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COMMITTEE ON UNIFORM STATE LAWS

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February 24, 2003

Ms. Josephine Scarlett
United States Department of Commerce
National Telecommunications and
Information Administration
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230

Re: The State Uniform Commercial Code Exception in the Electronic Signatures In
Global and National Commerce Act; Docket No. 010222048-2313-07

Dear Ms. Scarlett:

The Association of the Bar of the City of New York ("Association") is pleased to provide this letter to the National Telecommunications and Information Administration ("NTIA") in response to its request for comment on the evaluation of the Section 103(a)(3) exception for the Uniform Commercial Code ("UCC") from the Electronic Signatures In Global and National Commerce Act ("E-Sign"). The Association believes that the UCC exception, which excludes from the scope of E-Sign transactions governed by the provisions of the UCC other than UCC Sections 1-107 and 1-206 and UCC Articles 2 and 2A, should be retained in its current form.

The Association was established in 1870 and is today one of the country's preeminent bar associations. Devoted to political, legal and social reform in promotion of the public interest, the Association currently has more than 22,000 members and more than 180 committees, each charged to consider a specific area of law or the profession. The Uniform State Laws Committee, of which I serve as chair, focuses on proposed uniform laws and revisions to uniform laws and their appropriateness for New York.

E-Sign and its sibling, the Uniform Electronic Transactions Act ("UETA"), were designed to eliminate barriers to electronic commerce by extending legal recognition to signatures, records and contracts existing in electronic form. Each statute contains an identical exclusion for transactions arising under the UCC, which exclusion was included for two principal reasons:

First, the drafters of UETA and E-Sign recognized that the UCC already had been appropriately “electronified,” so that additional coverage of UCC provisions by UETA and E-Sign was unnecessary. Article 4A, for example, was written to specifically address electronic funds transfers. During the Article 4A drafting process, the Article 4A drafting committee considered, provision by provision, where the use of electronic means made commercial sense and where a paper-based writing should still be required. Revised Articles 3, 4, 5, and 9 of the UCC went through similar processes during their revisions in the 1980s-1990s. Revised Article 8 of the UCC is yet another good example: it established two separate paradigms for securities holdings – a paper-based system and an electronic system with appropriate legal rules for each.

Second, it was understood at both the UETA and E-Sign drafting tables that substituting an electronic framework of records and authentication for existing writing and signature requirements throughout the UCC would have a significant impact on substantive commercial law rules. For example, Articles 3, 4, and 7 of the UCC are based on the concept of possession of a signed writing, such as a negotiable instrument, item, or document of title. The substantive rules of these articles, which require possession and indorsement, simply do not work well, if at all, in an electronic world. A wholesale “electronification” of these articles would create new electronic payment products, such as electronic negotiable instruments, including checks, without providing an appropriate framework for handling them. In comparison, Revised Articles 3 and 4 of the UCC retain the writing requirement for the instrument itself, but allow for various electronic communications and processes. For example, Revised Article 3 provides for an electronic notice of dishonor (Section 3-503(b)) and electronic declaration of loss of a bank instrument (Section 3-312), while Revised Article 4 permits imaging, truncation and electronic processing of checks pursuant to an agreement or federal regulation (Sections 4-103 and 4-110).

The Association believes that the above reasons for having a UCC exclusion in E-Sign and UETA remain as valid today as when UETA and E-Sign were initially crafted. In fact, Article 7 of the UCC is currently going through a revision process, which contemplates the conversion of paper documents into electronic records. Revised Article 9, which introduced the concept of “control” of an electronic record, recently has been enacted in all fifty states. Revised Articles 3 and 4, and Article 4A, have gone through another revision process as recently as in 2002.

In addition, we believe that the peculiar status of New York state law makes it necessary to retain the UCC exclusion. Although a great majority of states have adopted Revised Articles 3 and 4, New York has thus far chosen not to do so, retaining instead the version of Articles 3 and 4 enacted by it in 1962. One of the principal reasons for the New York legislature’s reluctance to enact these Revised Articles has been powerful resistance of consumer

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advocacy groups. Strong concerns were expressed with respect to various aspects of the proposed electrification, as some of the provisions of Revised Articles 3 and 4 of the UCC were considered inadequate for consumers' protection. More than decade-long negotiations between New York banking institutions and consumer advocacy groups have yet to produce a mutually acceptable resolution. The repeal of the UCC exclusion in E-Sign is likely to have a much more profound effect on consumer interests in New York State than the changes contemplated by Revised Articles 3 and 4.

Moreover, while many other states in recent years have enacted UETA, New York has not done so, passing instead the Electronic Signature and Records Act ("ESRA"), which differs from UETA and E-Sign in many aspects, including its scope. Unlike UETA and E-Sign, ESRA does not exclude transactions governed by UCC. Rather, the New York statute carves out a much narrower exemption for negotiable instruments and documents of title, possession of which is deemed to confer title, with the notable exception that under certain technology-related conditions ESRA does allow for the existence of an electronic negotiable instrument, including an electronic check.

Until now, the Association took comfort in the fact that ESRA was likely preempted by E-Sign, while at the same time urging the New York legislature to repeal ESRA and, for purposes of uniformity and certainty, to adopt UETA. If the UCC exclusion in E-Sign is repealed, however, the lingering preemption issue will become even more complex. It is still likely that the above-mentioned "negotiable instrument exception," which requires that certain technology-related conditions for electronic checks be met, would remain preempted and will apply only to intra-state transactions. Inter-state transactions, on the other hand, are likely to be governed by E-Sign, which, absent the UCC exception, presumably would allow for electronic checks without any technology-related conditions attached. The revocation of the UCC exclusion in E-Sign may thus result in having at least two differing standards for electronic checks in New York, depending on whether the check is being used in- or out-of-state – hardly a desirable outcome either for the country's payments system or for New York consumers.

In conclusion, because a substantial revision of the UCC has been underway for some time, is nearly complete and is resulting in the inclusion of properly tailored and carefully considered electronic record and signature provisions throughout the various articles of the UCC, deletion of the E-Sign Section 103(a)(3) UCC exception would serve no benefit. In fact, not only would this deletion have no positive effect, but, as noted above, it would have an unintended and undesirable impact on the commercial law of New York State and that existing elsewhere in the country. Revisions to the UCC should be made only by relevant UCC drafting committees with expertise in the specific areas being revised through a process that entails

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section-by-section review of the relevant UCC articles. In addition to bringing to the table the necessary expertise, such a process of revision has had and will continue to have the benefit of active participation from observers representing virtually all affected constituents, including consumer advocates. For the foregoing reasons, we support the retention of the existing UCC exception in E-Sign.

With best regards,

Sincerely,



Penelope L. Christophorou

cc: E. Leo Milonas, President, The Association of the Bar of the City of New York
Alan Rothstein, Esq.
Members of the Uniform State Laws Committee