Calendar No. 243

106TH CONGRESS, *1st Session* | SENATE | REPORT 106–131

MILLENNIUM DIGITAL COMMERCE ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 761

JULY 30, 1999.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

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JULY 30, 1999.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 761]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 761), "A Bill to regulate interstate commerce by electronic means by permitting and encouraging the continued expansion of electronic commerce through the operation of free market forces, and other purposes", having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to promote electronic commerce by providing a consistent national framework for electronic signatures and transactions.

BACKGROUND AND NEEDS

The growing use and global reach of the Internet can reduce paperwork and ease the burdens of conducting commercial transactions. Internet commerce has already been estimated at more than one hundred billion dollars and is growing rapidly. But for the Internet to reach its potential and function as a substitute for traditional paper transactions, the public must trust the integrity and reliability of electronic commerce and be assured that consistent and predictable legal rules will govern electronic transactions.

Presently, however, one of the greatest barriers to the growth of Internet commerce is the lack of consistent, national rules governing the use of electronic signatures. More than forty States have enacted electronic authentication laws, and no two of these laws are the same. This inconsistency deters businesses and consumers

from using electronic signature technologies to authorize contracts or transactions.

Fortunately, the National Conference of Commissioners of Uniform State Laws (NCCUSL) is preparing a model State law that adapts existing commercial law to govern electronic commerce. This "Uniform Electronic Transactions Act" (UETA) will create a market-based, technology-neutral legal framework for electronic commerce. It is currently estimated that UETA will be finalized in July of this year.

The impending release of UETA confronts the Congress with a situation similar to that which arose when NCCUSL first released its Uniform Commercial Code (UCC). The release of the UCC began a process that eventually created a predictable regime of commercial law that was adopted by all the States. However, the UCC was not adopted everywhere simultaneously. There was a transition period in which commercial law remained unsettled as States reviewed the UCC, debated its merits, and enacted it into law.

Inevitably, a similar transition period will occur in the case of UETA. This legislation is intended to protect and foster commerce during this transition period by providing a predictable legal regime governing electronic signatures. This legislation is not intended to preempt or overrule the developing State law of electronic signatures embodied in UETA. Once the States enact uniform standards consistent with those of UETA, the standards prescribed in this legislation will cease to govern.

LEGISLATIVE HISTORY

Senator Abraham, member of the Committee on Commerce, Science, and Transportation, introduced S. 761 on March 25, 1999 to regulate interstate commerce by electronic means by permitting and encouraging the continued expansion of electronic commerce through the operation of free market forces, and for other purposes. On May 27, 1999, the Senate Commerce Committee held a panel hearing, chaired by Senator Abraham, on S. 761. Testimony was received from Mr. Ray A. Campbell, III, General Counsel, Information Technology Division, State of Massachusetts; Mr. Harris Miller, President, Information Technology Association of America; Mr. W. Hardy Callcott, Senior Vice President and Deputy General Counsel, Charles Schwab; and Mr. Ira H. Parker, Vice President and General Counsel, GTE Internetworking. On June 23, 1999, the Senate Commerce Committee, chaired by Senator McCain, met in an open markup session to consider S. 761. The Committee ordered that the bill be reported, favorable with an amendment in the nature of a substitute by voice vote.

SUMMARY OF MAJOR PROVISIONS

The bill promotes the use of electronic signatures and provides a consistent and predictable national framework of rules governing the use of electronic signatures. The legislation preempts State law that is inconsistent with UETA, and provides that the electronic records produced in the execution of a digital contract shall not be denied legal effect solely because they are electronic in nature. This legislation also assures that a company will be able to rely on an

electronic contract and that another party will not be able to escape their contractual obligations simply because the contract was entered into over the Internet or any other computer network.

This Federal preemption of State law is designed to be an interim measure. It preempts State law until the State enacts uniform standards which are consistent with those contained in this legislation or the UETA. Once States enact the UETA or other legislation governing the use of electronic signatures which is consistent with the UETA, the Federal preemption is lifted. The legislation also grants parties to a transaction the freedom to determine the technologies and business methods to be used in the execution of an electronic contract. Additionally, the legislation sets forth the principles for the international use of electronic signatures which stress that paper-based obstacles to electronic transactions must be eliminated and that a technology-neutral, market-based, nondiscriminatory approach to electronic authentication technology should be adopted. Finally, the bill directs the Department of Commerce and Office of Management and Budget to report on Federal laws and regulations that might pose barriers to electronic commerce and report back to Congress on the impact of such provisions and provide suggestions for reform.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 30, 1999.

Hon. JOHN MCCAIN,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 761, the Third Millennium Digital Commerce Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Shelley Finlayson (for the state and local impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 761—Third Millennium Digital Commerce Act

S. 761 would preempt state laws that regulate interstate commercial transactions conducted via electronic means (such as contracts with electronic signatures), unless states enact uniform standards equivalent to those specified in the bill. Such a preemption constitutes an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs would not be significant and would not exceed the threshold established by the act ($50 million in 1996, adjusted annually

for inflation). As defined in the bill, the term "transaction" would specifically exempt any contract to which a governmental entity is a party. As a result, CBO estimates that the bill would not significantly affect the budgets of state, local, or tribal governments. S. 761 contains no new private-sector mandates as defined in UMRA.

The bill also would require federal agencies to identify laws and regulations that impose barriers to electronic commerce. Finally, S. 761 would require the Office of Management and Budget and the Department of Commerce to submit a report within 18 months recommending legislation to remove barriers to electronic commerce and detailing actions by the federal government to remove such barriers through regulation.

Based on information from the Department of Commerce, CBO estimates implementing the bill would cost about $500,000 a year, subject to the availability of appropriated funds. S. 761 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

The CBO staff contracts are Shelley Finlayson (for the state and local impact) and Mark Hadley (for federal costs). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

Number of persons covered

The Committee believes that the bill will not subject any individuals or businesses affected by the bill to any additional regulation.

Economic impact

After full implementation of the bill, individuals and businesses will benefit from the increased certainty provided by a consistent national framework for electronic commerce. Moreover, by facilitating the use of electronic records and purely electronic transactions, this bill will help to provide consumers with an alternative to paper transactions.

Privacy

There will be no impact on personal privacy as a result of this legislation.

Paperwork

The paperwork resulting from this legislation will be primarily due to the filing of reports by the Department of Commerce and Office of Management and Budget on the laws and regulations that might pose barriers to electronic commerce. However, to the extent that these reports lead to the future elimination of such laws and regulations, in the long term this Act will significantly reduce paperwork burdens.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides the short title of the bill as reported as the "Third Millennium Electronic Commerce Act".

Section 2. Findings

In general, this section outlines the importance of electronic commerce, the benefits of uniformity in electronic transactions and the need for the Federal government and States to promote and not hinder this new market.

Section 3. Purposes

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

Section 4. Definitions

This section sets forth the definitions of terms used in the bill. These definitions are consistent with the definitions contained in the UETA, written by the National Conference of Commissioners on Uniform State Law. In referring solely to commercial use, the definition of transactions provided in this legislation is intentionally narrower than is provided in the UETA.

Section 5. Principles governing the use of electronic signatures in international transactions

The Internet is a global electronic marketplace that transcends national borders. As governments around the world begin to review and implement approaches in the area of electronic signatures and authentication, it is important that the United States government advocate consistent principles for such action based on longstanding principles of commercial law. This section sets out the principles that the United States Government should follow, to the extent practicable, in its international negotiations on electronic commerce as a means to facilitate cross-border electronic transactions. The principles in this section are consistent with those adopted by the OECD Ministers in a Declaration on Authentication for Electronic Commerce, and proposals for multilateral and bilateral arrangements that are being discussed. These principles are included in order to support the efforts of the Departments of State and Commerce in advocating a technology-neutral, market-based approach to electronic transactions and authentication technology.

Paragraph (1) advocates the removal of paper-based obstacles to electronic transactions. This can be accomplished by taking into account the enabling provisions of the Model Law on Electronic Com-

merce adopted by the United Nations Committee on International Trade Law (UNCITRAL) in 1996.

Paragraph (2) permits that parties to a transaction shall have the opportunity to choose the technology of their choice when entering into an electronic transaction. Parties to a commercial transaction should be able to chose the appropriate authentication technologies and implementation models for their transactions. Unnecessary regulation of commercial transactions distorts the development and efficient operation of markets, including electronic markets. Moreover, the rapid development of the electronic marketplace is resulting in new business models and technological innovations. This is an evolving process. Therefore, government attempts to regulate may impede the development of newer alternative technologies.

Paragraph (3) permits parties to a transaction the opportunity to prove in a court or other proceeding that their authentication approach and transactions are valid. Parties should have the opportunity to prove in court that the authentication methods that they select are valid and reliable.

Paragraph (4) adopts a nondiscriminatory approach to electronic signatures. It promotes the policy that governments should treat technologies and providers of authentication services from other countries in a nondiscriminatory manner. Under this policy, the free market, and not governments, will determine the type of authentication technologies to be used in international commerce.

Section 6. Interstate contract certainty

In approving section 6 of the bill, it is the Committee's view (in accord with the findings and purposes of the bill) that a consistent legal foundation across multiple jurisdictions permitting the usage of electronic signature will promote the growth of electronic commerce. This can best be accompanied by the adoption of a uniform framework by the States. It is for these reasons that the Committee seeks to encourage the adoption of the UETA as its legal foundation for governing electronic signatures. To the extent that State laws or regulations do not provide such a consistent national baseline, the national interest is best served by Federal uniformity to the extent necessary to provide such a baseline and eliminate barriers to the growth of electronic commerce.

It is the Committee's view that the provisions of section 6 apply, consistent with the language of the bill, to any commercial transaction affecting interstate commerce. It is the Committee's intent that the scope of section 6 of the bill be consistent with the scope of the current draft of the UETA, other than to government transactions and negotiable instruments, which are dealt within other areas of law. The Reporter's Notes to UETA states that the Act is intended to apply "in toto" to transactions covered by Articles 2 and 2A of the Uniform Commercial Code. As those notes provide: "it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today.".

Subsection (a) sets forth the general rules that apply to electronic commercial transactions affecting interstate commerce. The provisions of this section are consistent with the provisions of the UETA. This section provides that a record or signature executed

electronically shall not be denied legal effect solely because it is in electronic form. Moreover, this section mandates a written record or signature required by law will be satisfied by an electronic record or signature. This section also dictates that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. By limiting the scope of this legislation only to commercial transactions, the committee deliberately left to other areas of law such issues as probate documents, conveyance of real property, wills and codicils, instruments of title or negotiable instruments.

Subsection (b) authorizes parties to a contract to adopt or otherwise agree on the terms and conditions on which they will use and accept electronic signatures and electronic records in commercial transactions affecting interstate commerce. This authority includes methods for using and accepting electronic signatures and records. Thus, for example, parties may adopt or agree on the use of particular technologies, business models or procedures in connection with their use of electronic signatures and electronic records. At the same time, subsection (b) makes clear that any party remains free to decline to agree to any particular terms or conditions regarding the use and acceptance of electronic signatures and electronic records; the provision is not intended to deprive a party of that choice.

Where parties do wish to agree on particular terms and conditions regarding the use and acceptance of electronic signatures or electronic records, they may do so in the same contract in which they otherwise contract with one another using such signatures and records as they have agreed. Subsection (b) does not require parties to enter into a separate agreement regarding their use of electronic signatures and records before they may rely on agreed terms and conditions when contracting with one another. The provision is intended to ensure that parties have maximum flexibility in the use and acceptance of electronic signatures and electronic records in connection with commercial transactions affecting interstate commerce. This subsection is intended to clarify that parties have the same latitude to use and accept electronic records as they have with paper records.

Subsection (c) applies common law principles regarding signatures to those of electronic signatures.

Subsection (c)(1) describes the steps necessary to attribute a signature to a person. It clarifies that existing rules of attribution also apply to electronic signatures. Subsection (c)(2) describes the legal effect the signature will have. It reflects the current state of the law of signatures by assuring reference to all the relevant contexts and surrounding circumstances at the time the signature was created.

Subsection (d) makes clear that a contract relating to a commercial transaction affecting interstate commerce may not be denied legal effect because it was formed by the interaction of electronic agents of the parties or by the interaction of an electronic agent of a party and an individual acting on the individual's own behalf or on behalf of another person who is a party to the transaction. Electronic agents typically are computer programs that independently initiate or respond to messages on behalf of a party without human

intervention at the time of the message or the response is sent. Electronic agents are increasingly used in systems to effect transactions on behalf of principals who have created such agents and authorized them to act on their behalf. By ensuring that contracts formed through the use of electronic agents are not denied legal effect by virtue of the involvement of such agents, Section 6(d) seeks to facilitate the growth and development of efficient online commerce.

Subsection (e) preempts State laws that are inconsistent with this legislation and thereby sets a national framework for electronic commercial transactions. However, this Federal preemption of State law will apply only if a State has not adopted the UETA as its legal foundation for governing electronic signatures. Once a State enacts the UETA, the Federal preemption is lifted.

There is every indication that the UETA will codify a market-based, enabling approach to electronic commerce and provide a uniform law governing commercial transactions in cyberspace. However, this section addresses concerns that several years may elapse before the UETA is enacted by all of the States. This legislation provides a Federal legal standard, consistent with UETA, which is effective in the interim period while the States are enacting UETA.

Section 7. Study of legal and regulatory barriers to electronic commerce

This section directs the Department of Commerce and Office of Management and Budget (OMB) to report to Congress within 18 months on Federal laws and regulations that might pose barriers to electronic commerce, including suggestions for reform. It is the Committee's intent that this information will provide the basis for the removal of additional impediments to electronic commerce. The Committee also expects that the individual Federal agencies will cooperate fully with the Department of Commerce and OMB in implementing this section, and that they will use their resources to develop those aspects of the study that relate to their particular programs.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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