ALDRICH & BONNEFIN
MEMORANDUM

TO: Business Law Section/Cyberspace Committee

FROM: Mark A. Moore

DATE: May 11, 2001

RE: Senate Bill 97 **FILE NO.** 5115-00009

Senate Bill 97 was introduced by Senator Sher on January 18, 2001. It amends Civil Code Section 1633.1 *et seq*. It accomplishes this by deleting the current form of California=s Uniform Electronic Transactions Act (UETA) and substituting, in its place, a Aclean@ version of UETA. There are, however, some very minor variations between SB 97 and the uniform version of UETA as adopted by the National Conference for Commissioners on Uniform State Laws (NCCUSL). (Some of those are addressed in the memorandum Jeffrey Selman forwarded to the Committee in his email dated January 29, 2001.) The other area where SB 97 differs from a uniform or model version of UETA lies in SB 97's treatment of communications with governmental agencies, and that difference is the topic addressed in this Memorandum.

In summary, SB 97's failure to include the three model UETA provisions dealing with governmental agencies does not appear to me to create significant legal difficulty. It can be argued that including the three UETA provisions on governmental agencies would make matters simpler for practitioners, however, since it would obviate the need for an otherwise somewhat lengthy analysis of the relationship between E-Sign and the current California law on the use of electronic signatures in communications with governmental entities.

1. Model UETA Provisions.

Sections 17, 18 and 19 of the model UETA deal with electronic records and their use by governmental agencies. These are clearly optional provisions of the uniform, model version of the Act. This is noted in Comment 1 to Section 19: "Sections 17-19 have been braceted as optional provisions to be considered by each State."

Section 17 deals with the creation and use of electronic records by governmental agencies. Section 17 proposes two possible scenarios. Under one, each governmental agency would determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records. Under the second scenario, a single designated state officer of the state would determine whether,

and the extent to which, a governmental agency will create and retain electronic records and convert written records to electronic records.

Section 18 deals with the acceptance and distribution of electronic records by governmental agencies. Once again, an option is given in the sense that whether a single governmental agency will be used or whether each governmental agency will make its own determinations, in the areas covered by Section 18. Essentially, under Section 18 the state is required to determine whether it will send and accept electronic records and electronic signatures to and from other persons. Also, each state must determine whether it will otherwise create, generate, communicate, store, process, use and rely upon electronic records and electronic signatures.

Under Section 18, the governmental agencies are given some freedom to specify the manner and format in which electronic records must be used. Also, under Section 18(b)(2), the governmental agencies are given flexibility to determine the type of electronic signature that is required when used in connection with electronic records. This is important, since it allows governmental agencies to favor specific types of electronic signature technology. In other words, Section 18 does not require governmental agencies to be technology neutral as regards electronic signatures.

Section 19 instructs governmental agencies to adopt standards regarding electronic records and electronic signatures that will promote consistency and an interoperability with similar requirements adopted by other states and the federal government.

2. Senate Bill 97 and E-Sign.

Senate Bill 97 does not include any of Sections 17, 18, or 19 of the uniform version of UETA. As noted above, these provisions are optional. Therefore, failure to include these provisions does not render SB 97 a Anon-uniform version@ of UETA.

More specifically, in the language of the federal Electronic Signatures in Global and National Commerce Act (E-Sign), the failure of SB 97 to include Sections 17-19 would not prevent SB 97 from constituting an adoption of UETA Aas approved and recommended for enactment@ by NCCUSL in 1999. E-Sign '102(a)(1). However, since SB 97 does not include provisions on the use of electronic signatures and records with governmental agencies, adoption of SB 97 would not affect current law in this area.

3. Use of Electronic Records and Signatures with California Governmental Agencies.

The current California law in this area is found at Government Code Section 16.5 and its implementing regulations. These address the use of Adigital signatures@ in any written communication between a public entity and any other party. As a general matter, in order for a digital signature to Ahave the same force and effect as the use of a manual signature,@ Section 16.5 requires that the digital signature embody each of five attributes, including a requirement that the digital signature Aconform to regulations adopted by the Secretary of State.@

The Secretary of State=s Regulations are found at Title 2 of the California Administrative Code, beginning at Section 22000. Among other things, Civil Code Section 16.5 and these implementing regulations of the Secretary of State require that an Aacceptable technology@ be used before the digital signature will serve as the equivalent of a manual signature. Currently, the Secretary of State=s Regulations designate two digital signature technologies as Aacceptable.@ These are Public Key Cryptography (*see* 2 Cal. Admin. Code '22003(a)) and Signature Dynamics (*see* 2 Cal. Admin. Code '22003(b)).

Under Civil Code Section 16.5(a), a digital signature will have the same effect as a manual signature Aif and only if@ it conforms to the Secretary of State=s Regulations. Since the Secretary of State=s Regulations require the use of an Aacceptable technology,@ and since only two technologies have been found acceptable by the Secretary of State, the use of any technology other than one listed by the Secretary of State as acceptable would result in a digital signature not being treated as equivalent to a written signature.

4. Civil Code 16.5 and E-Sign.

Under the federal E-Sign Act, California law is generally preempted to the extent there are statutes, regulations or any other rule of law that would deny the legal effect, validity or enforceability of a signature solely because it is in electronic form. E-Sign '101(a)(1). The question therefore arises whether the provisions of Civil Code Section 16.5 are preempted by E-Sign. At first blush, preemption would appear to be the case since the Secretary of State=s implementing regulations prohibit digital signatures from qualifying as written signatures, if the technology used in the creation of the digital signature is not an Aacceptable technology.@

Nevertheless, as discussed in more detail below, it does not appear to me as if preemption would occur. More particularly, a closer look at the E-Sign Act suggests that there may not be any significant area of conflict between the E-Sign rules and California Civil Code Section 16.5.

a. Commerce Clause Limitations.

As an introductory matter, it is important to note that E-Sign applies only to Atransactions@ that Aaffect interstate or foreign commerce.@ Accordingly, wholly intrastate transactions would not be affected by E-Sign. Since Civil Code Section 16.5 by its terms addresses the use of electronic signatures and records in dealings with the State of California, these Commerce Clause limitations on the scope of E-Sign may be relevant. If the E-Sign Act does not apply due to Commerce Clause limitations, there is no preemption.

b. Definition of "Transactions."

Second, E-Sign only applies to "transactions," and then defines the word Atransaction@ in a very particular manner. Specifically, a Atransaction@ is defined as any action relating to Athe conduct of business, consumer or commercial affairs...@ E-Sign '106(13). Governmental affairs are not included in the definition of a Atransaction.@ Since E-Sign Section 101 applies only to Atransactions,@ as a limiting factor this definition exclusion of governmental affairs from E-Sign=s scope may also be very important. Put another way, where a governmental agency is engaged in governmental activity, there is a very significant question as to whether E-sign applies. If E-Sign does not apply because a purchase of goods from state agency is not a "transaction" under E-Sign, there is no preemption.

c. Procurement by Governmental Agencies.

Finally, when it comes to private sector activities by the State of California and its governmental agencies, E-Sign is actually quite permissive by its own terms. While it is a slightly more convoluted legal analysis, the end result is that it appears to me as if E-Sign does not affect procurement contract activities by California governmental agencies or other private sector contracts with them. Since these are the types of transactions contemplated by Civil Code Section 16.5, if E-Sign does not apply to this area then there would be no preemption.

To begin, it is necessary to look at the exceptions to the preemption provisions of E-Sign. These are found at Section 102. As a general matter, under Section 102, a state statute, regulation or other rule is not preempted by E-Sign Section 101 if one of two exemptions are met.

For our purposes, the relevant exemption is found at Section 102(a)(2) of the E-Sign Act. Under this exemption, a state law or regulation may specify alternative procedures or requirements for the use or acceptance of (among other things) electronic signatures, and will not be preempted, if the alternative procedure or requirements are consistent with E-Sign and the alternative procedures or requirements are technology neutral. *See* E-Sign '102(a)(2)(A)(ii). [1]

Since the Secretary of State=s Regulations are not technology neutral, the general exception to preemption would not be available under Section 102(a). However, a savings clause was included at E-Sign Section 102(b) for specified governmental activities. Under Section 102(b) the technology neutrality requirements of Section 102(a)(2)(A)(ii) are not applicable to statutes, regulations or other rules of law Agoverning procurement by any State, or any agency or instrumentality thereof.@

As a result of this savings clause, it would appear that a California governmental agency would be able to insist on compliance with Section 16.5, notwithstanding that the Secretary of State=s implementing

[1] We should also not forget that no party can be compelled to accept an electronic signature. E-Sign '101(b)(2). Indeed, Section 102(b)(2) specifically covers a governmental agency with respect to records other than contracts to which it is a party. An ancillary issue, therefore, is whether a governmental agency may avoid preemption issues by agreeing to accept an electronic signature only if an acceptable technology is used. However, given Civil Code Section 16.5, it seems that this type of conditional agreement by a governmental agency would cause a problem under E-Sign Section 101(a).

regulations are not technology neutral. Put more concisely, the exception to preemption found at E-Sign Section 102(a)(2) could still be available, notwithstanding that the Secretary of State=s regulations are not technology neutral. Under this line of analysis, Civil Code Section 16.5 would not be preempted.[2]

d. Electronic Records by Governmental Agencies.

E-Sign also deals with governmental records, at Section 104 of that Act. Under '104(a), state governmental agencies are specifically given the ability and the authority to require that Arecords@ be filed with their agencies Ain accordance with specified standards or formats." While it is not immediately clear what is meant by Astandards or formats,@ this provision of E-Sign supports the ability of a governmental agency to insist on compliance with Civil Code Section 16.5 as it affects records maintained by California governental agencies.

In addition, E-Sign Section 104(b) allows state governmental agencies that interpret state laws to interpret E-Sign Section 101 with respect to those state statutes through the issuance of regulations pursuant to that state statute. There are limitations on the ability of a state agency to restrict the use of electronic communications or electronic signatures under Section 104(b). Specifically, any requirements imposed must be justified and must also be technology neutral, as a general matter. *See* E-Sign '104(b)(2)(C)(iii). Nonetheless, another savings clause exempts governmental entities engaged in marketplace transactions from this technology neutrality requirement.

5. Summary.

As a result, it does not appear that E-Sign significantly affects the current status of Civil Code Section 16.5. Since current California law appears to be unaffected by E-Sign, it would not appear that there is any pressing need to adopt a clean version of UETA that would include Sections 17, 18 and 19. That is to say, since Sections 17-19 of the uniform version of UETA deal with a subject matter that is currently handled by Civil Code Section 16.5, and since Section 16.5 does not appear to be preempted in

[2] There would still be a need to establish that Civil Code '16.5 and the Secretary of State=s implementing regulations are Aconsistent with@ E-Sign, before the the exemption to preemption at E-Sign '102(a)(2) would be available. While this would not seem to be an impossible burden, it could be an impediment to the use of technologies other than Aacceptable technologies@ as electronic signatures in this area. Proponents of alternative technologies may face an up-hill struggle both in the marketplace and in the courts, given the ambiguity of the phrase "consistent."

any meaningful manner by E-Sign, there seems no particular reason to adopt those three Sections of UETA by re-incorporating them into SB 97.

One additional comment in this regard: while there is no immediate demand as a matter of strict legal analysis to include these three provisions of UETA in SB 97, there would be one significant positive benefit to their inclusion. Specifically, while one can arrive at the conclusion that E-Sign does not affect the viability of Civil Code Section 16.5, the effort to reach this conclusion is not simple and is not straightforward. The adoption of a clean version of UETA, including these three sections, would simplify the legal landscape and make it easier for practitioners in this area.

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