



Montana Legislative Services Division
Office of Research and Policy Analysis
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TO: Members of the Select Committee on Efficiency in Government
FROM: Dave Bohyer
RE: Application of the Uniform Electronic Transactions Act

The Select Committee asked staff to determine if the "Uniform Electronic Transactions Act" (UETA), Title 30, ch.18, MCA, applies to local governments.

Section 30-18-117, MCA, says that the UETA applies to local governments, i.e., to a "governmental agency", to the extent a local government chooses to participate, and section 30-18-102(10) specifically defines governmental agency to include "county, municipality, or other political subdivision of the state".

Section 30-18-103(2)(b), MCA, limits the application of the UETA within the Uniform Commercial Code (UCC). Under section 30-18-103, MCA, the UETA applies to only 30-1-107, MCA, and Title 30, ch. 2 and 2A, MCA, i.e., "Sales" and "Leases".

Within the UCC, Title 30, ch. 1, MCA, allows/provides for electronic transactions. Section 30-1-201, MCA, "General definitions.", defines: "Authenticate"; "Delivery"; "Document of title"; "Record"; "Send"; "Signed"; and "Writing". All of those terms either use or imply the use of electronic means of writing, signature, transmission, delivery, receipt, etc., by which a local government, included under the definition of "Person" in 30-1-201(2)(bb), is subject to all of the provisions of the UCC that apply to a "person".

In conclusion:

1. the "Uniform Electronic Transactions Act" applies to local governments and to the state and all other political subdivisions as well;
2. electronic transactions allowed/provided for in the UCC also apply to local governments (and the others) in the same manner they apply to all other "persons" under the UCC; and
3. the UETA applies to a governmental agency to the extent to which the government chooses to participate in electronic transactions. A local government is not required to use electronic transactions, nor is a local government's use of electronic transactions statutorily limited

Respectfully submitted.

30-1-201. General definitions. (1) Unless the context requires otherwise, words or phrases defined in this section, or in the additional definitions contained in other chapters of the code that apply to particular chapters or parts of chapters, have the meanings stated.

(2) Subject to additional definitions contained in other chapters of this code that apply to specific chapters or parts of chapters:

(a) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity, and any other proceeding in which rights are determined.

(b) "Aggrieved party" means a party entitled to pursue a remedy.

(c) "Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in 30-1-205.

(d) "Authenticate" means to:

(i) sign; or

(ii) execute or adopt a symbol, or encrypt a record in whole or in part, with present intent to:

(A) identify the authenticating party; and

(B) adopt, accept, or establish the authenticity of a record or term.

(e) "Bank" means any person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(f) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security payable to bearer or endorsed in blank.

(g) (i) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods.

(ii) The term does not include a warehouse receipt.

(h) "Branch" includes a separately incorporated foreign branch of a bank.

(i) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(j) "Buyer in ordinary course of business" means a person that buys goods, in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under chapter 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(k) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is for decision by the court. Conspicuous terms include the following:

(i) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(ii) language in the body of a record or display in larger type than the surrounding text, or in

contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(l) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(m) "Contract" means the total legal obligation that results from the parties' agreement as affected by this code and as supplemented by any other applicable rules of law.

(n) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(o) "Defendant" includes a person in the position of defendant in a counterclaim or third-party claim.

(p) *"Delivery" with respect to an electronic document of title means voluntary transfer of control and with respect to instruments, tangible documents of title, or chattel paper means voluntary transfer of possession.*

(q) (i) *"Document of title" means a record:*

(A) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers; and

(B) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(ii) The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title is evidenced by a record consisting of information stored in an electronic medium. A tangible document of title is evidenced by a record consisting of information that is inscribed on a tangible medium.

(r) "Fault" means wrongful act, omission, breach, or default.

(s) "Fungible goods" means:

(i) goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(ii) goods which by agreement are treated as equivalent.

(t) "Genuine" means free of forgery or counterfeiting.

(u) "Good faith", except as otherwise provided in chapter 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(v) "Holder" means:

(i) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(ii) a person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(iii) a person in control of a negotiable electronic document of title.

(w) "Insolvency proceedings" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(x) "Insolvent" means:

(i) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(ii) unable to pay debts as they become due; or

(iii) insolvent within the meaning of the federal bankruptcy law.

(y) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an

intergovernmental organization or by agreement between two or more countries.

(z) "Organization" means a person other than an individual.

(aa) "Party", as distinct from "third party", means a person that has engaged in a transaction or made an agreement subject to this code.

(bb) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(cc) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(dd) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(ee) "Purchaser" means a person that takes by purchase.

(ff) "*Record*" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(gg) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(hh) "Representative" means any other person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(ii) "Right" includes a remedy.

(jj) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to chapter 9A. The special property interest of a buyer of goods on identification of those goods to a contract for sale under 30-2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with chapter 9A. Except as otherwise provided in 30-2-505, the right of a seller or lessor of goods under chapter 2 or 2A to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with chapter 9A. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (30-2-401) is limited in effect to a reservation of a "security interest". Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to 30-1-211.

(kk) "*Send*" in connection with a writing, record, or notice means:

(i) *to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed, and in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or*

(ii) *in any other way to cause to be received any record or notice within the time it would have arrived if properly sent.*

(ll) "*Signed*" includes any symbol executed or adopted with present intention to adopt or accept a writing.

(mm) "Surety" includes a guarantor or other secondary obligor.

(nn) "Term" means a portion of an agreement that relates to a particular matter.

(oo) "Unauthorized" signature means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(pp) "Warehouse receipt" means a document of title issued by a person engaged in the

business of storing goods for hire.

(qq) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

30-18-102. Definitions. In this part:

(1) "agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction;

(2) "automated transaction" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction;

(3) "computer program" means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result;

(4) "contract" means the total legal obligation resulting from the parties' agreement as affected by this part and other applicable law;

(5) "cryptosystem" means a system that transforms or encrypts information for the purpose of secrecy or authenticity. The term includes a computer-based security procedure capable of generating and using a key pair.

(6) "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

(7) "electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances, in whole or in part, without review or action by an individual;

(8) "electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means;

(9) "electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record;

(10) "governmental agency" means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state;

(11) "information" means data, text, images, sounds, codes, computer programs, software, databases, or the like;

(12) "information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information;

(13) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity;

(14) "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(15) "security procedure" means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(16) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of

the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(17) "state agency" means a department, board, commission, authority, or other governmental entity of the executive branch of state government, including the Montana university system, that sends or receives electronic records;

(18) "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.

30-18-103. Scope. (1) Except as otherwise provided in subsection (2), this part applies to electronic records and electronic signatures relating to a transaction.

(2) This part does not apply to a transaction to the extent it is governed by:

(a) a law governing the creation and execution of wills, codicils, or testamentary trusts; and

(b) Title 30, chapter 1, other than 30-1-107, and chapters 3 through 9A.

(3) This part applies to an electronic record or electronic signature otherwise excluded from the application of this part under subsection (2) to the extent it is governed by a law other than those specified in subsection (2).

(4) A transaction subject to this part is also subject to other applicable substantive law.

30-18-111. Retention of electronic records -- originals. (1) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record that:

(a) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(b) remains accessible for later reference.

(2) A requirement to retain a record in accordance with subsection (1) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(3) A person may satisfy subsection (1) by using the services of another person if the requirements of that subsection are satisfied.

(4) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (1).

(5) *If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (1).*

(6) A record retained as an electronic record in accordance with subsection (1) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after July 1, 2001, specifically prohibits the use of an electronic record for the specified purpose.

(7) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

30-18-117. Acceptance and distribution of electronic records by governmental agencies.

(1) Except as otherwise provided in 30-18-111(5), each governmental agency shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(2) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (1), the secretary of state, giving due consideration to security, may

specify:

(a) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(b) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;

(c) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(d) any other required attributes for electronic records that are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(3) Except as otherwise provided in 30-18-111(5), this part does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.