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DRAFT RECOMMENDATION OF LEGAL SUBGROUP*

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I. Introduction

The Legal Subgroup is concerned by a pivotal position in the Department of Defense implementation plan for secure transactions. The DoD's policy states that "[i]n no event will the DOD be liable for any losses, including direct or indirect, incidental, consequential, special, or punitive damages, arising out of or relating to any certificate issues by a DOD CA [certificate authority]." ¹ This statement of general policy could easily conflict with commercial norms, which generally allocate legal risks more evenly between trading partners. ² If the Department is serious about encouraging electronic commerce, the policy of accepting absolutely no liability may need to be revisited. It is unreasonable to place the full risk on commercial vendors, especially when that risk is more significant when conducting business electronically.

II. Background and Problem Statement

One alternative approach would be for the DoD to explore commercial standards for allocating liability, such as the Uniform Electronic Transactions Act ("UETA" or "the Act"). UETA is designed to remove barriers to electronic transactions through the provision of a legal framework for the validation and effectuation of electronic records and signatures. In short, UETA's purpose is to ensure that electronic transactions are legally recognized and are just as valid as signed paper transactions. ³

* This piece is based in large part upon an article by Daniel Silien, an associate in the government contracts and Internet practice groups at the Washington, D.C. law firm Wiley, Rein & Fielding, and a co-chair of the legal subgroup. This draft reflects the work of Dan Silien and Chris Yukins, co-chairs; it is a working draft, and does not yet reflect input from the other public- and private-sector attorneys in the subgroup.

¹ This policy is set forth in the X.509 *Certificate Policy for the United States Department of Defense*, Version 5.0 (December 13, 1999) at § 2.2.1.

² See, e.g., the *Digital Signature Guidelines*, promulgated by the Information Security Committee of the Science & Technology Section, American Bar Association (<http://www.abanet.org/scitech/ec/isc/>). A tutorial on the *Guidelines* is available at <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html>.

³ In addition to these purposes, the Act and the Comments to the Act declare that other purposes and policies of the Act include the promotion of uniformity in the law relating to recognition of electronic transactions and the promotion of public confidence in the validity,

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Although to date UETA has not been enacted nationally, it has been passed in several states, including Virginia and Maryland. This paper highlights some of UETA's strengths and sets forth an argument for UETA's application to DoD transactions with commercial trading partners, especially electronic transactions governed by Part 12 of the Federal Acquisition Regulation ("the FAR"), which covers purchases of commercial items.

III. Discussion: How Does UETA Work and What Does UETA Cover?

UETA, as adopted by the National Conference of Commissioners on Uniform State Laws, "applies to electronic records and electronic signatures relating to a transaction."⁴ For purposes of UETA's potential application to DoD commercial contracts, Section 7, "Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts," is the most important. This section provides:

- (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.⁵

As the Comments make clear, this section "sets forth the fundamental premise of this Act: namely, that the medium in which a record, signature, or contract is created, presented or retained does not affect its legal significance."⁶ The Act merely ensures that contractual documents previously requiring a handwritten signature will be deemed legally valid with an electronic signature.

UETA also contains provisions for:

- the "Provision of Information in Writing; Presentation of Records;"⁷
- "Attribution and Effect of Electronic Record and Electronic Signature;"⁸
- the "Effect of Change or Error;"⁹

integrity and reliability of electronic commerce and governmental transactions. UETA § 6 and Comments thereto.

⁴ UETA § 3(a).

⁵ UETA § 7.

⁶ Comments to UETA § 7.

⁷ UETA § 8.

⁸ UETA § 9.

⁹ UETA § 10.

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- “Notarization and Acknowledgment;”¹⁰
- the “Retention of Electronic Records; Originals;”¹¹
- “Admissibility in Evidence;”¹²
- “Automated Transaction;”¹³
- “Time and Place of Sending and Receipt;”¹⁴
- “Transferable Records;”¹⁵ and
- provisions dealing with governmental agencies.”¹⁶

IV. Alternatives

It is equally important, though, to recognize what UETA does not cover.¹⁷ Perhaps most significantly, UETA does not replace the substantive elements of contract law.¹⁸ Thus, the Act is “designed to complement existing state law and, except for the form and format elements of such law, not to disturb or alter the law applicable to transactions.”¹⁹ Therefore, application of UETA does not relieve a party to an electronic transaction from any of the obligations or requirements contained in existing law. The only difference is that UETA recognizes the validity of an electronic signature in place of a traditional written signature.

UETA also does not attempt to regulate digital signatures.” In fact, UETA is entirely agnostic as to the technology used for digital signatures.²⁰ Thus, even were UETA broadly adopted for federal government transactions, the Department of Defense could still set its own policies and procedures for determining what constitutes a valid digital signature, and could still maintain its own certification authority guidelines.

¹⁰ UETA § 11.

¹¹ UETA § 12.

¹² UETA § 13.

¹³ UETA § 14.

¹⁴ UETA § 15.

¹⁵ UETA § 16.

¹⁶ UETA §§ 17-19.

¹⁷ Specific types of contracts exempted from UETA are found in § 3(b).

¹⁸ UETA § 3(d).

¹⁹ *The Medium Shall Not Be The Message - Securing Legal Certainty for Electronic Transactions with the Uniform Electronic Transactions Act*, Patricia Brumfield Fry. Ms. Fry chaired UETA’s Drafting Committee.

²⁰ See UETA Prefatory Notes.

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Additionally, UETA does not mandate that parties utilize electronic business.²¹ It merely serves to validate the use of electronic commerce if the parties to a transaction seek to use such means for their business.

V. Recommendations

A. UETA Proponents' View

Until the Department of Defense adopts new, formalized policies and procedures, UETA could easily serve as a gap filler for government contracts conducted electronically. In effect, for example, UETA's guidelines and recognition of digital signatures could serve as an overlay for commercial transactions conducted pursuant to FAR Part 12.²²

Application of UETA to these transactions would allow commercial vendors to conduct electronic business with the government with the same ease provided in the more traditional paper contracting, without fear as to how such a transaction might later be treated. Providing this element of certainty is likely to increase utilization of electronic commerce by vendors doing business with the government. UETA would ensure both parties to the transaction that the digital signature on the contract would be binding and would carry the same significance as a paper signature. Additionally, UETA's rules for acceptance and delivery, possibly as modified by DoD, would also provide greater certainty and assurances to merchants seeking to take advantage of electronic commerce.

B. Possible Points of Opposition

Opponents of incorporating UETA into federal procurement law are likely to raise the following concerns, among others:

- To accommodate FACNET in the mid-1990s, the Federal Acquisition Regulation (FAR) was already modified to accommodate advanced principles in electronic commerce, such as electronic signatures. These opponents would argue that UETA is just a clumsy commercial overlay, over an already mature system of federal regulation.
- Opponents would likely argue that UETA is only a distraction. Opponents would point out that even UETA's proponents in the federal marketplace acknowledge that the truly knotty issues in electronic commerce - such as the allocation of risk using Public Key Infrastructure (PKI) -- would have to be resolved by additional, probably bilateral agreements, known as Trading Partner Agreements (TPAs).

²¹ "This [Act] does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form." UETA § 5(a).

²² FAR Part 12 governs Acquisition of Commercial Items. As FAR 12.102(b) makes clear, the policies therein are to be used "in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; or Part 15, Contracting by Negotiation, as appropriate for the particular acquisition." Therefore, UETA would be applicable to FAR Parts 13 - 15 to the extent FAR Part 12 demands it.

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(UETA contemplates and endorses that special bilateral agreements.) If that is so (opponents would argue), there is little point in diverting attention to UETA, a loose framework, and leaving to the contracting parties (the government and industry) the onerous and expensive task of negotiating TPAs. A better solution, opponents would probably argue, is to ignore UETA and instead to focus the limited available resources on establishing “standard” (or regulatorily required) TPAs.

VI. Implementation Concerns

The Department of Defense (and more broadly, the federal government) should adopt and apply UETA (or the core principles contained therein) to commercial electronic transactions between the government and parties doing business with the government.²³ Implementation of this recommendation could occur through Congressional action, modification of the FAR, or creation of agency-level policies.

UETA’s best application to Department contracting is to serve as a gap filler for commercial transactions with the Department. DoD would still be free to adopt its own procedures and policies. However, in the absence of such regulations, UETA would allow the Department to participate in commercial electronic business under a commercial model, without further regulatory work.

In addition, UETA could serve as the foundation for DoD electronic commerce policies. Thus, instead of creating its own rules for the recognition and validity of digital signatures, UETA could be starting point for further expansion.

VII. Resource Implications

In implementing legal solutions for electronic commerce, probably the Defense Department’s most serious resource constraints is in legal manpower. It is expensive and difficult for attorneys, whether public or private, to learn and apply principles of electronic commerce. UETA offers a means of improving that process, by presenting streamlined commercial legal solutions to simplify the DoD’s expansion into electronic commerce.

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²³ Adoption of UETA would also be consistent with the Clinton Administration’s policy on electronic signatures. “The Administration supports legislation that promotes a predictable, minimalist legal environment for electronic commerce and encourages prompt state adoption of uniform legislation assuring the legal effectiveness of electronic transactions and signatures.” Statement of Andrew J. Pincus, General Counsel, U.S. Department of Commerce before the Courts and Intellectual Property Subcommittee on the House Committee on the Judiciary (Sept. 30, 1999).