DISCUSSION DRAFT ONLY
SUBJECT TO REVISION

Electronic Signatures in Global and National Commerce Act of 2000:
Effect on State Laws

Raymond T. Nimmer

I. Introduction

In the summer of the year 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (Federal Act). The Federal Act establishes a national principle that, subject to listed exceptions, electronic signatures and records cannot be denied legal effect solely because they are electronic as compared to being on paper. This paper focuses on the relationship of the Federal Act to state law and, particularly, on the extent to which the Federal Act preempts state law.

Notably, the Federal Act contains no general statement about the scope of its preemption. Rather, the preemptive effect of the Act must be discerned from the terms and scope of the provisions of the Act that specifically invalidate contrary state law, and from the underlying purpose of the statute. As we see below, there are several preemptive rules in Section 101 of the Federal Act and these constitute the relevant essence of the preemption under this statute. Section 102 of the Act, however, allows states to step away from those preemptive effects by following one of two approaches under which they can modify or supersede the effects of Section 101. There is no general preemption of substantive state law, including any law that deals with establishing obligations or attribution to a party.

II. Barriers and Statutory Focus

The Federal Act stems from a broad consensus since at least the mid-1990's that electronic commerce should be promoted. An early U.S. governmental report described the relationship between contract law, e-commerce and that goal in the following terms:

> The challenge for commercial law [is] to adapt to the reality of the NII [National Information Infrastructure] by providing clear guidance as to the rights and responsibilities of those using the NII. Without certainty in electronic contracting, the NII will not fulfill its commercial potential. [Regardless] of the type of transaction, where parties wish to contract electronically, they should be able to form a valid contract on-line. In particular, on-line licenses should be encouraged because they offer efficiency for both licensors and licensees.[1]

[1] Report of the Working Group on Intellectual Property Rights, Intellectual Property and the National Informaton Infrastructure 58-59 (1995).

While there are many other fundamental contract law issues that must be resolved in order to facilitate electronic commerce, many have focused on a perceived need to remove technical *barriers* to electronic commerce. Two goals often dominate the discussion or barriers: 1) prevent burdensome local regulation (*regulation issues*) and 2) establish that electronic technology satisfies traditional requirements associated with paper writings (*technology adequacy issues*).

The Federal Act narrowly focuses on the latter of these two goals. We can see this in Congressional Record statements by primary legislators involved in enactment of the Federal Act.[2] For example, one sponsor commented:

> [This Federal Act] is founded on a simple premise. Any requirement in law that a contract be signed or that a document be in writing can be met by an electronically signed contract or an electronic document. We are simply giving the electronic medium the same legal effect and enforceability as the medium of paper.[3]

The statement of another leading legislative figure in enactment likewise carves out a narrow but important, focused goal for the Federal Act:

> [The Federal Act] will eliminate the single most significant vulnerability of electronic commerce, which is the fear that everything it revolves around - electronic signatures, contracts, and other records - could be rendered invalid solely by virtue of their being in "electronic" form, rather than in a tangible, ink and paper format. This [Act] will literally supply the pavement for the e-commerce lane of the information superhighway.[4]

It is quite clear that the basic rule should be that, except in limited cases, electronic records and signatures should fulfill former legal requirements of a writing so long as the content, timing and the intent underlying these electronics corresponds to other requirements in law.

Section 101(a), the primary substantive provision, corresponds to these statements. It provides:

> Notwithstanding any statute, regulation, or other rule of law … with respect to any transaction in or affecting interstate or foreign commerce:
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

[2] The Federal Act does not have official commentary or an official explanatory statement by the Conference Committee, but was accompanied by prepared statements in Congress by sponsors and members of the conference committee.

[3] Statement by Representative Bliley, 146 Cong.Rec. H4352 (June 14, 2000).

[4] Statement by Senator Abraham, 146 Cong. Rec. S5223 (June 15, 2000).

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[5]

This language states the basic principle of technology adequacy. That rule and the underlying premise are, indeed, quite simple: law should not deny effect to a signature, record or contract solely because it is electronic.

What we have, then, is a statute directed to eliminating barriers in the form of obstacles e-commerce through rules that prevent a state from denying legal effect to electronics simply because they are electronic in nature. Consistent with that focused goal, Section 101(c) establishes various disclosure and consent standards that apply to consumer protection laws that require disclosure or provision of information in writing to a consumer. These are described as exceptions to the general rule of Section 101(a) (which requires not preconditions to establish application of its basic rule). Whether the consumer disclosure rules are mandatory (e.g., the only method available to use electronic disclosures) is not clear from the statute, but that does not directly bear on preemption as discussed here.

Section 101 contains four additional rules that alter contrary state law. These are:

- Section 101(h): a state cannot deny effect to contracts involving electronic agents solely because of electronic character.
- Section 101(d): certain electronic records meet any rule that requires retention of a record or production of an original.
- Section 101(g): changes rules on use of electronic signatures in notarization and the like.
- Section 101(j): places limits under other law on the liability risk for insurance agents from use of electronic procedures.

In addition, Section 101 contains various rules concerning electronic records and signatures that support, rather than supplant state sovereignty. These include rules that exclude any intended effect on notice or similar requirements, exclude any effect on state or other law creating or excluding obligations, and permit a state to deny effect to an electronic record that was not retainable.[6]

[5] Federal Act § 101. The Act contains a number of exclusions from this principle which, in the interests of space, I will not discuss in this context.

[6] Federal Act § 101(e). Federal Act 101(b) states: "This title does not …limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in non-electronic form." The Federal Act contains other specific but seemingly redundant rules. For example, it states that its provisions do not alter the required content or timing of any disclosure or other record required to be provided or made available to any consumer under any other law. Similarly, in a consumer context, the Act does not alter a requirement that the record be made available in a form or method that requires verification or acknowledgment of receipt.

III. Preemption

Before Congress adopted the Federal Act, numerous states had adopted rules dealing with electronic records and signatures. Of course, an appropriately enacted and applicable federal statute can preempt contrary state law. On the other hand, federal statutes often coexist with state law on the same subject. While some might argue that the Federal Act preempts all state law other than UETA and several listed exceptions dealing with electronic records and signatures, the Federal Act does not say that. Indeed, it stops far short of widespread preemption.

The issues are two-fold.

- First, what is the scope of preemption to begin with?
- Second, what is the meaning of the rule in Section 102 of the Federal Act that allows certain state laws to modify or supersede Section 101 rules?

1. *Scope of Affirmative Preemption*

Federal law does not preempt state law unless (1) it expressly does so, (2) the state law conflicts with, and will frustrate a clear policy in the federal law, or (3) the federal law precludes state laws in an area because it occupies the entire field..

As I have said, the Federal Act does not contain any statement of preemption of state law, other than in the specifically preemptive rules in Section 101. There is no general statement that preempts other state law. There is a provision (Section 102) that which cuts back on preemption of state law, but that provision reduces preemption, it does not create independent preemptive effect. I discuss that rule below.

There is clearly no effort in the Federal Act to fully occupy the field in a way the precludes all other state action. Statutes that seek this effect, such as the federal Bankruptcy Code, are typically far more extensive in their coverage of topics within the field. Instead, the Federal Act, by its language and content, is a narrow statute that does not occupy the entire field concerning the legal efficacy of electronic records. The statutory rules are premised generally on the simple policy premise that any "requirement in law that a contract be signed or that a document be in writing can be met by an electronically signed contract or an electronic document."[7] State laws that conflict with or frustrate *that* policy and that are not authorized by the Federal Act itself are preempted.

Consistent with this policy focus, the primary mandatory (preemptive) rules deal with altering existing legal requirements (and preventing future requirements) that hinge the validity of a record or signature on the existence (or non-existence) of a writing. For these, the Act forbids any law that *denies effect* to electronics *solely* because they are electronic except as allowed in the Act itself.[8] This preserves state choices, but leaves no room to impose restrictions on the fundamental *technology adequacy* rule.

[7] For purposes of this statement, I ignore the treatment of insurance agent liability in Section 101.
[8] Obviously, a similarly preclusive effect arises for the other mandatory rules.

To understand the scope of preemption, consider several hypothetical state laws:

No Writing Required. *A state law provides that no writing of any type is required to form a particular contract or give a particular notice.*

The Federal Act does not apply since Section 101 concerns only state (or federal) laws that require writings. That same result governs for the disclosure and consent procedures with respect to consumers in cases where consumer protection law does not require disclosures or notices in writing. The Federal Act consumer rules only apply when a law requires information to be in a writing. They do not prevent a state from deciding that no writing is required.

Law Equates Electronics with Writings: *A state law provides that a statute of frauds rule can be met by either a signed writing or an authenticated electronic record*.

Does the Federal Act preempt? No. This law does not trigger Section 101 because it does not deny enforceability solely because the record or contract is electronic and does not require a writing or a written signature. Indeed, the state law has the opposite effect. This result is not affected by, and has no relationship to, the so-called back-in rule in Section 102 which, as discussed later, allows states to reassert control over electronics as satisfying writing requirements in some cases.

Mandatory Digital Signature Law: *A state law provides that electronic records and signatures will be recognized only if they use a particular, designated technology*.

This is a "mandatory digital signature law." Is that law preempted? Yes. By validating *only* one type of electronic record or signature *and* denying all other electronic records, it denies effect to the other electronics *solely* because they are electronic. Section 101(a) bans that. The result is that electronics using the designated technology and electronics using any other technology are enforceable under law as altered by the Federal Act.

Optional Digital Signature Law (Secure Signatures): *A state law provides that, if the parties opt to use a specific technology, the results of using that technology 1) satisfy the signature and the writing requirement, and 2) create a presumption that the party identified by the technology was the party actually using it.*

This is an "optional law" since it does not preclude use of other electronics or require parties to use on method. This approach describes most modern secure signature or digital signature statutes. Does the Federal Act preempt such statutes? No, but it does change part of the framework in which this law applies.

The Federal Act does not deal with state law on when or whether a signature or record is *attributed* to a person and does not deal with state laws that determine whether obligations exist that are chargeable to a person. Indeed, the Federal Act expressly

excludes any change in the law on rights or obligations of persons under other law.[9] That rule clearly preserves the second part of the hypothetical law stated above. Even without that rule, attribution, obligations and the like are not covered by the Federal Act. A statute does not preempt rules outside its coverage unless the Act specifically so provides or purports to entirely dominate the entire field. The Federal Act does not do so. The only way to argue for a different result under the Act would be to argue that the Federal Act rule that on its face merely bars state laws that invalidate electronic records actually contains an implied invalidation or policy that invalidates any state law that gives enhanced effect to certain technologies the Federal Act itself does not establish. But that ignores preemption jurisprudence and the simple purpose of the Federal Act: to validate electronics. It attempts to read in preemptive coverage of a topic that the Act specifically does not address.

However, the Federal Act does supplant rules that deny enforcement of electronic records solely because they are electronic. Thus, in our "optional digital signature" illustration, the Federal Act converts any underlying state statute of frauds into a rule that requires a writing *or* an electronic record. This precludes any part of the hypothetical statute that implicitly gave effect *only* to signatures or records created with a particular technology. It renders the first statement in the hypothetical (which validates the electronics) irrelevant. The result: electronic and written records are equivalent, but procedures recognized in state law which give presumptions to users of particular procedures are not disturbed.

2. *The "Back in" Rule.*

Section 102 of the Federal Act, entitled "exemption to preemption," contains a curious rule which I will describe as a "back-in rule" because its effect is to allow states back into the business of determining when or whether electronics satisfy requirements of a writing. The section reads as follows:

> (a) …. A State [law] may modify, limit, or supersede … section 101 with respect to State law only if such [law]:
>
> (1) [enacts UETA] as approved … by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of [UETA is] preempted to the extent such exception is inconsistent with this title … or would not be permitted under paragraph (2)(A)(ii) of this subsection; **or**
>
> (2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—
>
> (i) such alternative procedures or requirements are consistent with this [Act]; and

[9] Federal Act § 101(b)(1).

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology …; and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.[10]

This language is curious because it implies that state law can modify federal law.[11] That is never true. Also, it is curious because some read into it a broad, preemptive policy that this section simply do not address.

On its face, Section 102 simply states that a state can "modify, limit, or supersede Section 101" in one of two ways. Before jumping to the ways this can be done, a focus on the language of the rule itself is needed: a state may modify, limit or supersede *provisions of Section 101*. This rule only applies to changing (or superseding) the effect of Section 101, but many of the rules of Section 101 in themselves permit state law to control. Section 101 contains only a few mandatory rules and has no other mandatory effect.

The rules in Section 102 thus mean that, unless a state enactment meets the conditions in Section 102, it cannot alter the effect of the mandatory Section 101 rules. Thus, a state cannot limit or supersede the rule that precludes a law from denying effect to electronics solely because they are electronic except by complying with one of the options in Section 102. It cannot deny effect to contracts by electronic agents except as permitted by Section 102.

a. Clean Version of UETA

Federal Act Section 102 permits a state to supersede Section 101 by adopting UETA as proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and without changes. The legislative history refers to this as a right to "opt-out" of the federal scheme and replace it with UETA.[12] Enactment of UETA in its pure form supersedes the Federal Act and excludes its impact. To produce that outcome, the enactment must be pure and most likely should express an intent to supersede the Federal Act. Otherwise, the fact that UETA is limited to transactions in which use of electronics is agreed to leaves the Federal Act governing cases where no assent was obtained.

Prior to the Federal Act, a number of states enacted UETA (and a variety of other electronic validation laws), but in many cases the UETA enactment made significant modifications in the statute, ranging from the wholesale changes in California, to relatively minor adjustments, to circumstances where a state adopted attribution rules rejected in UETA.

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[10] Federal Act § 102(a).

[11] What is meant here apparently is that a state can modify, limit or supersede the effect of Section 101 on transactions in the state.

[12] "The conference report adopts a substitute provision. Section 102 of the conference report provides a conditioned process for States to enact their own statutes, regulations or other rules of law dealing with the use and acceptance of electronic signatures and records and thus opt-out of the federal regime." Statement by Senator Abraham.

These variant statutes do not meet the requirement of a *clean* enactment of UETA and, thus, do not fall within the first standard for modifying the effect of the Federal Act. As the legislative history comments: "Any variation or derivation from the exact UETA document reported and recommended for enactment by NCCUSL shall not qualify under subsection (a)(1). Instead, such efforts and any other effort may or may not be eligible under subsection (a)(2)." This seemingly takes not only the modifications out of the scope of Section 102(a)(1), but the entire enactment, placing it under Section 102(a)(2).[13]

There are many differences between UETA and the Federal Act. Thus, the federal policy regarding UETA does not mean that UETA and the Federal Act are identical. Rather, the federal policy here entails a narrow deference to state sovereignty on matters involving electronic records and signatures. Congress elected to permit adoption of a uniform state law, even though it differs significantly from the Federal Act in important ways. This presents a significant policy choice to the states: a state may rely on the enabling rules of the Federal Act or exclude and replace them by adopting UETA in pure form. To date, no states have considered that choice. As it relates to preemption, however, the choice centers only on modifying, limiting, or superseding Section 101 of the Federal Act. Neither the Federal Act nor UETA preclude other laws that do not conflict with the core validation principles of Section 101.

b. Consistent Other Laws.

The second back-in rule permits states to modify, limit or supersede the terms of Section 101 if the state law specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures and:

- the alternative procedures or requirements are *consistent* with the Federal Act;
- do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and
- if enacted after enactment of the Federal Act, the statute makes specific reference to the Federal Act.

Of these three conditions, the only clear rule requires that new laws make a specific reference to the Federal Act if they are to modify or supersede the provisions of Section 101.

(i) <u>Technology Neutrality</u>. Section 102(a)(2) disallows any state law that modifies, limits or supersedes Section 101 of the Federal Act by a law that does not maintain technology neutrality, that is, by a law that requires or gives greater legal status or effect to a specific technology. Some may claim that this back-in rule precludes any state law that hinges any

[13] There are two exceptions to this: 1) the Federal Act specifically disallows modifications of the scope of UETA that are not *consistent* with the provisions of the Federal Act scope, and 2) the Federal Act disallows use of the unusual UETA rule on mail delivery as a means to circumvent the policy of the Federal Act that electronics are to be treated as equivalent to paper. In both cases, efforts to do either of these apparently leaves the remainder of a clean UETA enactment intact.

beneficial effect on complying with a particular type of technology, but that seems well beyond the scope of this rule.

The rule only precludes superseding or modifying *Section 101 rules* (e.g., rules that bar invalidation of records or signatures solely because they are electronic and the other Section 101 preemptive rules) with a law that validates a particular technology and not others. The rule of neutrality thus functions within Section 102 as a whole and, as a result, only is relevant with respect to the effects of Section 101.

There is understandable confusion on this issue because the language of Section 102(a)(2) states that it applies only if the alternative state "procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology …" The troublesome language here is the reference to giving "greater legal status" to a specific technology. The uncertainty about this language and the neutrality rule is buttressed by some references in the legislative history of the Federal Act to preventing state laws from "favoring" certain technologies. Thus, the argument goes, the Federal Act precludes and preempts any state law that, through certification or other means, gives enhanced effect to any particular technology whether that effect extends to satisfying a writing or signature requirement, to establishing in law the identity of a party (attribution), to creating or foreclosing obligations on the part of a service provider, or any other issue.

That argument is flawed. A basic principle of statutory interpretation is that the language of the statute and comments made in reference to it must be interpreted in their statutory context. Legislative history cannot rewrite statutory text and statutory text cannot be pulled out of the context in which it is placed in the statute. The statutory context of the neutrality rule is Section 102 and Section 102 only refers to allowing (or disallowing) a state from altering the effect of Section 101. As we have seen, Section 101 does not deal with questions about attribution, obligations, or other substantive rules. It precludes state laws that deny validity to electronics solely because they are electronic or to contracts solely because they are created through electronic agents. In that context, the neutrality rule states simply that a state cannot circumvent the Federal Act by a state law that gives legal validity as supplanting a writing only to electronics executed through a designated technology. A state cannot enact a law that validates *only* a particular type of technology. That is preempted. But the requirement of neutrality on its face goes no further.[14]

This view of the statutory language is fully consistent with comments in the legislative history about not favoring a particular technology. What is precluded is favoring a technology by making it the only one (or one of only several) that fulfills a requirement of a writing or a

[14] A similar interpretations appears appropriate for Section 301 which states a federal position that, internationally, electronic record and signature rules should conform to four stated principles. Describing the type of approaches to be resisted, the legislative history focuses on the German Digital Signature law and German policy characterized as allowing an electronic signature to be valid *only* if it conforms to reglated technology standards. The key fact once again is the mandatory and preclusive nature of the technology requirement. Statement by Senator Abraham, 146 Cong. Rec. S5281-06 (Senate Proceedings and Debate of the 106th Congress, 2d Sess. (June 16, 2000).

signature. But the comments must be read in context of the language and effect of the statute itself. The statement of Senator Abraham puts this in the right context: "[Inclusion] of the 'or accord greater legal status or effect to' is intended to prevent a state from giving a leg-up or impose an additional burden on one technology or technical specification that is not applicable to all others, and is not intended to prevent a state or its subdivisions from developing, establishing, using or certifying a certificate authority system."[15]

Assume the following two hypothetical statutes enacted after the adoption of the Federal Act and specifically referring to it:

> **Statute 1:** "In this state, electronic records and signatures satisfy existing laws requiring a written signature or paper record only if they use "XYZ" technology."
>
> **Statute 2:** "In this state, electronic records and signatures satisfy requirements of a writing or signature. In addition, if the parties choose to use them, signatures that use XYZ technology and certification procedures establish a presumption that they are the records or signatures of the person identified by the technology."

Statute 1 is not technologically neutral. It cannot modify, limit or supersede the federal rule in Section 101 on questions dealt with on a mandatory basis in Section 101. The federal rule continues to over-ride on topics it addresses and a wide range of technologies suffice to meet writing and signature requirements.

Statute 2 is technology neutral on questions addressed in Section 101 of the Federal Act (see the first sentence of the statute). Indeed, on questions about the adequacy of electronics, this statute arguably precludes any application of the Section 101 rules that apply only if a law otherwise *requires* a writing or a written signature. Under the first sentence, state law no longer requires a writing. Statute 2, however, also goes beyond adequacy and other Section 101 issues, and establishes a presumption about the attribution of a signature or message. The Federal Act does not deal with this issue. So long as the attribution rule does not modify the basic rule in Section 101, the Federal Act does not apply. That aspect of Statute 2 is not affected by Section 102, nor is it affected by enactment of UETA.

(ii) Consistency. The third condition requires that, in order to limit, modify or supersede the effect of Section 101, the state law must be *consistent* with the Federal Act. The legislative history gives no guidance on what is meant by "consistent."

The provision clearly allows state laws substantively identical to the Federal Act. Thus, a state might supersede Section 101 by adopting the federal provisions in full as state law. This would allow state courts to rule on the relevant issues and return the subject matter to state law control. Of course, a clean UETA enactment can supersede Section 101 of the Federal Act even though UETA is not consistent with it on many issues, but that is under a separate rule.

[15] 146 Cong.Rec. S5281-06.

A state law can be "consistent" with the Federal Act if it is identical to the Federal Act on issues covered in the federal law, but also deals with additional issues (e.g., attribution, timing of notice, etc.) or with issues permitted by the Federal Act to be handled as a matter of state law (assuming that it does so in a manner that does not conflict with the Federal Act).

Arguably, a state law may be consistent with the Federal Act if it is "substantively identical" to the Act. If, however, the idea of consistency goes beyond that it means "substantively identical" on issues covered by the Federal Act, we will be open to a large array of uncertainty and litigation.

Throughout, it is important to recognize that the rule requires consistency with the Federal Act. It does not refer to state laws "consistent" with UETA. While the Federal Act allows a clean UETA to supersede the provisions of Section 101, both the statutory language and the legislative comments indicate that a modified UETA enactment is judged under a standard of consistency with the Federal Act, not whether the modification is consistent with the official UETA draft.

IV. Summary

The Federal Act sets a strong basis for eliminating the issues encountered in rationalizing the idea of *electronic* commerce with laws centered on and developed for paper commerce. The Act is "founded on a simple premise. Any requirement in law that a contract be signed or that a document be in writing can be met by an electronically signed contract or an electronic document. We are simply giving the electronic medium the same legal effect and enforceability as the medium of paper." This policy, along with the preemptive rules of Section 101, sets parameters of federal preemption. As a basic principle, except as such preconditions are permitted in the Act, the Federal Act only precludes state laws that place mandatory conditions on the adequacy of electronics to meet existing writing requirements or that conflict with the other preemptive rules of Section 101.