GOVERNMENTAL AGENCY.—The term ''governmental agency'' means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the Federal Government or of a State or of any county, municipality, or other political subdivision of a State.

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

(7) TRANSACTION.—The term ''transaction'' means an action or set of actions relating to the conduct of commerce, including the business and regulation of insurance, between 2 or more persons, nei-

ther of which is the United States Government, a State, or an agency, department, board, commission, authority, institution, or instrumentality of the United States Government or of a State.

(8) UNIFORM ELECTRONIC TRANSACTIONS ACT.—The term ''Uniform Electronic Transactions Act'' means the Uniform Electronic Transactions Act as provided to State legislatures by the National Conference of Commissioners on Uniform State Laws.

SEC. 102. PRINCIPLES GOVERNING THE USE OF ELECTRONIC SIGNATURES IN INTERNATIONAL TRANSACTIONS.

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

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

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

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

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

SEC. 103. INTERSTATE CONTRACT CERTAINTY.

(a) AGREEMENTS AND RECORDS.—The following rules apply to any commercial transaction, including an insurance transaction, affecting interstate commerce:

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

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

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

(4) If a law requires a signature, or provides consequences in the absence of a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature.

(5) If a law requires that certain records be retained, that requirement is met by retaining an electronic record of the information in the record which—

(A) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(B) remains accessible for later reference.

(6) A requirement to retain records in accordance with paragraph (5) does not apply to any infor-

mation whose sole purpose is to enable the record to be sent, communicated, or received.

(7) A person satisfies paragraph (5) by using the services of any other person if the requirements of paragraph (5) are met.

(8) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with paragraph (5).

(9) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with paragraph (5).

(10) A record retained as an electronic record in accordance with paragraph (5) satisfies a law requiring a person to retain records for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this subsection specifically pro-

hibits the use of an electronic record for a specified purpose.

(11) This subsection does not preclude a governmental agency of the United States or any State from specifying additional requirements for the retention of records, written or electronic, subject to the agency's jurisdiction.

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

(c) ELECTRONIC AGENTS.—A contract relating to a commercial transaction affecting interstate commerce may not be denied legal effect solely because its formation involved—

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

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

(d) APPLICATION IN UETA STATES.—This section does not preempt the Uniform Electronic Transactions Act as in effect in a State, so long as the Uniform Electronic Transactions Act as in effect in such State is not inconsistent, in any significant manner, with the form provided by the National Conference of Commissioners on Uniform State Laws.

(e) ADMISSIBILITY OF EVIDENCE.—In a legal proceeding, evidence of an electronic record or electronic signature may not be excluded because it is an electronic record or electronic signature or it is not an original or is not in its original form.

(f) SPECIFIC EXCLUSIONS.—The provisions of this section shall not apply to a statute, regulation, or other rule of law governing any of the following:

(1) Private medical records.

(2) The creation or execution of wills, codicils, or testamentary trusts.

(3) Divorce, marriage, adoption, or other matters of family law.

(4) Court orders or notices, or documents used in court proceedings.

(5) Titles to property.

(6) Landlord-tenant relationships.

(7) The Uniform Anatomical Gift Act.

(8) Premarital agreements.

(9) The Uniform Health-Care Decisions Act.

SEC. 104. STUDY BY ATTORNEY GENERAL.

The Attorney General shall, within 18 months after the date of enactment of this Act, report to the Congress concerning the effect of this Act on the authenticity of records, their storage and retention, and their usability for law enforcement purposes, along with any legislative recommendations.

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