

E-Sign and UETA:
What Should States Do Now?

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Introduction

Congress passed the Federal Electronic Signatures in Global and National Commerce Act² ("E-Sign") in June 2000. This law provides that electronic signatures and electronic records generally satisfy legal requirements for signatures or writings. E-Sign authorizes the substitution of electronic notices for paper notices including most, but not all, types of consumer notices. E-Sign also includes a number of important protections to ensure that consumers can receive, keep and use electronic notices provided to them.

Over twenty states have enacted some version of the Uniform Electronic Transactions Act ("UETA"). This is a proposed Uniform Law on the same subject matter as E-Sign that is recommended by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Some states have enacted the uniform version,³ while other states have added significant consumer protections not found in the uniform version.⁴

E-Sign and UETA are similar in many respects, but they are not at all similar in the way they treat consumers. In consumer transactions, E-Sign requires a specific and electronic consent process before an electronic notice may replace a legally required written notice. UETA merely requires that the parties agree to conduct transactions by electronic means, but does not specify how that agreement is to be proven. Instead, UETA states that agreement is determined from the context and circumstances.⁵ UETA's agreement requirement applies to all types of electronic notices (legal and contractual). UETA undercuts its own basic premise of agreement by permitting the agreement to conduct transactions electronically to be found from the context, including conduct. UETA also permits the agreement for future electronic notices to be given only on paper. UETA does not exempt any categories of consumer notices.

UETA alone is worse for consumers than E-Sign on all major aspects except perhaps UETA's requirement of agreement for electronic notices sent pursuant to contract, as well as its recognition that state agencies can impose added requirements on retained records subject to the agency's jurisdiction. The passage of E-Sign removes the key reason for states to enact UETA to facilitate nationwide acceptance of electronic notices and electronic signatures. Thus, a state might wisely choose not to enact UETA in light of E-Sign. However, the National Conference of Commissioners on Uniform State Laws, UETA's author, has representatives in every state who are expected to continue to seek to enact UETA. If UETA is enacted at all, it should be enacted in a way that does not "modify, limit, or supersede" the consumer protections of E-Sign. Ideally, it should be accompanied by a companion consumer protection act.

Can these two statutes coexist? What is the impact of the federal E-Sign Act in states that have enacted

¹This article is written by Gail Hillebrand and Margot Saunders. It will appear in the January issue of *Cyberspace Lawyer*.

²Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified as 15 U.S.C. §§ 7001-7006, 7021, 7031) (enacted S. 761). For a full text of the final bill, see the Congressional web site: <http://thomas.loc.gov/home/thomas.html> and search for S. 761.

³For information on the status of UETA's passage in the states, see <http://www.uetonline.com>. This site, however, does not list or describe the nonuniform amendments. For the uniform text and comments, see <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>. For a discussion of the nonuniform variation by state, see <http://www.bmck.com/ecommerce/uetacomp.htm>.

⁴Some states also have other laws affecting electronic signatures or electronic records. These laws are preempted to the extent they violate E-Sign's prohibitions against "procedures or requirements that require or accord greater legal status or effect to . . . a specific technology . . .": E-Sign § 102(a)(2)(A)(ii).

⁵UETA § 5.

UETA? Should states that have not passed UETA pass it now? If so, in what form? What else can states do to protect their consumers?

E-Sign contains important consumer protections that are absent from UETA. Like many other federal consumer protection laws, E-Sign contemplates that states may add additional consumer protections which are consistent with the federal act.⁶ Surprisingly, however, E-Sign also contains an apparent optional reverse preemption feature which permits a state to modify, limit, or supersede parts of E-Sign with the uniform version of UETA.⁷ Since E-Sign provides stronger consumer protections than UETA in most areas, care must be taken that future state enactments of UETA do not displace the federal consumer protections of E-Sign. This article describes how to structure any future UETA enactment to avoid interfering with E-Sign's consumer protections. It also offers additional provisions which can and should be added to state law, beyond both UETA and E-Sign, to improve state-level consumer protection in electronic notices.

This article is designed to assist advocates, lawmakers and policymakers, as they face these choices:

- Should UETA be enacted in a state now that the federal E-Sign statute is in place?
- Will UETA, if enacted, displace E-Sign's consumer protections under E-Sign's optional reverse preemption provision?
- What additional consumer protections are needed for electronic notices?
- What consumer protections may states enact as a companion to E-Sign?

⁶E-Sign § 102(a)(2)(A)(ii).

⁷E-Sign § 102(a). E-Sign also permits other state law additions. E-Sign § 102(a)(2).

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E-Sign and UETA: What Should States Do Now?⁸

I. Key Consumer-Related Provisions of E-Sign

The federal E-Sign bill states these two general rules:

- Signatures, contracts or other records may not be denied legal effect, validity, or enforceability solely because they are in electronic form; and
- A contract may not be denied effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

E-Sign expressly affects only requirements that contracts or other records be written, signed or in non-electronic form. All requirements concerning the content and timing of notices found in other law are left undisturbed.⁹ Whether an electronic notice must be "provided" or just "made available" and how it is delivered are issues determined by the underlying statute that requires a notice.¹⁰ Additionally, E-Sign cannot be used to require a

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⁹ "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." E-Sign ' 101(c)(2).

¹⁰ E-Sign ' 102(a)(2)(A). See 146 Cong. Rec. S 5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes) ("State and federal law requirements on delivering documents have not been addressed in this Act. The underlying rules on these issues still prevail. It is our view that records provided electronically to consumers must be provided in a manner that has the same expectation for the consumer's actual receipt as was contemplated when the state law requirement for provided was passed.") It is important to note the close involvement of these three Senators in the passage of E-Sign. Senator Wyden was an original co-sponsor of S. 761, the bill that became E-Sign. Senator Hollings is the ranking member (lead Democrat) on the Senate Commerce Committee, through which the E-Sign bill passed before it went to the Senate floor. Senator Sarbanes, the ranking member of the Senate Banking Committee, was responsible for holding up the bill before it could be considered by

person, other than governmental agencies in certain situations, to agree to use electronic records or signatures.¹¹

A. E-Sign's Consent Requirements

E-Sign qualifies its general rule of validity for electronic records with a special consent requirement for consumer notices required by law. E-Sign's consent rule, found in section 101(c), applies where another statute, regulation or rule of law requires information to be provided or made available to a consumer in writing.¹² It requires all of the following:

- There must be an affirmative consent, which has not been withdrawn.
- The consent must be preceded by a clear and conspicuous statement informing the consumer of all of the following:
 - Any right or option to receive the information on paper (if the option exists),
 - How to withdraw the consent and whether any other consequences, such as fees or termination of the arrangement, will be imposed on the withdrawal,
 - How to update the contact information, and
 - How to obtain a paper copy on request and the fee, if any, for that copy.
- Before the consent is given, the consumer must be provided with a statement of the hardware and software requirements for access to and for retaining the electronic records.
- The consumer's consent must be obtained or confirmed electronically (not just on paper).

the full Senate because consumers were not adequately protected. *See also* 146 Cong. Rec. H 4357-4358 (daily ed. June 14, 2000) (statement of Cong. Dingell) ("[P]rovided that the delivery methods required are electronic and do not require that notices and records be delivered in paper form, States retain their authority under Section 8(b)(2) of UETA to establish delivery requirements.")

¹¹ "This title does not . . . require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party." E-Sign ' 101(b)(2). In fact, this provision should be read to prohibit anyone from requiring another to use electronic records or electronic signatures. However, E-Sign leaves open the possibility of a business simply refusing to contract with consumers who do not wish to contract electronically.

¹² E-Sign contains no clear consent requirement for the use of electronic notices when the notice is given pursuant to contract, rather than to law. However, there are repeated statements in the legislative history that E-Sign requires consent for all electronic consumer notices. *See* 146 Cong. Rec. H4348 (daily ed. June 14, 2000) (statement of Cong. Taupin) ("This is purely voluntary"); 146 Cong. Rec. 4349-4350 (daily ed. June 14, 2000) (statement of Cong. Bliley) ("No one will be forced into using or accepting an electronic signature or record."); 146 Cong. Rec. H4757-4358 (daily ed. June 14, 2000) (statement of Cong. Dingell) ("These provisions require that consumers affirmatively consent to receive information in electronic form."); 146 Cong. Rec. H4360 (daily ed. June 14, 2000) (statement of Cong. Taupin) ("Consumers must opt-in to electronic transactions ."); 146 Cong. Rec. H4363-4364 (daily ed. June 14, 2000) (statement of Cong. Morella) ("For instance, businesses must receive the consumer's consent before they conduct their dealings electronically."); 146 Cong. Rec. H4364 (daily ed. June 14, 2000) (statement of Cong. Inslee) ("It will make sure that only when consumers want to use electronic measures will they be used.").

- The manner of obtaining the electronic consent or confirmation must reasonably demonstrate that the consumer can access information “in the electronic form that will be used to provide the future information.”¹³
- The consumer's consent must be reacquired if there is a change in the hardware or software requirements needed to access or to retain the electronic record and the change creates a material risk that the consumer will not be able to access or store records delivered electronically.

E-Sign’s requirement that consumer consent be given or confirmed electronically is of crucial importance. Paper consent to future electronic transactions creates a risk that consumers will be offered boilerplate paper agreements to receive future electronic notices that they may or may not be able to open and read. The federal requirement that consent be given or confirmed electronically eliminates this risk, at least for notices legally required to be in writing.

In contrast, UETA merely requires agreement, but does not specify how that agreement is to be proven. Instead, UETA states that agreement can be determined from the context and circumstances.¹⁴ UETA undercuts its own basic premise of agreement by permitting the agreement to conduct transactions electronically to be found from the context, including conduct. UETA also permits an agreement to receive future electronic notices to be given only on paper.

B. E-Sign Prohibits Substituting Oral Communications for Written Notices

UETA would allow a tape recording of a voice conversation to qualify as an electronic record that can replace a notice required by law to be in writing. E-Sign explicitly prohibits this for consumer consent forms.¹⁵

C. E-Sign’s Document Integrity and Retention Requirements

Record “integrity” standards are important because both UETA and E-Sign generally allow electronic records to replace documents required by law to be in writing. Yet the law traditionally has made certain inherent assumptions that about the characteristics of paper “writings” that are not necessarily applicable to electronic records:

- A paper writing is by its nature tangible. Once handed to a person a paper writing will not disappear unless lost or destroyed by the recipient.

¹³ This should mean that the consumer must initiate or respond to an email to consent or confirm consent:

I maintain that any standard for affirmative consent must require consumers to consent electronically to the provision of electronic notices and disclosures that verified the consumer’s capacity to access the information in the form in which it would be sent. *Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating email address and the other technical means for accessing the information.* [Emphasis added.]

146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. McCain). *See also* 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) (“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.”)

¹⁴ UETA ‘5.

¹⁵ “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 by applicable law.” E-Sign ‘ 101(c)(6).

- The printed matter on the paper writing will not change each time someone views it. The writing can be used at a later time to prove its contents.
- While the information on the paper can be deliberately changed by forgery, that takes an effort and some skill.

None of those assumptions necessarily applies to an electronic record. Congress recognized these distinctions when it passed E-Sign, and E-Sign's provisions are stronger on these points than UETA. UETA does not require that the format used for electronic records be change-proof or tamper-proof. Under UETA, a record can be sent to a person in a format that allows the record to be inadvertently changed every time it is opened. Imagine the problems that might result if the homeowner's copy of a mortgage note was saved in an automatically-updating word processing format, such that every time the homeowner reviewed the document electronically, the record was saved with a new date on it. The mortgage company will have kept its own electronic copy in a more secure fashion, and will have the technical capacity to prove in a court of law that the electronic document it has in its possession is the same one electronically signed by the homeowner. Yet, if the homeowner had been provided only with a version that can be inadvertently changed, the homeowner will face a much tougher battle using his or her copy to prove the terms of the contract.

E-Sign, while not perfect, attempts to address this concern by requiring that the record be provided in a format that can be accurately reproduced for later reference by all parties who are legally entitled to retain the record.¹⁶ It is important to note that, unlike the consent provisions, the retention and integrity requirements of E-Sign are not limited to consumers; they apply to all users of electronic records.

D. E-Sign Has Specific Exceptions for Certain Consumer Notices

Congress was convinced that some notices to consumers are so important that state law requiring paper notices should not be preempted to allow electronic records to replace paper writings for these types of notices.¹⁷ E-Sign specifically excludes the following consumer notices from the federal rule allowing electronic records to replace writing requirements:¹⁸

- Utility termination and shut offs
- Default, acceleration, repossession, foreclosure or eviction, or a right to cure, under a rental agreement or a mortgage on a principal residence
- Cancellation or termination of health insurance or benefits, and of life insurance benefits (except annuities)
- Product recall or material failure of a product that risks endangering health and safety.¹⁹

UETA has no exceptions for any consumer notices.

E. E-Sign's Consumer Protections May Be Partially Eliminated by Federal Agency Action.

¹⁶E-Sign ' 101(d) and (e).

¹⁷Like UETA, notices relating to wills, family law and the UCC (other than the Statute of Frauds and Articles 2 and 2A) are excluded from the application of E-Sign. E-Sign ' 103(a).

¹⁸In addition to the consumer notices, E-Sign also excludes court orders and notices, as well as official court documents executed in connection with court proceedings. E-Sign ' 103(b)(1).

¹⁹ E-Sign ' 103(b)(2).

The consumer protections provided in E-Sign may prove to be ephemeral -- if opponents to them successfully convince federal agencies to eliminate them. There are a variety of ways this might take place:

- E-Sign's section 104(d) allows a federal regulatory agency to "exempt without condition a specified category or type of record from the requirements relating to consent 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." The federal exemptions listed in section 103(b) are to be studied by the Secretary of Commerce, through the Assistant Secretary for Communication and Information, after three years, and the Secretary is to recommend whether the exemptions remain necessary.²⁰ Also, any federal agency can -- after notice and opportunity for public comment -- find that one or more of these exemptions "are no longer necessary for the protection of consumers" and can then omit it from the list.²¹

- Finally, the federal requirement that the consent be given or confirmed electronically is to be studied by the secretary of Commerce and the Federal Trade Commission after 12 months, with a report on benefits and burdens of the requirement.²²

II. Why UETA Alone Is Bad for Consumers

E-Sign's significant consumer protections on consumer consent, [(101(c))], ability to retain electronic records [101(d)], document integrity [(101(e))] and exclusion of certain essential consumer notices [103(b)(2)] should apply as baseline requirements for all written notices that are to be delivered to consumers electronically. However, E-Sign allows states to "modify, limit or supersede" part of E-Sign by enacting the uniform version of UETA. Consequently, it is essential to understand the dangers to consumers if the uniform version of UETA is the prevailing law.²³

UETA was written as a rule for facilitating voluntary electronic transactions. In their desire to facilitate good transactions, UETA's drafters unintentionally opened the door to authorize some new unsavory practices. Here are some examples of why UETA should not be permitted to simply displace E-Sign.

A. UETA Permits Paper Agreement to Receive Future Notices Electronically

Under UETA, a consumer who does not own a computer could sign a piece of paper in a person-to-person transaction and later find that all notices, disclosures, and records relating to that transaction are to be sent electronically to an email address set up for the consumer by the salesperson.²⁴ UETA's proponents respond that such conduct would violate the basic contractual obligation of good faith and fair dealing, and perhaps also be unconscionable. Consumer advocates believe that clear standards provide better deterrence than relying only upon the standards of good faith and unconscionability.

²⁰E-Sign ' 103(c)(1).

²¹E-Sign ' 103(c)(2).

²²E-Sign ' 105(b).

²³Part III of this Article discusses in more detail the scope of states' power to modify E-Sign, as well as the best methods for states to protect consumers.

²⁴ For a more complete description of the problems and loopholes in UETA, *see*, Gail Hillebrand, *Uniform Electronic Transactions Act: Consumer Nightmare or Opportunity?* NCLC Reports, Summer 1999, posted at <http://www.consumersunion.org/finance/899nclwcw.htm>.

Over two thirds of this nation's households are not yet online, and the percentages of elderly and poor who do not own computers are much higher,²⁵ yet UETA would allow crucial notices which now are required to be physically handed to these consumers to be emailed instead. E-Sign, at least, does not permit paper form agreements to be used as the sole method for consumers without computer skills or equipment to agree to electronic notices. E-Sign prohibits this by requiring that the consumer's consent must be either given or confirmed electronically. Mere paper consent to receive future electronic notices is not sufficient to permit an electronic notice to replace a legally required paper notice.²⁶

B. UETA Does Not Require That Electronic Notices Can Be Opened and Read

Most people have received electronic transmissions that would not open. UETA would allow a consumer to mistakenly agree to receive documents electronically even when the consumer cannot actually open and read the documents. UETA gives a consumer no right to a paper copy of an important document when the email won't open or when it is unreadable if it does open. To assure that the consumer actually has access to the necessary hardware and software to access these documents, the consumer consent process should test and assure capacity to receive electronic notices. E-Sign addresses this issue by requiring that the initial consent both be electronic and that it reasonably demonstrated the ability to receive notices using the consumer's existing technology.

C. UETA Leaves Open a Loophole for Face-to-Face Transactions Where the Salesperson Brings Computer Equipment to the Consumer for One-time Use

Imagine an elderly consumer sitting at home who is visited by an aluminum siding salesperson. The salesperson talks the consumer into agreeing to an expensive contract for new siding. The documents state that the consumer "agrees" that all the information relating to the transaction will be provided electronically. The salesperson takes out a laptop, connects to the Internet through the consumer's telephone line, and asks the consumer to type her name on the computer as he scrolls through the FTC Notice for Door to Door Sales about the consumer's right to cancel, the sales contract, the mortgage on the house, the Truth in Lending disclosures, and other required legal notices. When the salesperson departs, the consumer is left with no paper copies of these key documents. UETA permits this process. E-Sign implicitly prohibits this (although this prohibition could be stronger) by requiring electronic consent or confirmation of consent. A consumer who is in a face-to-face transaction should not be able to consent electronically by using the computer equipment belonging to the seller. That consent does not meet the requirements of E-Sign's section 101(c) because it does not "reasonably demonstrate that the consumer can access information in the electronic form." As Senator McCain said, "[t]his should mean that the consumer must initiate or respond to an email to consent or confirm consent."²⁷ Congressional statements by the sponsors of this legislation indicate that the only rational reading of E-Sign's strict requirements for consent would prohibit this activity.²⁸

²⁵National Telecommunications and Information Administration, U.S. Department of Commerce, *Falling Through the Net: Defining the Digital Divide* (July 1999) Chart II-1, page 62.

²⁶E-Sign also has a provision which explicitly states that it does not require anyone to use electronic records. E-Sign § 101(b).

²⁷146 Cong. Rec. S5219-5222 (daily ed. June 15, 2000) (statement of Sen. McCain).

²⁸ 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 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 email 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 request the consumer to indicate in an emailed response to the provider of the electronic records that he or she

To deal clearly with this issue in state law, North Carolina recently enacted a flat rule that whenever a consumer conducts a "transaction on electronic equipment provided by or through the seller, the consumer [must] . . . be given a written copy of the contract which is not in electronic form."²⁹ This would prevent many unscrupulous business practices from flourishing as a result of the new electronic enabling laws. The North Carolina rule should ensure that the electronic transaction is not used as a subterfuge to avoid actually providing the consumer with information that the consumer needs and is legally entitled to receive.³⁰

D. Both UETA and E-Sign Overlook That Email Can Be Less Certain of Delivery than Regular Mail, but E-Sign's Consent Rules Partially Address this Problem

Both UETA and E-Sign fail to fully address the significant differences between the ease and lack of cost involved in receiving mail through the U.S. Postal Service, and the complexities, ongoing expense, and uncertainties involved with receiving email. The expense includes access to a working computer and access to the Internet. The uncertainties include Internet service provider failure, use of a stale email address and junk mail filtering programs that may incorrectly filter out the message. Until the receipt of email reaches the same level of certainty as the U.S. mail, some care must be taken to assure that the consumer has at least the same expectation of actual receipt of email as for U.S. mail.

Neither UETA nor E-Sign fully recognizes the higher degree of delivery uncertainty with email, but E-Sign takes three important partial steps. First, E-Sign requires that the initial consent be given or confirmed electronically, so that any consumer consenting to receive legally required notices under E-Sign must have and demonstrate the capacity to send email or to go online at the time of the initial consent. Second, E-Sign recognizes that some types of consumer notices are so important that they should be provided on paper.³¹ Third, E-Sign permits additional state law provisions to address delivery issues. Recommended language for a state companion act is found in Part IV.

E. UETA Does Not Fully Assure Unchanged Copies for Later Consumer Use

can access information in the attachments. . . . 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.

106th Congress, 146 Cong. Rec. H4352-4353 (daily ed., June 14, 2000) (statement of Cong. Bliley).

²⁹N.C.G.S. ' 66-308.16(d).

³⁰Part IV recommends a similar, but more clearly "media neutral" rule to achieve the same result. *See* Recommendation # 11.

³¹These include cancellation or termination of utility services, default, acceleration, repossession, foreclosure, eviction, or right to cure agreements affecting a primary residence, cancellation of health or life insurance, and recall or material failure of a product. E-Sign ' 103(b)(2).

UETA does not fully account for the different inherent characteristics between paper documents and electronic records. Unlike paper records, electronic records can be accidentally altered when one intended only to view the contents. For electronic records to provide the same degree of certainty as paper records, the electronic records must be protected from both inadvertent and intentional changes, that is, they must be maintained in a "Read-only" form. Under UETA, a person could inadvertently change a single byte on an electronic document memorializing an important transaction and then find that the electronic record is useless if a dispute arises, because the record is no longer exactly as it was when it was signed by the parties. UETA requires that an electronic record substituting for a legal notice be capable of retention, but it does not say that the form of retention must permit accurate later reproduction.³² E-Sign adds a requirement that the document be provided in a form in which it can be accurately reproduced by all parties who are entitled to a copy.³³ E-Sign also contains a provision permitting a court to deny enforcement of an electronic record that was not properly retained.³⁴

F. Other Provisions.

UETA's proponents contend that UETA's section 10 includes a new consumer protection in the form of a right to cancel a transaction when a record was sent in error and all benefit and value is returned. However, this error correction provision explicitly does not apply if the original transaction included an "opportunity for prevention or correction" of the error, such as any confirmation screen. Unless interpreted by a court to require an effective, well-designed prevention opportunity that draws an active response from the consumer, rather than just any passive order confirmation screen, any benefits of the error correction provision of UETA section 10 are likely to be largely illusory.

III. Relationship of E-Sign and UETA

A. Preemption

E-Sign is a messy concoction of provisions that 1) partially preempt state law, 2) allow states to regain control over their own electronic rules subject to some limitations, and 3) apply a federal rule to state transactions unless a state acts in a very specific way. The mission is to thread our way through the complexities of this statute and decipher how it relates to existing and future state laws on electronic signatures and electronic records. Several sections have very different standards:

- **Section 101 - General Rule of Validity.** Section 101 applies to any rule of law regarding the legality of a signature or a writing requirement. To the extent that state rules are different from any of the rules in section 101 -- either the general rule in subsection (a) or any of the limitations on that general rule in the remaining following subsections (including the consumer protection provisions in (c), (d) and (e)) -- the initial rule is that those *differences are preempted*. Thus, if nothing else happens in a state, the general rules for electronic records and signatures established section 101 are the prevailing law.
- **Section 102 - Exemption to Preemption.** This section is somewhat misnamed because it achieves several different purposes. First, it allows states to *partially* avoid the preemptive effects of E-Sign's section 101, so long as the states follow the rules set out in section 102. This permission to the states is only partial because a state's attempt to avoid the preemptive effect of E-Sign's section 101 is limited by the two tests

³²UETA's section 8(a) requires that a record be provided in an "electronic record capable of retention by the recipient at the time of receipt." There is no discussion addressing the recipient's ability to accurately reproduce the document later in a form that allows proof of its terms in court.

³³E-Sign ' 101(e).

³⁴Id.

established in section 102.

One distinction that arises from a close analysis of the relationship of section 102 to the rest of E-Sign is the difference between a state's *ability* to avoid preemption, and the question of whether the particular requirements in E-Sign can be *displaced* by state action. In other words, the difference between a state being able to maintain the effectiveness of its own laws, and acting to intentionally nullify the application of the particular requirements of E-Sign as to that state. This issue is particularly important to the question of whether the consumer protections in section 101(c), (d) and (e) apply to consumer transactions in a state when there has also been any state activity. Congressional intent indicates that a state that intends to displace the federal consumer protections must do so *deliberately*, even if it otherwise acts to avoid the preemptive effects of E-Sign's general rule, which authorizes substitution of writings and signatures with electronic records and electronic signatures.³⁵ Similarly, no preexisting state law can be used to *displace* the specific requirements of E-Sign, yet parts of that preexisting state law may not be preempted under section 101. (*See* discussion in Part C, Option 1, below.)

- **Section 103 - Specific Exceptions.** This section has two impacts, one overt and one implicit. The protections in this section are cast as an exception to the preemptive effects of section 101 ("The provisions of section 101 shall not apply to . . ."). Unfortunately, the section 103 exemptions from electronic delivery affect only the applicability of the federal law on the subject, they do not mandate that state laws observe those exemptions; thus states remain free to recognize electronic records for the enumerated communications. (*See* discussion in Parts III C and III D below for more on this.) In states where valid state laws allow these notices to be electronic and no state law requires paper, E-Sign's exemptions do not apply.

The other effect of the exemptions listed in section 103 is to limit the exemptions to UETA that a state may enact. Section 3(b)(4) of the Uniform version of UETA anticipates that states will exempt certain transactions from the effects of UETA. However, E-Sign specifically *limits* a state's ability to displace E-Sign with such exceptions in section 102(a)(1), which reaffirms that to "the extent [that] exception is inconsistent with this title or title II . . ." those UETA exceptions are preempted. As the only exemptions listed in E-Sign are listed in section 103,³⁶ those exemptions provide the test against which state exemptions from UETA should be measured.³⁷

³⁵146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) ("In addition, subsection (a)(2)(B) requires that a State that utilizes subsection (a)(2) to escape federal preemption must make specific references to this Act in any statute, regulation or other rule of law enacted or adopted after the date of enactment of this Act.")

³⁶ This provision provides a potential enormous 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).

146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

³⁷It is not clear whether the "inconsistent" test for exemptions limits the consumer notices only to those explicitly described in E-Sign's section 103(b), or if notices similar to and consistent with these categories of notices might be covered as well.

- Section 104 - Applicability to Federal and State Governments. This section includes limitations on the authority that states (and the federal agencies) otherwise have to adopt interpretive guidelines on electronic records under E-Sign. It specifically preempts states from adopting regulations which are inconsistent with E-Sign, or that do not meet the listed requirements in section 104(b)(2).³⁸ Federal and state agencies are also prohibited from reimposing any requirement that a record be in a tangible printed form, except in certain narrow circumstances. However, section 104 limits state action only so long as section 101 applies, because section 104 anticipates rulemaking *pursuant to section 101*. If a state escapes the preemptive effects of section 101, then section 104 should not limit a state's rulemaking authority with regard to its own laws.³⁹ E-Sign's limitations on a state's rulemaking ability provide one of the best reasons for states to adopt the uniform version of UETA, as UETA's sections 12(f) and (g) allow states considerable latitude in these areas, *however, UETA should not be adopted unless the state also adopts a companion act providing for consumer protections.*⁴⁰

B. Displacement

E-Sign's section 102 permits states to *displace part of E-Sign*. A state can displace part of E-Sign, that is, avoid the preemptive effect of section 101, if it meets one of the two tests established in section 102. As such it appears to operate as an optional A reverse preemptions provision. The only part of E-Sign that states may modify or supersede, that is, displace, is section 101 (though, as noted above, displacing section 101 also displaces those provisions that derive directly from section 101, such as the limits on state action set forth in section 104). Section 101(a) contains the general rule authorizing substitution of writings and signatures with electronic records and electronic signatures, and sections 101(c), (d), and (e), and 103(b) contain the key consumer protections. A sensible

³⁸ The limitations on interpretive authority in section 104(b)(2) are:

- (2) Notwithstanding paragraph (1), . . . a state regulatory agency is preempted by section 101 from adopting any regulation order, or guidance described in paragraph (1) unless--
 - (A) such regulation, order, or guidance is consistent with section 101;
 - (B) such regulation, order, or guidance does not add to the requirements of such section;
 - and
 - (C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that --
 - (i) there is substantial justification for the regulation, order, or guidance;
 - (ii) the methods selected to carry out that purpose --
 - (I) are substantially equivalent to the requirements imposed on records that are not electronic records; and
 - (II) will not impose unreasonable costs on the acceptance and use of electronic records; and
 - (iii) the methods selected to carry out that purpose do not require, or accord greater legal status or effect to, the implementation or application of a specific technology specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.

Federal and state agencies are also prohibited from reimposing any requirement that a record be in a tangible printed form.

³⁹See discussion on this point in Part II C 2. A state's ability to avoid the application of the strictures of section 104 on the state's rulemaking ability depends upon whether E-Sign's section 101 governs electronic transactions in the state or whether UETA displaces E-Sign. As the limitations in section 104 are derivative of the application of section 101, section 104 should not apply to a state if section 101 does not apply.

⁴⁰See *infra* Part III C, Option 1.

reading of section 102(a)'s authorization for a state to modify, limit, or supersede" section 101 would be that states are permitted to alter section 101(a)'s general rule authorizing the use of electronic records and signatures by imposing either UETA or other allowable state law, *leaving E-Sign's rules for consumer consent still applicable*. However, another reading of section 102 is that it permits states to modify or displace all of section 101, including the consumer consent requirements of section 101(c) and the related consumer protections of sections 101(d) and (e). The effect on the exemptions to E-Sign in section 103(b) is discussed in Part III D, below.

This section discusses the options available to states in light of E-Sign. If a state that has not already adopted UETA proceeds to do so, it should include the language recommended in Part IV in a companion law. This companion law should be enacted at the same time the state adopts UETA, and in the same bill.

If a state has already adopted UETA, we recommend that the state either enact a new law establishing consumer protections or add a section to its UETA clearly establishing or deferring to E-Sign's consumer protections. Part IV offers text for such state legislation.

E-Sign contemplates two kinds of state legislation on electronic notices and electronic signatures. These two kinds of state statutes are: 1) UETA, and 2) another law which "specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures."⁴¹ Nothing prohibits a state from enacting both UETA and a companion consumer protection law, and indeed the legislative history suggests that this was contemplated.⁴² The companion law must:

⁴¹ ' 102(a) The language authorizing the two approaches (UETA and companion statute) reads:

(a) In General.--A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law--

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or title II, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if--

(i) such alternative procedures or requirements are consistent with this title and title II; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

⁴²See 146 Cong. Rec. S 5229 B5230 (daily ed., June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes) ("These choices for states are not mutually exclusive.")

See also 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) ("[S]ome states are

- Be consistent with E-Sign
- Specify alternative procedures or requirements for the use or acceptance of electronics records and signatures
- Not favor one technology over another, and
- Make reference to the federal Act if it is adopted after E-Sign.

States are being asked by NCCUSL commissioners to adopt UETA. Part B discusses five choices for states. Options One, Two and Three are recommended. Option One is UETA with a companion consumer protection statute; Option Two is a consumer protection statute without UETA; and Option Three, a minimalist approach, calls for UETA with an additional provision stating that the consumer protections in E-Sign are preserved. Option Four - no UETA at all, is perfectly acceptable, but given the strong push made by NCCUSL, may not prevail. Option Five, UETA alone, is not recommended. Part IV provides statutory language to implement these recommended options.

States that adopted some version of UETA prior to the passage of E-Sign have different issues to consider, and may also wish to enact a companion statute. Part III D, below, discusses strategies in these states.

C. Choices for States that Have Not Adopted UETA

E-Sign section 102(a)(1) creates uncertainty about what consumer protections apply in a state that enacts the uniform version of UETA in the future. A key question is the scope of the displacement effected by the adoption of UETA. It is not clear whether passage of UETA displaces just E-Sign's validation of electronic signatures and contracts [found primarily in section 101(a)] or displaces that provision plus its consumer protections [found in section 101(c), (d) and (e)]. E-Sign can be read either way.⁴³ The displacement rule could have been intended to reach only the general rule of validity in section 101(a), even if more than section 101(a) can be affected by state law. Even if the provision is read broadly, it still does not state that passage of UETA automatically displaces E-Sign, only that a state may use it to do so.

A reasonable interpretation of the federal law's optional displacement provision, also referred to here as a "reverse preemption" provision, is that the consumer protection provisions in the federal E-Sign continue to apply in a state which has passed UETA unless the state law enacting UETA states an express intent to displace E-Sign's consumer protection provisions. This interpretation is supported by the legislative history:

Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points. A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effects. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in

enacting or adopting a strict, unamended version of UETA as well as enacting of 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) . . . and (a)(2)."

⁴³E-Sign's legislative history, however, is replete with statements about how E-Sign provides consumer protections.

section 101(c).⁴⁴

Displacement of federal consumer protections is a rare event, and one that should not simply be implied in the absence of a clear legislative statement of intent to do so.

Nonetheless, UETA's proponents argue that any uniform enactment of UETA eliminates the application of the consumer protections in E-Sign.⁴⁵ **While this seems an unlikely result when there has been no statement of an intent to displace those protections in addition to E-Sign's provisions regarding the use of electronic records and signatures, the safest course for any state enacting UETA is either to:**

- 1) **reenact E-Sign's consumer protections into state law in a statute which is a companion to UETA and to E-Sign, or**
- 2) **expressly state that enactment of UETA is not intended to modify, limit or supersede the consumer protections of E-Sign sections 101(c), (d) and (e); and to copy into state law the exemptions in section 103(b).**

Option One B UETA with a Companion Consumer Protection Law on Electronic Notices

The preferred approach is for a state to enact both UETA and a companion law of the type permitted under section 102(a)(2) of E-Sign. This route is best for a number of reasons. First, it would allow the state to address issues which are not included in E-Sign. Second, this approach ensures that a state can continue to apply its own rules for record retention for evidentiary, audit or regulatory purposes.⁴⁶

This subsection discusses the electronic notice⁴⁷ provisions of such a law. The state companion statute should reenact certain parts of E-Sign into state law and add other provisions. The E-Sign consumer protections that should be reenacted into state law are the provisions relating to:⁴⁸

- 1) Consumer electronic consent to engage in electronic transactions (*Recommendation # 1*).
- 2) Document retention and integrity (*Recommendation # 2*).
- 3) Exclusion of recordings of oral communications from the definition of an electronic record (*Recommendation # 3*).
- 4) Exemptions of certain notices from electronic records (*Recommendation # 4*).
- 5) A definition of consumer transactions (*Recommendation #5*).

Adding all of these items to the companion act is essential to ensure that a post E-Sign UETA will not undo what E-

⁴⁴146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

⁴⁵Patricia Brumfield Fry, AA *Preliminary Analysis of Federal and State Electronic Commerce Laws UETA Online.* <http://www.uetonline.com/docs/pfry700.html> Yet, it is hard to see how a state enactment of UETA which occurred prior to E-Sign could displace E-Sign. See note 35, *supra*.

⁴⁶*Compare* E-Sign section 104 with UETA sections 12(f) and (g).

⁴⁷ There may be other consumer protections that would be desirable in connection with electronic signatures, including rules for loss allocation in the event of theft or manipulation of the electronic signature. These rules are beyond the scope of this article.

⁴⁸See Part IV, *infra*.

Sign has just done to protect consumers.

The companion act should also address issues left to the states for further legislation under E-Sign section 102(a)(2), and not addressed by UETA. Those issues include:

- 6) A general no-waiver rule for the state ' s electronic consumer protections (*Recommendation # 6*).
- 7) A mutuality rule so that consumers can effectively respond to notices which they receive electronically (*Recommendation # 7*).
- 8) The time at which an electronic record is considered delivered (*Recommendation # 8*).
- 9) The time at which an electronic record becomes effective (*Recommendation # 9*).
- 10) The effect of a record that cannot be, or is not, opened or read when received (*Recommendation # 10*).
- 11) Preservation of hand delivery of documents in face-to-face transactions (*Recommendation # 11*).
- 12) Designation of the place where an electronic contract with a consumer is formed (*Recommendation # 12*).
- 13) Protections in connection with the transfer of electronic loan notes (*Recommendation # 13*).

Finally, any state law addressing electronic records and signatures adopted after E-Sign should also:

- 14) Establish that state law supplements, rather than displaces, the federal E-Sign law (*Recommendation # 14*).

Option Two B Companion Consumer Protection Law Permitted by E-Sign Without UETA

Another choice is for a state to enact the recommended provisions as a companion to E-Sign, without also enacting UETA. The benefits of this approach are the same as those discussed in the "AUETA plus companion" approach, and the enacting language would be very similar to the language recommended for that approach. *See Part IV.*

Option Three B UETA with a "No Displacement" Statement

Despite the poor case for a need for UETA after E-Sign, UETA ' s author, the National Conference of Commissioners on Uniform State Laws, is expected to continue to seek state-by-state enactment of UETA. At a minimum, any future UETA enactment should include plain language stating:

This act is not intended to modify, limit, or supersede the requirements of section 101(c), (d), or (e), or to authorize the electronic delivery of any notice of the type described in section 103(b), of the federal Electronic Signatures in Global and National Commerce Act.

Without this language, there might be litigation over whether or not a future UETA was intended to displace E-Sign, including E-Sign's consumer protections. There is also a risk that E-Sign ' s exemptions could be undone by UETA, so that even essential notices such as utility shutoff notices could be sent electronically to someone who might be unable to open and read them. Without this "no displacement" language as part of any UETA bill, a state ' s consumers are better off without UETA.

Option Four B No UETA

States may choose not to enact UETA, and simply rely on E-Sign to both authorize electronic notices and to provide

accompanying consumer protections.⁴⁹ This approach gives consumers the protection of the federal consent and related requirements, and leaves the federal exemptions for key consumer notices (such as utility shutoff, foreclosure and life and health insurance cancellation) in place. It also provides the better rules for document integrity and retention contained in E-Sign, and avoids the UETA loophole allowing a recording of a phone call to satisfy a requirement for a writing.

At the same time, this approach leaves a state's consumers open to a possible future watering-down of federal consumer protection standards. The federal exemptions are to be studied by the Secretary of Commerce, through the Assistant Secretary for Communication and Information, after three years. The Secretary is to recommend whether the exemptions remain necessary. The federal requirement that the consent be given or confirmed electronically is to be studied by the secretary of Commerce and the Federal Trade Commission after 12 months, with a report on benefits and burdens of the requirement.

Despite this concern, however, the one UETA approach is a clean and simple solution, and one that consumer protection policymakers and advocates should seriously consider.

Option Five B UETA Alone B Not Recommended

UETA alone is not recommended, for the reasons discussed in Part II. Because of the risk that a court might hold that UETA displaces all of E-Sign section 101, including its consumer protections, consumers are better off without UETA alone.

D. Effect of Earlier-Enacted UETAs

There are two potential consequences in a state that passed UETA B or another law legalizing electronic signatures and electronic records⁵⁰ B before E-Sign was enacted:

- 1) E-Sign completely preempts and displaces the state UETA, leaving E-Sign the only effective law on the issues addressed in E-Sign and UETA.
- 2) E-Sign preempts and displaces UETA on those issues that are addressed in E-Sign, but leaves other parts of the state law intact if they meet the standards of general preemption analysis.

Some may argue that a third result might be possible: that E-Sign does not apply in the state because a previously enacted UETA B or the other state law B meets one of the tests in E-Sign section 102(a)(1) or (2). Given the clear Congressional intent, as expressed in E-Sign as well as in the accompanying legislative history, this argument should not succeed.

The issue is especially complex because it is entirely possible for *both* UETA and E-Sign to be applicable in a state. The question then becomes, what happens to a non-uniform previously passed UETA?

1. Pre-E-Sign State Law Does Not Displace E-Sign

E-Sign should apply in all states that had previously passed UETA B both uniform and non-uniform B and as well as

⁴⁹The one potential protection contained in UETA that would be lost under this approach is UETA's underlying requirement that all electronic notices (even those not required by law to be in writing) be sent only after there is an agreement to communicate electronically. However, UETA significantly undercuts this protection by suggesting that the agreement can be inferred from circumstances such as conduct. Unfortunately some could argue that such conduct might be as simple as listing an email address in a paper form contract. UETA ' 5.

⁵⁰ State laws on electronic records or signatures, not based on UETA should be analyzed in the same manner as non-uniform UETAs.

any other law legalizing electronic records and electronic signatures. This means that B at the least B on all issues that are addressed in E-Sign, E-Sign is the prevailing law. For the purposes of consumer protection, the provisions of E-Sign ' s section 101(c), (d) and (e) should apply in all those states. The question of whether any part of the pre-E-Sign state law is still in effect after E-Sign is addressed below.

E-Sign ' s legislative history establishes that prior state statutes do not displace it. Statements by the bill sponsors and other members closely involved with the passage of E-Sign bill indicate it was Congress ' intent that E-Sign could be displaced (in part) only by a post-E-Sign state statute:

A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of section 101.⁵¹

Speaking to a related topic, Congressman Bliley, the original sponsor of the E-Sign bill in the House,⁵² and the Chair of the Conference Committee on E-Sign, emphasized that prior passage of a state law does not eliminate the application of E-Sign in a state.

[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. . . .⁵³

Logic also supports the conclusion that prior statutes do not displace E-Sign. E-Sign and prior state UETAs can coexist without either being displaced. A merchant dealing with a consumer can comply with both the general rules of UETA and the more specific E-Sign consumer protections. In addition, it would be extremely odd for a UETA enacted before E-Sign to displace the subsequent federal statute. If Congress had wanted prior uniform UETAs to displace E-Sign, it could have made E-Sign applicable only in states lacking a uniform UETA. It did not do so. Thus, a state may only displace E-Sign with legislation enacted after E-Sign that meets one of the two tests set forth in section 102.⁵⁴

2. Does E-Sign Preempt Prior UETAs?

The honest answer is maybe: It depends on what is in those statutes, whether they interfere with E-Sign, and the extent to which they address issues left to the states by E-Sign.

Uniform UETAs. E-Sign probably does not preempt preexisting uniform UETAs. As the statute expressly allows them to be enacted after E-Sign, they would seem to pass a general consistency test. With a preexisting uniform UETA (or with a post E-Sign UETA that does not state an intent to displace E-Sign), E-Sign ' s rules would simply apply as an overlay to UETA ' s more general rules. For example, in a consumer transaction, UETA requires general agreement to communicate electronically, while E-Sign adds a requirement for a specific form of consent for legally required notices to consumers.

Non-Uniform UETA. Again, Congressman Bliley provides us the window to congressional intent:

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 without amendment. Any variation or derivation from the exact UETA document reported and recommended for enactment by

⁵¹146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

⁵²H.R. 1714, 106th Cong., 1st Sess (1999).

⁵³See 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

⁵⁴ See *supra* parts III A and B.

NCCUSL shall not qualify under subsection (a)(1). Instead, such efforts and other efforts may or may not be eligible under subsection (a)(2). Thus, a State that enacted a modified version of UETA would not be preempted to the extent that the enactment or adoption by a State met the conditions imposed in subsection (a)(2).⁵⁵

A non-uniform version of UETA will not meet the requirements of the first test for displacement, E-Sign's section 102(a)(1), that allows a state to displace E-Sign with a statute that constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved or recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1999."

When a state non-uniform UETA, passed prior to E-Sign is evaluated under the second test for displacement, E-Sign section 102(a)(2)(A), there are two possible outcomes. First, if the state law is not consistent with E-Sign, it is preempted. It does not qualify for displacement, or "reverse preemption," under either the first test of section 102(a)(1) (uniform UETA) or under the second test of section 102(a)(2)(A) (other state law consistent with E-Sign). However, a second possible outcome is that parts of the state law are preempted and other parts are not. It is easy to imagine many pre-E-Sign provisions that are consistent with E-Sign, such as a definition of when something is delivered, a topic E-Sign leaves open to the states.⁵⁶

The analysis for nonuniform UETAs is first: "Is there explicit preemption," and if not, "Is there implied preemption because the state law conflicts with the federal law?"

Explicit preemption. Whether a federal statute preempts state law depends upon whether Congress intended that it do so.⁵⁷ Congress can evince that intent either explicitly, with the language of the statute, or implicitly. Only three parts of E-Sign contain explicitly preemptive language: sections 101(a), 102(a)(1), and 104. First, section 101(a) says that its rule is notwithstanding any other provision of law." This phrase applies to section 101(a) of E-Sign, which states the twin general rules:

- A rule that a signature, contract, or other record in a transaction relating to interstate commerce may not be denied legal effect, enforceability, or validity solely because it is in electronic form, and
- A rule that a contract relating to a transaction in interstate commerce cannot be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

A nonuniform provision of a state UETA which regulates when and how electronic signatures and records can be sent or delivered, or the effect of a record or signature on the sender's or recipient's rights, should not be **explicitly** preempted because it does not deny effect to an electronic signature or electronic record solely because it is in electronic form. (E-Sign section 101.)

The explicit preemption extends to exemptions to the scope of the uniform UETA, but only if those exemptions are inconsistent with E-Sign. This is the cross reference of E-Sign's exemptions for certain transactions and consumer notices in section 103 with the explicit language in section 102(a)(1).⁵⁸ Thus it appears that any exemptions from

⁵⁵146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

⁵⁶In these states, since E-Sign is not subject to "reverse preemption" the consumer protection provisions of section 101(c)(d) and (e) are fully applicable. Also, unfortunately for the states, in those instances where there is a conflict between E-Sign's provisions and those in UETA, E-Sign's preemption should prevail. Thus, on the issue of whether the rule for record retention is governed by UETA's sections 12(f) and (g) or by E-Sign's sections 101 and 104, E-Sign's rules will apply.

⁵⁷*Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996).

⁵⁸E-Sign Section 102(a)(1) limits the states' authority if it passes the uniform version of UETA: "except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the

UETA are limited to those that are consistent with E-Sign; inconsistent exemptions are preempted.

The other explicit preemption in E-Sign is found in section 104, in which a state's authority to issue interpretative regulations of the effects of section 101 are preempted by the specific limitations in section 104. The phrasing of section 104 is specific, and therefore the preemption is explicit. *However, the preemption explicitly flows only along with the application of the rules of section 101.* To the extent that section 101 preempts state law, then the state is limited in how it can apply its own rules. However, once a state avoids the preemption found in 101 -- by complying with the requirements in section 102 -- the provisions of section 101 no longer apply in the state, and accordingly the limitations of section 104 do not apply either. Some may argue that the preemptive provisions in section 104 are general in nature & that they apply to both a state UETA as well as the federal E-Sign law. But this interpretation is defeated by a close analysis of the language of section 104, as well as by the legislative history.⁵⁹ There is no equivalent language about interpreting UETA or other state law enacted pursuant to section 102(a) in compliance with the strictures in section 104. This is despite the fact that the uniform version of UETA quite specifically includes the grant of authority to states in sections 12(f) and (g).

Implicit Preemption. Even where Congress does not explicitly state that it intends to preempt state law on the subject of the federal statute, courts may construe an implicit intent in one of two ways. First, a federal statute that creates a scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" demonstrates implicit intent to preempt state regulation.⁶⁰

Second, federal law may preempt state law to the extent that it actually conflicts with federal law.⁶¹ The conflict may arise where it is physically impossible to comply with both the federal and state regulations, or where the law stands ' as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. ' "⁶²

However, it is doubtful that there can be any implied preemption in the case of E-Sign. Nothing about this federal statute meets any of the tests for implied preemption. The entire construct of E-is to fill a void regarding electronic commerce *unless and until the states move to act.* Under the "pervasive scheme" prong of implicit preemption (as opposed to the "actual conflict" prong), where the subject matter of the regulation is one traditionally handled by the states, the Supreme Court has stated the following:

The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress,' In other words, we are not to conclude that Congress legislated the ouster of [the state statute by the federal rule] in the absence of an unambiguous congressional mandate to that effect.⁶³

extent such exception is inconsistent with this title" *See supra* Part III A.

⁵⁹ *See* 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley) ("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.") (Emphasis added). *See supra* Part III A, in discussion regarding E-Sign ' 104.

⁶⁰ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁶¹ *See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (holding that the federal Pregnancy Discrimination Act did not preempt California's own, more protective, anti-discrimination statute as employers could comply with both and Congress did not intend the federal Act to be a ceiling on benefits).

⁶² *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶³ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963) (holding that the Federal Agricultural Marketing Agreement Act of 1937 did not preempt California's stricter standards for avocados) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

So, by definition, the first test B whether the federal law creates a scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" does not apply. Instead, the premise of E-Sign B as evidenced in section 102 B is that federal and state law will work together to create a set of rules for electronic transactions.

The second standard for implied preemption is also simple to apply to E-Sign B if the issue does not conflict with E-Sign, there can be no preemption of a provision addressing it in state law. Indeed, the legislative history on E-Sign is replete with examples of issues affecting electronic records which are not addressed in E-Sign and which Congress deliberately left to the states to address. The primary example of this is the question of when an electronic record is considered delivered.⁶⁴

The national standard for electronic transactions that is contemplated by E-Sign is articulated in 1) E-Sign's section 101, 2) along with the uniform version of UETA, and 3) any other provisions which are consistent with E-Sign and not addressed in E-Sign. Whether these "other" provisions are contained in a non-uniform version of UETA or in another state law, should not matter. The determination of whether any provision not in the uniform version of UETA affecting electronic records and electronic signatures is preempted by federal law is measured by one of two tests:

- 1) If the matter is addressed in E-Sign, then the provision must be consistent with E-Sign, or else it is preempted.
- 2) If the matter is not addressed in E-Sign, it is not preempted.

Some nonuniform provisions of a state UETA should survive E-Sign under this preemption analysis. It is easy to imagine a pre-E-Sign provision that is consistent with E-Sign. Questions left open by Congress for the states to address, such as the definition of when something is delivered, should be effective when answered by a non-uniform state UETA or other state law.

3. E-Sign Does Not Transform Nonuniform UETAs into Uniform Ones

⁶⁴See 146 Cong. Rec. S 5219-5222 (daily ed., June 15, 2000) (statement of Sen. McCain):

Thus, a State enacting UETA may continue to prescribe specific delivery methods, so long as there is an electronic alternative for any nonelectronic delivery methods.

This leaves the question of how the federal legislation will affect Federal delivery requirements and State delivery requirements in non-UETA states. Because our bill is silent on this question, and because repeal and preemption by implication is disfavored, a court or agency interpreting the legislation could reasonably conclude that these Federal and State delivery requirements remain in full force and effect. Indeed, this interpretation is practically compelled by the plain language of the legislative text. It does however, have the potential to undermine one of our key legislative objectives B that is, the elimination of unintended and unwarranted barriers to electronic commerce. For this reason it will be tempting to discern in this legislation some sort of plan to permit electronic delivery of information whenever delivery is required by law, even when the law specifies a particular method by which delivery must be made. *Let me assure the courts and regulators that have occasion to read these words that this legislator had no such plan.* (Emphasis added.)

UETA's proponents suggest that even if all or many of the nonuniform parts of an enacted UETA are preempted, the uniform parts survive, transforming a nonuniform UETA into a uniform one.⁶⁵ This argument turns the insistence of state legislatures on non-uniform UETAs on its head.⁶⁶ Nonuniform UETAs were enacted in states that were originally offered the uniform UETA. Those state legislatures deliberately refused to pass UETA without changes, generally to protect consumers. If those state legislatures had found UETA adequate without the nonuniform consumer protection additions, then they could have simply enacted the uniform version. The fact that state legislators made nonuniform changes to UETA is strong evidence that those legislators did not intend the uniform version of UETA to become law in their states. Clearly, E-Sign applies to these states because no state law has displaced the application of E-Sign. The tests for whether some of the non-uniform provisions of UETA are still good are determined by the questions examined above, 1) if the matter is addressed in E-Sign, then the provision must be consistent with E-Sign, and 2) if the matter is not addressed in E-Sign, it is not preempted, and is still good law.

4. Recommendation for States with Pre-existing UETAs

States that passed a nonuniform version of UETA prior to E-Sign should examine the provisions of their nonuniform act and determine whether those provisions are consistent with E-Sign. If they are not consistent, for example, the state had chosen a strategy of exemptions (broader than the federal exemptions) to UETA to address consumer protection concerns, then that state should revise its statute to address the same consumer protection issues in a different manner such as in the companion consumer protection statute set forth in Part IV. Furthermore, E-Sign permits state legislatures to address issues left open by E-Sign, including delivery, format, and effect of electronic messages.

States that passed any UETA prior to E-Sign should adopt a companion act addressing consumer protection issues left to the states by E-Sign. To regain state control over record retention issues, states which passed UETA prior to the passage of E-Sign may choose to pass the uniform version of UETA, **but should do so only with a companion consumer protection act.** See the recommendations in Part III B, above.

E. Can a State Permit Electronic Delivery of the Notices Exempted in E-Sign?

The impact of E-Sign's exemption of key consumer notices in section 103(b) on state law is also tricky. Unfortunately, the answer to this question is probably Ayes, the state can displace this provision if the state deliberately acts on these notices." A close analysis of the structure of E-Sign is necessary.

Section 101(a) of the federal law preempts other laws on the issue of allowing electronic signatures and electronic records to replace paper writings: "Notwithstanding any statute . . . with respect to any transaction in or affecting

⁶⁵Patricia Brumfield Fry, *AA Preliminary Analysis of Federal and State Electronic Commerce Laws UETA Online.* <http://www.jetaonline.com/docs/pfry700.html> Yet, it is hard to see how a state enactment of UETA which occurred prior to E-Sign could displace E-Sign, (*Id.*), and the legislative history of E-Sign also is to the contrary. See 146 Cong. Rec. H4352-4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

⁶⁶*See id.*:

As stated above, subsection (a)(2) is designed to cover any attempt except a strict enactment or adoption of UETA (which would be covered by subsection (a)(1)), 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. . . Thus a regulation or other rule issued to implement a State's enactment or adoption of a clean UETA would fall under and be tested against the standards contained in (a)(2) *if it strays in any manner from the strict, specific text of UETA, as reported and recommended for enactment by NCCUSL.* (Emphasis added.)

interstate or foreign commerce . . .” Section 101(c) then establishes an exception to the preemptive rule in section 101 for consumer transactions: “Notwithstanding subsection (a), if a statute . . . requires that information relating to a transaction . . . be provided . . . to a consumer in writing, the use of an electronic record to provide . . . satisfies the requirement that such information be in writing if B . . .”

Section 102(a) allows a state to “modify, limit or supersede the *provisions of section 101*” only if the state rule meets the specific requirements of that section.

The exemption for certain consumer notices is contained in section 103(b) of E-Sign. The lead-in language of that section is: “The provisions of section 101 shall not apply to B” As a result, it appears that the effect of section 103 is *to leave state law in place on these notices*.⁶⁷ The federal E-Sign law does not change the state law and does not prohibit these notices from being provided electronically. Although Congressional intent is clear that these important notices should continue to be provided in writing,⁶⁸ it appears that a state’s enactment of the uniform version of UETA could have the effect of allowing these notices to be provided electronically. *However, it is also crystal clear that a state may continue to require that these notices be provided in writing.*

Because UETA does not contain exemptions to mirror E-Sign section 103(b)(2), it is essential for any state enacting UETA to repeat the federal exemptions in its UETA. This is further discussed in Part IV.

F. UCITA Amendments Should Not Affect E-Sign.

A recent action by NCCUSL has further complicated the picture. NCCUSL has a very controversial proposed uniform state law dealing with computer information, including software and Internet service providers, called UCITA.⁶⁹ In summer 2000, NCCUSL amended UCITA to try to displace E-Sign with UCITA’s rules on the enforceability of electronic records and signatures. This appears in UCITA section 905.

UCITA’s provisions have even worse implications for consumers than UETA:⁷⁰

- While UETA requires agreement to communicate electronically,⁷¹ UCITA simply authorizes electronic

⁶⁷ See *supra* Part III A.

⁶⁸ See 146 Cong. Rec. 4349-4350 (daily ed. June 14, 2000) (statement of Cong. Markey):

In addition this legislation also safeguards the consumer protection policies that have historically served to adequately inform consumers of potentially life-changing events or safety issues. The conference report wisely requires written notices for any notice dealing with court orders and official court documents B including legal briefs and court pleadings, any notice concerning the cancellation of utility services such as water, heat or power service, for foreclosure or eviction notices. It also would require the continuation of written notices for the cancellation or termination of health insurance or benefits or life insurance benefits.

⁶⁹Uniform Computer Information Transactions Act. For information about the difficulties UCITA presents for consumers, see Jean Braucher, *The Uniform Computer Information Transactions Act (UCITA): Objections From The Consumer Perspective*, slated for publication in Vol 5. No. 6, *Cyberspace Lawyer* (Sept. 2000), and posted at: <http://www.ftc.gov/bcp/workshops/warranty/comments/braucherjean.pdf>

⁷⁰At one time, UETA and UCITA were parallel with respect to some issues other than agreement, but UETA was improved somewhat for consumers before it was adopted by NCCUSL, while those same improvements were not added to UCITA.

⁷¹UETA § 5.

communications in the place of paper communications whether or not there has been any agreement.⁷²

- UETA states a "bounce-back" rule,⁷³ so that if the sender knows a message was not sent or received (perhaps because it "bounced"), then other law decides whether or not that notice has an effect. In UCITA, by contrast, "sent" but has no bounce back rule.
- UETA also contains a rule that it does not displace statutory requirements to deliver information by means other than first class mail, such as hand delivery, certified mail, or other method.⁷⁴ UCITA fails to address this topic.
- UETA plainly states that the format requirements of other law remain undisturbed.⁷⁵ UCITA is silent on this point.

UCITA should not actually qualify as a displacing statute under E-Sign. E-Sign requires displacing statutes other than UETA to provide alternative procedures or requirements for the use or acceptance of electronic records or signatures which are consistent with E-Sign.⁷⁶ See Part III B, above.

UCITA is not consistent in any manner with E-Sign:

- E-Sign requires affirmative electronic consent to consumers' use of electronic records in place of legally required written notices.⁷⁷ UCITA does not require that the consent to communicate electronically be given by electronic means, but instead would appear to permit a paper form contract for future electronic notices.
- UCITA does not require any disclosure to the consumer about the consequences of a request to revert to paper notices at a later time, which is required by E-Sign.⁷⁸ UCITA does not require any disclosure to the consumer at the time of consent or at any other time about what hardware and software will be needed to receive the communications which are to be provided electronically, another requirement of E-Sign.⁷⁹

Because UCITA is weaker than both E-Sign and UETA, it should not qualify as a displacing statute. To avoid the need for litigation on this question, however, states should take care not to adopt UCITA section 905.⁸⁰

IV. Language to Implement These Approaches

The following language is offered for Options One and Two B UETA with a companion consumer protection statute

⁷²UCITA ' ' 105(d)(1) and (2).

⁷³UETA ' 15(g).

⁷⁴UETA ' 8(b).

⁷⁵UETA ' 8 (b)(1).

⁷⁶E-Sign ' 102(a)(2)(A)(i).

⁷⁷E-Sign ' 101(c)(1).

⁷⁸E-Sign ' 101(c)(1)(B).

⁷⁹E-Sign ' 101(c)(1)(C)(i).

⁸⁰ A broad range of groups and industries oppose UCITA for other reasons, and a state's consumers will be better off if it rejects UCITA in full. See www.4cite.org/101docs/UCTA101.html, and <http://www.nclc.org>.

or a companion consumer protection act alone to accompany E-Sign. The text of the recommended language is also set forth, without accompanying explanation, in Appendix 2. The discussion for Option 3 - UETA with “no displacement” B sets forth suggested language. No language is needed for Option Four B the “no UETA” approach. Because Option Five is not recommended, no language is offered for it.

1) Consumer consent to engage in electronic transactions should be given or confirmed *electronically* and should include disclosures

Recommended language:

Section 1. (a) Notwithstanding the Uniform Electronic Transactions Act, the use of an electronic record to provide or make available (whichever is required) information required by a statute, regulation, or rule of law, to be provided or made available to a consumer shall satisfy any requirement that the record be in writing, if:

- (1) the consumer has affirmatively consented to such use and has not withdrawn such consent;
- (2) the consumer, prior to consenting, is provided with a clear and conspicuous statement--
 - (i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;
 - (ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;
 - (iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and
 - (iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;
- (3) the consumer--
 - (i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and
 - (ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and
- (4) after the consent of a consumer in accordance with subparagraph (1), 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--
 - (i) provides the consumer with a statement (I) describing the revised hardware and software requirements for access to and retention of the electronic records, and (II) complying with section 1(a)(2)(iii) by describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact

the consumer electronically; and with section 1(a)(2)(iv) by informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy; and

(ii) again complies with this subsection.

[Source: E-Sign ' 101(c).]

Explanation: This language uses the requirements for consumer consent in section 101(c) of the federal E-Sign bill. This language follows E-Sign ' s approach of applying the consent rule to all notices required by statute, regulation or rule of law to be in writing. The language is slightly different from that of E-Sign ' s section 101(c) because in addition to applying to those notices required by law to be writing, it also applies the consent rules to notices which are implicitly, but not explicitly,⁸¹ required to be provided in writing.⁸²

(b) Notwithstanding the Uniform Electronic Transactions Act, the use of an electronic record to provide or make available information required by contract shall satisfy any promise that the information will be provided or made available in writing only if the consumer B

- (1) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and
- (2) consents electronically to receive written notices electronically, or confirms consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

[Source: This is a streamlined version of E-Sign ' s section 101(c) ' s requirements for legally required notices.]

Explanation: Subsection (b) provides a condensed consent rule for electronic receipt of notices which a contract promises will be provided in writing. A more concise rule is offered here because these are notices that are not required by law to be given in writing. Notices required by law fall under E-Sign section 101(c) and subsection (a) of this language. Notices sent pursuant only to contract are offered the protection of electronic consent or electronic confirmation of prior written consent, in a manner reasonably designed to ensure that the consumer will be able to open the subsequent contractual notices.⁸³

2) Federal rules from E-Sign should be applied to document retention and integrity requirements

Recommended language:

Section 2. (a) If a statute, regulation, or other rule of law requires that a contract or other record be retained, that

⁸¹Many laws implicitly require notice to be provided in writing, but do not explicitly require a writing. (*See e.g.* N.C.G.S. ' 24-10.1) When these laws were originally enacted there was no other viable way to provide the information required in the notice. It is logical to assume that E-Sign ' s requirements will apply to all legally required notices. However, the question of whether E-Sign's provisions will apply to state laws which implicitly, but not explicitly, require that a notice be provided in writing will be left for the courts.

⁸²An even broader approach was used in the recently passed North Carolina legislation, *see*: <http://www.ncga.state.nc.us/html1999/bills/AllVersions/Senate/s1266v4.html>

Under the new North Carolina statute, the consent requirement applies to all agreements to conduct a transaction electronically whether or not written notices would otherwise be required.

⁸³ Although the consent rules of section 101(c) of E-Sign do not apply to contract notices not *required by law*, use of a consent process less effective than the one laid out in section 101(c) might be attached under other state law as an unfair and deceptive practice if that practice significantly disadvantages the consumer.

requirement is met by retaining an electronic record of the information in the contract or other record that :

- (1) accurately reflects the information set forth in the contract or other record; and
- (2) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

[Source: E-Sign ' 101(d)]

(b) Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

[Source: E-Sign ' 101(e)]

Explanation: The recommended language is identical to that in E-Sign.⁸⁴ It sets a more complete standard than UETA for the accuracy and integrity of a record.⁸⁵ Unlike E-Sign, UETA does not specify to whom the record must remain accessible for later reference, nor for how long. The recommended language, taken from E-Sign, adds requirements that the record remain accessible:

- 1) to all persons who are entitled to access by statute, regulation, or rule of law;
- 2) for the period required by law [this probably could be inferred into UETA Section (12)]; and
- 3) in a form that is capable of being accurately reproduced for later reference by all parties.

This language, like E-Sign section 101(e), also contains a sanction not found in UETA. It allows a court to deny enforceability to a record required to be in writing if the record is not in a form which is capable to being retained and accurately reproduced by all parties who are entitled to retain it.

3) Oral communications cannot be electronic records in consumer transactions

Recommended language:

Section 3. In consumer transactions, an oral communication or a recording of an oral communication shall not qualify as an electronic record.

[Source: based on E-Sign ' 101(c)(6)] (Note: this is needed only in states that enact UETA)

⁸⁴E-Sign ' 101(d) and (e).

⁸⁵UETA requires that the electronic record be "capable of retention" and disallows the sender to "inhibit...the ability of the recipient to print or store the electronic record." UETA ' 8(a). UETA is silent on the integrity of the electronic record after creation and during storage.

Explanation: The definition of electronic records under both E-Sign and UETA includes any information that is electronically stored and retrievable in perceivable form. Taken literally, this includes a tape recording of a phone call. E-Sign recognizes that a recording of a telephone call should not be allowed to satisfy the requirement that a record be given to a consumer for consent forms, because the recording is not in a form that can be easily referenced by the consumer.⁸⁶ Adding this language to a state companion law would close this loophole in UETA. If a state enacts only a companion statute and not UETA, this section is not needed.

4) Prohibit electronic delivery as a complete substitute for certain essential notices

Recommended language:

Section 4. Notwithstanding the provisions of the Uniform Electronic Transactions Act, the requirement that a notice be in writing is not satisfied by providing or delivering any of the following types of notices electronically. This provision applies to notices of --

- (a) the cancellation or termination of utility services (including water, heat, and power);
- (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;
- (c) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);
- (d) recall of a product, or material failure of a product, that risks endangering health or safety;
- (e) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

[Source: E-Sign ' 103(b)(2)]

Explanation: This list of exempted notices is identical to the exemptions to E-Sign.⁸⁷ By including these exemptions, Congress recognized that electronic delivery does not currently provide the same degree of assurance of receipt as does the U.S. mail. These exemptions should be specifically enacted by any state which enacts UETA to assure that these essential notices continue to be provided on paper.⁸⁸

The exemption does not mean that notices such as utility shut-off notices can never be sent electronically, it only means that the electronic notice alone does not suffice. Because this list of exemptions is identical to those permitted under E-Sign, this addition to state law should be consistent with E-Sign and thus permitted under E-Sign section 102(a)(2).

A state which does not enact UETA does not need this companion provision.

⁸⁶UETA requires that the electronic record be "capable of retention" and disallows the sender to "inhibit...the ability of the recipient to print or store the electronic record." UETA ' 8(a). UETA is silent on the integrity of the electronic record after creation and during storage.

⁸⁷ E-Sign ' 103(b)(2).

⁸⁸Due to heavy pressure from industry, Congress also included a provision which requires the Secretary of Commerce to review the operation of these exceptions and Aevaluate over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers." E-Sign ' 103(c). Adding the exemptions to the state ' s companion act will protect a state ' s consumers from future changes in the federal exemptions. *See supra* Part I E.

5) Definition of consumer transaction

Recommended language:

Section 5. A consumer means a natural person acting with respect to or affecting primarily personal, family or household purposes.

[Source: The primarily for personal, family or household purposes test is widely used in federal and state consumer statutes; however the acting with respect to or affecting" language is new and slightly broader. The North Carolina law uses this language, *see* N.C.G.S. ' 66-308.1(4).]

Explanation: UETA will apply to all sorts of personal transactions, including purchases, credit, securities transactions, interactions with government, etc. The protections for consumers should apply as broadly as possible. This language is consistent with,⁸⁹ but not exactly the same as, that in E-Sign.⁹⁰

6) Rules for consumer contracts should not be changeable in form contracts

Recommended language:

Section 6. In consumer transactions, the rules and requirements set out in this Act may not be changed by agreement of the parties.

[Source: new]

Explanation: This provision should be included to avoid any argument that consumers waive the companion statute ' s consumer protection provisions when signing a form contract. While E-Sign ' s language does not address waiver, its provisions would make little sense if they could be waived. An explicit no-waiver provision is entirely consistent with E-Sign and thus should be permitted.

7) Permit consumers to respond electronically to electronic notices

Recommended language:

Section 7. When a consumer is required to provide notice to exercise or preserve the consumer's rights under any law, the consumer may exercise or preserve that right in the same manner in which the consumer was provided with notice of that right.

[Source: new]

⁸⁹See E-Sign ' 106(1). "The term "consumer" means an individual who obtains, through a transaction, products or services which are used primarily for personal, family or household purposes, . . ."

⁹⁰ Some state courts have interpreted language identical to the federal language on "goods and services" in state unfair and deceptive trade practice statutes to exclude credit transactions from coverage. The proposed language assures that this problem does not affect the consumer protections in electronic transactions relating to credit. *See, e.g. Boubelik v. Liberty State Bank*, 553 N.W.2d 393 (Minn. 1996); *Barber v. National Bank of Alaska*, 815 P.2d 857 (Alaska 1991); *Murphy v. Charlestown Savings Bank*, 405 N.E.2d 954 (Mass. 1980), *Haeger v. Johnson*, 548 P.2d 532 (Ore. App. 1976).

Explanation: This section is needed as a companion to UETA to avoid interference with state notice of right to cancel statutes. Those statutes generally say that the consumer may exercise the right to cancel by returning the notice of right to cancel in writing. Because UETA requires that each party agrees to receive an electronic notice, a merchant could put in its contract a clause that says, in essence, "company may communicate with consumer electronically, but consumer must communicate with company on paper." Such a clause, if enforced,⁹¹ could render a consumer's electronic reply to an electronic notice of right to cancel ineffective. This language closes that loophole. If a state enacts only a companion statute and not UETA, this section may not be needed.

This language should not be preempted under E-Sign section 102(a)(2)(A). It addresses an issue not addressed in E-Sign, it facilitates electronic communication from consumers to merchants, and it is technology-neutral.

8) Require that electronic delivery have the same degree of assurance of receipt as does the U.S. Mail

Recommended language:

Section 8. Notices required to be provided, sent or delivered to a consumer shall be considered received only when the notice is opened, acknowledged, or automatically acknowledged by a flag that tells the sender it has been opened.

[Source: new]

Explanation: Computers crash, ISPs and email addresses change, and often there is no system for forwarding mail. Even corporate email systems seem to break down fairly frequently. Until email reaches the at least the degree of reliability of the U.S. Postal Service, care must be taken to assure that consumers actually receive important information that is sent electronically. The recommended language gives three ways to trigger effectiveness of a notice: 1) actual opening; 2) manual acknowledgment; or 3) a technological automatic acknowledgment received by the sender.

E-Sign leaves delivery requirements for electronic records to state laws.⁹² The legislative history states in part:

State and federal law requirements on delivering documents have not been addressed in this Act. The underlying rules on these issues still prevail. It is our view that records provided electronically to consumers must be provided in a manner that has the same expectation for the consumer's actual receipt as was contemplated when the state law requirement for provided was passed.⁹³

9) Timeframes triggered by legally required notices should start when the consumer opens or acknowledges the notice

Recommended language:

Section 9. (a) Any time period for action by or rights to a consumer which is triggered by the sending or receipt of a notice is triggered by an electronic notice no earlier than the earliest of these dates: the date the consumer opens the notice, the date the consumer acknowledges electronic receipt of the notice; or the date on which the technology by

⁹¹UETA's proponents argue such a clause could be unconscionable if used to defeat the exercise of a statutory right to cancel.

⁹²E-Sign ' 101(d)(3).

⁹³146 Cong. Rec. S5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

which the notice is sent provides confirmation that the notice has been received and opened by the consumer.

[Source: new]

Explanation: Some people who use email check it frequently throughout a single day. Others, particularly those who have previously used email for personal use and not for business use, may check it infrequently. Electronic notices that replace paper notices may, in some cases, trigger time periods in which consumers must act or lose legal rights. In those cases, the time period should start to run when the email is opened or acknowledged by the consumer, or when the consumer's machine sends an automatic acknowledgement that the message has been opened.

10) Records should be effective as against a consumer only when they are received in a manner in which they can be opened, read, stored and printed

Recommended language:

Section 10. An electronic record sent in a transaction with a consumer is not sent to or received by a consumer until it is received by the intended recipient in a manner which can be opened, read, stored and printed by that recipient.

[Source: new]

Explanation: Email can arrive in a form in which it cannot be opened, or can be opened but not read. Records which the consumer can't see, use, or retain should not be given broad legal effect. E-Sign is silent on the effect of a record that can't be opened, although it does say that a record may be denied enforceability if a law requires it to be in writing and it is in a form in which it can't be retained and accurately reproduced for later reference by all parties.⁹⁴ UETA's comments say that a record is sent when it leaves the control of the sender, and that "whether a record is unintelligible or unusable by the recipient is a separate issue from whether that record was sent or received. The effectiveness of an illegible record, whether it binds any party, are questions left to other law."⁹⁵ Most other law is likely to be silent on the topic of notices that are unopenable when they arrive, since this hasn't been an issue with mailed paper notices. This language for the companion act provides law to address the effect of inability to open, read, and use an electronically delivered notice.

11) Hand delivery should be preserved in face-to-face transactions if sales materials are hand delivered

Recommended language:

Section 11. When the parties to a transaction in which one of the parties is a consumer are both physically present in the same location, or one party is present along with the agent of another, any contract, policy, notice, disclosure or other document provided at that time which is provided in a form other than orally must also be provided in the same medium, other than orally, in which sales materials are provided. This section does not prevent the additional delivery of the same documents by other means.

[Source: new. Adapted from North Carolina requirements for paper copies in face-to-face transaction, see N.C.G.S. ' 66-308.16(d).]

Explanation: This addresses the issue of the door-to-door salesperson with the laptop who uses paper sales material but then induces the consumer to click to sign an electronic contract, leaving the consumer without a copy of the contract. Because a contract is usually not a legally required document, such a practice might evade the consent

⁹⁴E-Sign ' 101(d)(3).

⁹⁵Comment 1 to UETA ' 15.

requirements of E-Sign section 101(c).

North Carolina addresses this issue by requiring that, in any consumer transaction where the electronic equipment is provided by the seller, the consumer must be given a written nonelectronic copy of the contract, and any consent to receive future electronic notices must be made or confirmed on electronic equipment not provided by the seller.⁹⁶

The recommended language offered here is based on the North Carolina approach. However, it is more clearly technology neutral. It simply requires that the contract and other documents be given in the same medium as the sales material. If a salesperson makes a fully electronic sales pitch, paper copies of the contract are not required. If, however, the salesperson uses paper sales materials in an in-person sale, then the contract and other documents must be provided in that same medium. Of course, those documents may be provided electronically as well if the seller so desires.

12) Place of contracting is the consumer 's residence

Recommended language:

Section 12. A transaction entered into by a consumer electronically is entered into at the individual 's place of residence.

[Source: N.C.G.S. ' 66-308.16(d).]

Explanation: E-Sign and UETA are both silent about the place of formation of an electronic contract. States may wish to clarify by statute that acts by a consumer to enter into an electronic contract occur in the consumer 's home state and county. The North Carolina law, which enacts both UETA and companion provisions as authorized by E-Sign, contains this type of "place of formation" rule.⁹⁷

13) Rules for electronic transferable records must assure consumers need not pay twice on a single note.

Recommended language:

Section. 13. Notwithstanding the provisions of the Uniform Electronic Transactions Act, the following rules apply to transferable records of transactions involving consumers:

(a) If payment is made to a person that the system indicates is in control of a transferable record, the obligor is discharged to the extent of the payment.

(b) A transferable record remains subject to the defenses of alteration and unauthorized signature whether or not those defenses are apparent on the face of the record.

(c) A record does not qualify as a transferable record if a system is unable to reliably establish the person entitled to enforce the record or the system permits the creation of multiple copies that appear to be authoritative copies.

(d) A consumer is entitled, on request and without charge, to a printed or printable copy of a transferable record at any time.

⁹⁶Senate Bill 1266, General Assembly of North Carolina, Session 1999, ' 66-308.16(d), <http://www.ncga.state.nc.us/html/1999/bills/AllVersions/Senate/s1266v.html>.

⁹⁷Senate Bill 1266, General Assembly of North Carolina, Session 1999, section 66-308.16(d),

[Source: new]

Explanation. Both UETA and E-Sign establish that negotiable instruments may be created and stored electronically.⁹⁸ E-Sign 's authorization applies only to negotiable instruments secured by real property. UETA applies to any kind of electronic loan note. Both E-Sign and UETA give holder in due course status to the new holder of the electronic note even though that holder is not in possession of the original note. "Original" is, of course, a questionable concept in electronic notes, because there can be multiple identical electronic copies.

Both E-Sign and UETA use the concept of "transferable record" to define a way of storing and transferring electronic notes which is intended to create a unique, electronic copy which is identified as the authoritative copy. If these statutes work as hoped, there will never be more than one authoritative copy. This companion provision is designed to protect consumers if this optimism is misplaced. This provision protects the consumer if he or she pays on a duplicate electronic loan note, and clarifies that the defenses of alteration and unauthorized signature remain available.

Under the holder in due course rule, a consumer may be unable to raise defenses to a loan note which are not apparent on the face of the note. The holder in due course rule assumes that the face of a paper loan note will show all but perhaps the most sophisticated of alterations. If an electronic loan note is altered or duplicated, it is far less likely than with a paper loan note that there will be any evidence of that change on the face of the loan note. The conferral of holder in due course status on assignees of electronic loan notes makes it particularly important to explicitly protect the consumer borrower from the consequences of alteration, unauthorized signature, and payment when there are multiple apparently authorized copies being held by different parties.⁹⁹

14) Establish relation with federal E-Sign.

Recommended Language:

Section 14. The requirements of this Act are designed to supplement, not to modify, limit, or supersede, the provisions of the federal Electronic Signatures in Global and National Commerce Act. If any part of this Act is held to be preempted by federal law, the provisions of the Uniform Electronic Transactions Act shall be without further force and effect with respect to transactions entered into primarily for personal, family, or household purposes.

⁹⁸UETA ' 16; E-Sign ' 201.

⁹⁹If read with extreme care, the definitions in E-Sign and UETA deprive a note of the status of a transferable record if the technology by which the note was transferred permits more than one apparently authoritative copy. This is small consolation, however, to the consumer who has in good faith paid the wrong party.

The comments to the Uniform Electronic Transactions Act recognize that the purpose of its transferable records section is to create a legal authorization to permit electronic loan notes to earn holder in due course status when the technology surrounding the loan notes becomes sufficiently secure and sufficiently resistant for tampering and copying to justify that status. This proposed amendment tries to address that same goal without exposing consumer borrowers to undue risk of multiple or erroneous claims from copied or altered electronic loan notes.

The comments to section 16 of the Uniform Electronic Transactions Act recognize " the extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper document or instrument Y" Academics and lawyers studying electronic loan notes reported to the UETA drafters: "When information is stored in a digital format, it becomes possible to make a virtually unlimited number of copies that are virtually indistinguishable from the original electronic record in every respect." *Joint Report to the UETA Drafting Committee on the UETA Provisions governing Transferable Records*. This report was prepared by the American Bar Association Science and Technology Section, Electronic Commerce Division, Committee on Electronic Commercial Payments, Working Group on Negotiability and Electronic Commerce ABA Business Law Section, Cyberspace Law Committee, Task Force on Transferability of Electronic Assets.

Explanation: This section indicates the state's intent is to supplement, not to modify, limit, or supersede, federal law. The effect of this should be that both federal law and state law should apply. Secondly, it establishes the state's intent to protect consumers from the risks created by the uniform version of UETA, by stating that if the companion act's consumer protection provisions are preempted for some reason, UETA also will not apply to consumer transactions. In this case, E-Sign would provide the only law governing electronic records in consumer transactions in that state.

15) States that enacted UETA before E-Sign should add a coordinating provision

Passage of UETA before E-Sign may create confusion and litigation over 1) whether the federal consumer protections apply in the state, and 2) whether the non-uniform provisions of the state's UETA apply after E-Sign.¹⁰⁰ States that have already passed UETA should consider adding the following provision to avoid future litigation over whether the state's UETA remains in effect if parts of it are preempted:

Recommended Language:

Section 15.

(a) No law of this state is intended to limit, modify, or supersede the requirements of Sections 101 (c), (d), or (e), or to authorize electronic delivery of any notice of the type described in Section 103(b) of the Electronic Signatures in Global and National Commerce Act.

(b) If any part of this Act is held to be preempted by federal law, the provisions of the Uniform Electronic Transactions Act shall be without further force and effect with respect to transactions entered into primarily for personal, family, or household purposes.

Explanation: Nothing in the federal E-Sign law mandates that a state's passage of UETA or other law regarding the use of electronic signatures automatically displaces the federal law. Instead, E-Sign gives states a choice. Thus, E-Sign's important consumer protections should not be displaced unless a state's enactment includes deliberate language evidencing an intent to "modify, limit or supersede" the federal E-Sign law. Adding language clearly stating an intent not to displace, however, adds clarity and avoids uncertainty and litigation.

Conclusion

Consumers welcome the opportunity to engage in safe and secure online transactions. However, safety, security, and consumer confidence are built upon this nation's long history of providing strong consumer protections. Consumer protections equivalent to those found in the offline world must be built into the online marketplace. States should consider declining UETA now that E-Sign is in place. Any state enacting UETA after E-Sign should clarify that UETA is subordinate to E-Sign's consumer protections. It would be even better for states enacting UETA to combine it with a companion statute adding the consumer protections as permitted by E-Sign. Strong consumer protection should build confidence in and encourage the use of electronic commerce.

¹⁰⁰Already there is disagreement over whether a state's non-uniform version of UETA is entirely preempted by federal law B leaving E-Sign as the only law governing electronic transactions in the state, or whether only the non-uniform *provisions* of a state's UETA are preempted, effectively converting a non-uniform UETA into the very uniform UETA that legislature declined to enact.

Appendix 1
Comparison of E-Sign and UETA on Key Issues

E-Sign and UETA differ in other important ways. Here are the answers to some key consumer protection questions under E-Sign and UETA:

Question: Is real consumer consent required?

Answer:

E-Sign: Yes. Required for those notices that are required by law to be in writing

UETA: Yes and no. Agreement is required for contracts and notices, but it may be inferred from the context, including conduct.

Question: Must the consent be electronic?

Answer:

E-Sign: Yes. Consent must be given or confirmed electronically.

UETA: No. Consent may be given on paper for future electronic communications.

Question: Are pre-consent disclosures required?

Answer:

E-Sign: Yes. Disclosures must include: 1) the types of needed hardware and software; 2) how to request a paper copy and the cost, if any; 3) how to update contact information, and 4) how to withdraw consent.

UETA: No. No pre-consent disclosures are required.

Question: Can a recording of a phone call replace a written notice?

Answer:

E-Sign: No, for consumer consent. Does not permit oral communications or recordings of oral communications to qualify as an electronic record in the consumer consent provision.¹⁰¹

UETA: Yes. A tape recording of a voice conversation is an electronic record.

Question: Are any types of consumer notices exempt?

Answer:

¹⁰¹E-Sign § 101(c)(6).

E-Sign: Yes. E-Sign exempts these consumer notices:¹⁰²

- Utility termination and shut offs;
- Default, acceleration, repossession, foreclosure or eviction, or a right to cure, under a rental agreement or a mortgage on a principal residence;
- Cancellation or termination of health insurance or benefits, and of life insurance benefits (except annuities); and
- Product recall or material failure of a product that risks endangering health and safety.

UETA: No. UETA leaves it to each state to decide what consumer law provisions, if any, should be exempted. It is unclear whether federal exemptions automatically apply in a state that has enacted UETA. To avoid questions, a state that enacts UETA should enact UETA exemptions to match the federal exemptions. Exemptions from UETA that match the federal exemptions are not preempted.¹⁰³

Question: Does either statute contain a loophole that allows posting rather than sending of notices required by law?

Answer:

E-Sign: No. The federal statute defers to other law on whether the information must be "provided" or merely "made available" to the consumer. E-Sign does not define "send" or "receive." In fact, the legislative history makes clear that the underlying law's requirements regarding the method of delivery still apply to the electronic delivery allowed by E-Sign.¹⁰⁴

UETA: Unclear. Section 15 of UETA seems to create a posting loophole by permitting both "send" and "receive" to be redefined by agreement of the parties, but the chair of the UETA drafting committee stated in a public forum of Attorneys General consumer protection staff that UETA section 15, which allows posting, was not intended to interfere with UETA section 8, which requires sending. UETA section 15(g) may defer this question to the policy of the underlying statute.

¹⁰²E-Sign ' 103(b)(2).

¹⁰³E-Sign ' 102(a)(1).

¹⁰⁴See 146 Cong. Rec. S 5229 B5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes):

State and federal law requirements on delivering documents have not been addressed in this Act. The underlying rules on these issues still prevail. It is our view that records provided electronically to consumers must be provided in a manner that has the same expectation for the consumer's actual receipt as was contemplated when the state law requirement for "provided" was passed.

Appendix 2
Recommended Provisions to Accompany Any State Enactment of UETA

The following language is offered for Options One and Two B UETA with a companion consumer protection statute or a companion consumer protection act alone to accompany E-Sign. The text of the recommended language is also set forth, without accompanying explanation, in Appendix 2. The discussion for Option 3 - UETA with "no displacement" B sets forth suggested language. No language is needed for Option Four B the "no UETA" approach. Because Option Five is not recommended, no language is offered for it.

1) Consumer consent to engage in electronic transactions should be given or confirmed *electronically* and should include disclosures

Recommended language:

Section 1. (a) Notwithstanding the Uniform Electronic Transactions Act, the use of an electronic record to provide or make available (whichever is required) information required by a statute, regulation, or rule of law, to be provided or made available to a consumer shall satisfy any requirement that the record be in writing, if:

- (1) the consumer has affirmatively consented to such use and has not withdrawn such consent;
- (2) the consumer, prior to consenting, is provided with a clear and conspicuous statement--
 - (i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;
 - (ii) informing the consumer of whether the consent applies (I) only to the particular transaction which gave rise to the obligation to provide the record, or (II) to identified categories of records that may be provided or made available during the course of the parties' relationship;
 - (iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and
 - (iv) informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy;
- (3) the consumer--
 - (i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and
 - (ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and
- (4) after the consent of a consumer in accordance with subparagraph (1), 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--
 - (i) provides the consumer with a statement (I) describing the revised hardware and

software requirements for access to and retention of the electronic records, and (II) complying with section 1(a)(2)(iii) by describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and with section 1(a)(2)(iv) by informing the consumer (I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and (II) whether any fee will be charged for such copy; and

(ii) again complies with this subsection.

[Source: E-Sign ' 101(c).]

2) Federal rules from E-Sign should be applied to document retention and integrity requirements

Recommended language:

Section 2. (a) If a statute, regulation, or other rule of law requires that a contract or other record be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that

(1) accurately reflects the information set forth in the contract or other record; and

(2) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

[Source: E-Sign ' 101(d)]

(b) Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that a contract or other record be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

[Source: E-Sign ' 101(e)]

3) Oral communications cannot be electronic records in consumer transactions

Recommended language:

Section 3. In consumer transactions, an oral communication or a recording of an oral communication shall not qualify as an electronic record.

[Source: based on E-Sign ' 101(c)(6)] (Note: this is needed only in states that enact UETA)

4) Prohibit electronic delivery as a complete substitute for certain essential notices

Recommended language:

Section 4. Notwithstanding the provisions of the Uniform Electronic Transactions Act, the requirement that a notice be in writing is not satisfied by providing or delivering any of the following types of notices electronically. This provision applies to notices of --

(a) the cancellation or termination of utility services (including water, heat, and power);

(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;

(c) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities);

(d) recall of a product, or material failure of a product, that risks endangering health or safety;

(e) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

[Source: E-Sign ' 103(b)(2)]

5) Definition of consumer transaction

Recommended language:

Section 5. "Consumer" means a natural person acting with respect to or affecting primarily personal, family or household purposes.

[Source: The "primarily for personal, family or household purposes" test is widely used in federal and state consumer statutes; however the "acting with respect to or affecting" language is new and slightly broader. The North Carolina law uses this language, *see* N.C.G.S. ' 66-308.1(4).]

6) Rules for consumer contracts should not be changeable in form contracts

Recommended language:

Section 6. In consumer transactions, the rules and requirements set out in this Act may not be changed by agreement of the parties.

[Source: new]

7) Permit consumers to respond electronically to electronic notices

Recommended language:

Section 7. When a consumer is required to provide notice to exercise or preserve the consumer's rights under any law, the consumer may exercise or preserve that right in the same manner in which the consumer was provided with notice of that right.

[Source: new]

8) Require that electronic delivery have the same degree of assurance of receipt as does the U.S. Mail

Recommended language:

Section 8. Notices required to be provided, sent or delivered to a consumer shall be considered received only when the notice is opened, acknowledged, or automatically acknowledged by a flag that tells the sender it has been

opened.

[Source: new]

9) Timeframes triggered by legally required notices should start when the consumer opens or acknowledges the notice

Recommended language:

Section 9. (a) Any time period for action by or rights to a consumer which is triggered by the sending or receipt of a notice is triggered by an electronic notice no earlier than the earliest of these dates: the date the consumer opens the notice, the date the consumer acknowledges electronic receipt of the notice; or the date on which the technology by which the notice is sent provides confirmation that the notice has been received and opened by the consumer.

[Source: new]

10) Records should be effective as against a consumer only when they are received in a manner in which they can be opened, read, stored and printed

Recommended language:

Section 10. An electronic record sent in a transaction with a consumer is not sent to or received by a consumer until it is received by the intended recipient in a manner which can be opened, read, stored and printed by that recipient.

[Source: new]

11) Hand delivery should be preserved in face-to-face transactions if sales materials are hand delivered

Recommended language:

Section 11. When the parties to a transaction in which one of the parties is a consumer are both physically present in the same location, or one party is present along with the agent of another, any contract, policy, notice, disclosure or other document provided at that time which is provided in a form other than orally must also be provided in the same medium, other than orally, in which sales materials are provided. This section does not prevent the additional delivery of the same documents by other means.

[Source: new. Adapted from North Carolina requirements for paper copies in face-to-face transaction, see N.C.G.S. ' 66-308.16(d).]

12) Place of contracting is the consumer's residence

Recommended language:

Section 12. A transaction entered into by a consumer electronically is entered into at the individual's place of residence.

[Source: N.C.G.S. ' 66-308.16(d).]

13) Rules for electronic transferable records must assure consumers need not pay twice on a single note.

Recommended language:

Section. 13. Notwithstanding the provisions of the Uniform Electronic Transactions Act, the following rules apply to transferable records of transactions involving consumers:

(a) If payment is made to a person that the system indicates is in control of a transferable record, the obligor is discharged to the extent of the payment.

(b) A transferable record remains subject to the defenses of alteration and unauthorized signature whether or not those defenses are apparent on the face of the record.

(c) A record does not qualify as a transferable record if a system is unable to reliably establish the person entitled to enforce the record or the system permits the creation of multiple copies that appear to be authoritative copies.

(d) A consumer is entitled, on request and without charge, to a printed or printable copy of a transferable record at any time.

[Source: new]

14) Establish relation with federal E-Sign.

Recommended Language:

Section 14. The requirements of this Act are designed to supplement, not to modify, limit, or supersede, the requirements of the federal Electronic Signatures in Global and National Commerce Act. If any part of this Act is held to be preempted by federal law, the provisions of the Uniform Electronic Transactions Act shall be without further force and effect with respect to transactions entered into primarily for personal, family, or household purposes.

15) States that enacted UETA before E-Sign should add a coordinating provision

Passage of UETA before E-Sign may create confusion and litigation over 1) whether the federal consumer protections apply in the state, and 2) whether the non-uniform provisions of the state's UETA apply after E-Sign.¹⁰⁵ States that have already passed UETA should consider adding the following provision to avoid future litigation over whether the state's UETA remains in effect if parts of it are preempted:

Recommended Language:

Section 15.

(a) No law of this state is intended to limit, modify, or supersede the requirements of Sections 101 (c), (d), or (e), or to authorize electronic delivery of any notice of the type described in Section 103(b) of the Electronic Signatures in Global and National Commerce Act.

(b) If any part of this Act is held to be preempted by federal law, the provisions of the Uniform Electronic Transactions Act shall be without further force and effect with respect to transactions entered into primarily for personal, family, or household purposes.

¹⁰⁵Already there is disagreement over whether a state's non-uniform version of UETA is entirely preempted by federal law B leaving E-Sign as the only law governing electronic transactions in the state, or whether only the non-uniform *provisions* of a state's UETA are preempted, effectively converting a non-uniform UETA into the very uniform UETA that legislature declined to enact.