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Secure Legal Transactions with Digital Signatures - A Legislative Update

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I. Introduction

With the explosion of Internet commerce the requirements for assuring the legality of any electronic transaction has become the primary concern for businesses throughout the United States. Current legal practice requires most transactions be formalized through documentation and signing or authentication. The historical method of binding two parties in a legal agreement is a document with signatures. The signature will identify the signer with the signed document and express the desire that it have legal significance. This will be done with both parties present, which guarantees that the document is authentic and the signatures are authentic. How can corporate America obtain the same or higher level of legal protection through the use of electronic means? The business community must develop policies, guidelines and tools to obtain the appropriate level of protection for all parties in a binding agreement using electronic/digital signatures.

A massive amount of legislation has been introduced in state legislatures and the federal government over the last few years. This legislation should insure the legal system would accept electronic/digital signatures as required by the "U.C.C." (Uniform Commercial Code) and other laws and create policies and procedures that will recognize secure electronic forms as legally binding. This will require a strong legal framework that is recognized at all layers of state and federal government. The states rely on model laws created by the NCCUSL (National Conference of Commissioners on Uniform State Laws).

II. The Framework

The information provided by 'McBride Baker & Coles' indicates that 47 states have some form of 'electronic signature' legislation 'Enacted' as of 1/13/2000. The statutes vary in their coverage and the types of signatures that are authorized. 'McBride Baker & Coles' (hereafter know as MBC) defines the signature types as follows: (1) Any Electronic signature – general definitions of electronic signatures that do not impose any requirements relating to security of the signature, and also encompass pki-based digital signatures, either expressly or by implication, (2) Digital Signatures – are limited in scope to pki-based signatures, (3) Any Electronic Signatures with specified authentication attributes only – the statute gives legal effect only to those type of electronic signatures that meets certain authentication attributes; requirements that the signature be unique to the person using it, capable of verification, under the sole control of the person using it and linked to data in such a manner that if the data are changed, the digital signature is invalidated. There are some statutes that use the term 'electronic signature' and some that use 'digital signature'. MBC has researched the different verbiage in the statutes and compiled their findings in tables located on their web site. These tables include information on provisions relating to: (a) Scope of Authorization to Use of Electronic Signatures, (b) Definitions of the Term 'Electronic Signature', (c) Definitions of the Term 'Digital Signature', (d) Liability of Identified Signer, (e) Liability of Unauthorized Signer, (f) Liability of Certification Authorities, and (e) Presumptions.

III. The NCCUSL

The NCCUSL (National Conference of Commissioners on Uniform State Laws) is comprised of over 300 lawyers, judges and law professors, appointed by the states to draft proposals for 'Uniform and Model Laws'. NCCUSL has recently finished work on the final draft of the 'Uniform Computer Information Transactions Act' and will present the document at the next NCCUSL meeting for final approval. The NCCUSL has also given final approval for the 'Uniform Electronic Transactions Act'. These two Acts have created the legal framework from which states can create uniform laws that pertain to electronic commerce.

IV. The UETA (Uniform Electronic Transactions Act)

The 'Uniform Electronic Transactions Act' (hereafter known as the UETA) is designed to 'support and compliment' the states digital signature statute's. This Act tries to equalize the validity of electronic signatures with manual signatures. Part of the Definition for "Electronic Signature" in this Act states, "A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as a part of an e-mail message – so long as in each case the signer executed or adopted the symbol with the intent to sign". Therefore if the state has a statute covering

electronic/digital signatures this Act would clarify what is construed as an electronic transaction and electronic signature. The UTEA applies only to transactions related to business, commercial (including consumer) and governmental matters and is therefore limited in scope. The states that have adopted the UETA are: Arizona, California, Idaho, Indiana, Kentucky, Maryland, Minnesota, Nebraska, Pennsylvania, South Dakota, Utah, and Virginia. States/district that will be introducing this Act in 2000 are: Alabama, Colorado, Delaware, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Michigan Ohio, Oklahoma, Rhode Island, Vermont and West Virginia.

V. The UCITA (Uniform Computer Information Transactions Act)

The 'Uniform Computer Information Transactions Act' (hereafter known as the UCITA) sets the rules for electronic contracts and the use of electronic signatures for contract adoption using the normal principals of contract law. This provides a comprehensive set of rules for licensing computer information, whether software or other clearly identified forms of computer information. Since these transactions are mostly in electronic form rules are needed to control the acceptance of electronic signatures. Authentication is basis for these rules. A signature or its electronic equivalent is the basic means of authentication under the UCITA. The UCITA will not receive final approval until the NCCUSL conference in July 2000, but some states have already adopted: Maryland and Virginia. Currently, there are three states/district that will introduce in the year 2000: Delaware, District of Columbia and Hawaii.

VI. The Federal Government

The United States House of Representatives has two Bills that directly pertain to electronic transactions and digital signatures. The first is H.R.1685 that was introduced 5/5/1999 and has the Title of "Internet Growth and Development Act of 1999". Title I of the document is "Authorization of Electronic Signatures in Commerce". All electronic signatures authenticated under this Act would be "equal to paper based, written signatures for purposes of record, rule, or law that requires a valid signature". It would consider an electronic signature authenticated if it: "(1) reliably establishes the identity of the maker, sender, or originator of a document or communication in electronic commerce; and (2) reliably establishes that such document or communication has not been altered". H.R. 1685 will also provide the acceptable procedures for proof of authentication. This Bill was sent to the House Judiciary Committee and hearings were held on 6/30/1999. No further action has been reported since then.

The second Bill is H.R. 1714 was introduced on 5/6/1999 and has the Title "Electronic Signatures in Global and National Commerce Act". This document concentrates solely on electronic records and signatures and has made it to the Senate committee process. H.R.1714 and its Amendments cover the same areas as the UETA and UCITA Acts that are being adopted by the states. The Bill specifically states in Title I Sec. 102(a) that a state may modify, limit, or supersede the provision of Sec. 101 if the "statute, regulation or rule of law – (1)(A) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as reported to the State legislatures by the National Conference of Commissioners on Uniform State Laws; or". This Bill passed the House (amended) on 11/9/1999.

VII. Conclusion

It is evident that the 'Legal Framework' for electronic transactions will be adopted by state legislatures across the country within the next two to three years. The Federal government is also close to a 'signature' bill. We can all hope that the United States will soon set the example for secure electronic commerce that is accepted in all judicial systems around the world.

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