BOILERPLATE TERMS, RULES OF INTERPRETATION, AND DEVELOPMENTS IN DRAFTING CONTRACTS

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BOILERPLATE TERMS, RULES OF INTERPRETATION, AND DEVELOPMENTS IN DRAFTING CONTRACTS

I. Introduction.

A contract is defined as a promise or set of promises to which the law attaches a legal duty and also provides a remedy for breach of that duty. *C&H Transportation Co. v. Wright*, 396 S.W.2d 443, 446 (Tex. Civ. App.-Tyler 1965, ref. n.r.e.; *Foster v. Wagner*, 343 S.W.2d 914. 197 Tex. Civ. App.-El Paso 1961, ref. n.r.e.). The courts of Texas, like those in other states, recognize the basic right of parties to contract freely and to create and define contractual duties, obligations, breaches, remedies, and the scope of damages for breach of the contract.

However, that basic right to freely contract is not unlimited. Because the courts must act as the enforcer of contracts; certain rules of contract interpretation and construction have evolved through the common law over many years. Furthermore, many of the basic rules of interpretation and construction now appear in statutes which govern certain contractual terms and which limit the parties’ ability to agree to certain terms and provisions. Finally, some common law rules and statutes have also been created which actually invalidate and make unlawful some provisions of a contract even if the parties agree to those terms.

This paper is not intended to provide an exhaustive list of every clause which may be necessary to the successful drafting of a contract. Each new transaction necessarily brings with it considerations different from the transaction before. However, this paper will address a basic outline of “boilerplate” clauses which should be contained in most written contracts. Additionally, this paper will discuss rules of interpretation which courts will apply to contractual clauses in the event of a contractual dispute. Additionally, this paper will discuss recent legal developments which should guide the parties successful drafting of an enforceable contract and to provide for successful enforcement in the event of a breach of contract.
A. **Requirement of a Writing.**

As a general rule, a contract should be expressed in writing and signed by both parties. Furthermore, the statute of frauds provides that certain contracts are not enforceable unless they are in writing and signed by the party to be charged. Although the statute of frauds does not apply to every contract, it is always advisable to draft every contract in a form that will comply with the Statute of Frauds. A contract that does not comply with the statute of frauds is not rendered invalid or illegal. However, the statute of frauds renders the contract unenforceable by a court because it establishes a rule of evidence which precludes proof of the terms of the contract. *Paine v. Moore*, 464 S.W.2d 477, 479 (Tex. Civ. App.-Tyler 1971, no writ).

1. **The Texas Statute of Frauds, TEX. BUS. & COM. CODE § 26.01.**

§ 26.01 Promise or Agreement Must Be in Writing

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

   (1) in writing; and

   (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

   (1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;

   (2) a promise by one person to answer for the debt, default, or miscarriage of another person;

   (3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

   (4) a contract for the sale of real estate;

   (5) a lease of real estate for a term longer than one year;
(6) an agreement which is not to be performed within one year from the date of making the agreement;

(7) a promise or agreement to pay a commission for the sale or purchase of:

   (A) an oil or gas mining lease;

   (B) an oil or gas royalty;

   (C) minerals; or

   (D) a mineral interest; and

(8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 1.03, Medical Liability and Insurance Improvement Act of Texas. This section shall not apply to pharmacists.


§ 26.02. Loan Agreement Must be in Writing.

(a) In this section:

   (1) "Financial institution" means a state or federally chartered bank, savings bank, savings and loan association, or credit union, a holding company, subsidiary, or affiliate of such an institution, or a lender approved by the United States Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act (12 U.S.C. Section 1701 et seq.).

   (2) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or another thing of value or to otherwise extend credit or make a financial accommodation. The term does not include a promise, promissory note, agreement, undertaking, document, or commitment relating to:

      (A) a credit card or charge card; or
(B) an open-end account, as that term is defined by Section 301.002, Finance Code, intended or used primarily for personal, family, or household use.

(b) A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative.

(c) The rights and obligations of the parties to an agreement subject to Subsection (b) of this section shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and merged into the loan agreement.

(d) An agreement subject to Subsection (b) of this section may not be varied by any oral agreements or discussions that occur before or contemporaneously with the execution of the agreement.

(e) In a loan agreement subject to Subsection (b) of this section, the financial institution shall give notice to the debtor or obligor of the provisions of Subsections (b) and (c) of this section. The notice must be in a separate document signed by the debtor or obligor or incorporated into one or more of the documents constituting the loan agreement. The notice must be in type that is boldface, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. The notice must state substantially the following:

"This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

"There are no unwritten oral agreements between the parties.

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<td>&quot;Debtor or Obligor&quot;</td>
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(f) If the notice required by Subsection (e) of this section is not given on or before execution of the loan agreement or is not conspicuous, this section does not apply to the loan agreement, but the validity and enforceability of the loan agreement and the rights and obligations of the parties are not impaired or affected.
(g) All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such a manner and in places in the institutions so as to fully inform borrowers of the provisions of this section. The Finance Commission of Texas shall prescribe the language of the notice.


2. **Exceptions to the Statute of Frauds.**

As stated above, only certain categories and types of contracts must comply with the statute of frauds in order to be enforced by a court. However, there are several exceptions which have evolved whereby a contract which is otherwise within the Statute of Frauds is excepted from its requirements:

a. **Complete Performance.**

   The complete performance by one party to a contract that would otherwise be unenforceable under the statute of frauds may take the contract out of the application of the statute of frauds. *McElwee v. Estate of Joham*, 15 S.W.3d 557, 559 (Tex. App.-Waco 2000, no pet.).

b. **Partial Performance If Equities Require Enforcement.**

   The partial performance by one party to a contract that would otherwise be unenforceable under the statute of frauds may take the contract out of the application of the statute of frauds if the equities so require. *Maddox v. Cosper*, 25 S.W.3d 767, 772 (Tex. App.-Waco 2000, no pet.).

c. **Promissory Estoppel.**

   The doctrine of promissory estoppel may bar the application of the statute of frauds when the promisor makes a promise that he should expect the other party to rely upon and which causes an injury. *Exxon Corp. v. Breezendale Ltd.*, 82 S.W.3d 429, 438 (Tex. App.-Dallas 2002, no pet. h.).
d. **Certain Electronic Transactions.**

A more recent development, which may also be characterized as an exception to the writing requirement of the statute of frauds, is the adoption of electronic transaction statutes which may govern certain electronic transactions.

i. **UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA), TEX. BUS. & COM. CODE, CHAPTER 43.**

As of January 1, 2002, Texas adopted the **UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA), TEX. BUS. & COM. CODE, Chapter 43.** The newly-developing laws relating to electronic contracts leave many of the basic tenets of contract law unchanged. However, the new legislation makes significant changes to the requirements of a “written contract” and the type of “signature” required for execution of a binding and enforceable contract. A copy of the Texas UETA is attached hereto as Exhibit A in the Appendix.


Similar in many respects to the Texas UETA, the federal E-Sign legislation may govern electronic transactions in jurisdictions that have not adopted the UETA or comparable legislation. The E-Sign legislation specifically allows for State laws to preempt its federal counterpart. A copy of the federal E-Sign Legislation is attached hereto as Exhibit B in the Appendix.

II. **Boilerplate Terms.**

A. **Description of Parties.**

The parties to the contract should be specifically identified at the beginning of the contract and defined in such a way to make clear the identity of the parties, the capacity and authority of the parties, an address for purposes of notice and determining venue, and defined abbreviations for use throughout the contract when referencing the parties. Although often overlooked as mere recitals to
the contract, these party descriptions may become critical when seeking to enforce the contract and any judgment obtained for breach of the contract.

B. **Recitals.**

Recitals are not strictly a part of the contract unless it appears that the parties intended them to be. *Universal Health Services, Inc. v. Thompson*, 63 S.W.3d 537, 543 (Tex. App.-Austin 2001, no pet.). However, as will be discussed below, the recitals in a contract may be helpful and persuasive to a court when interpreting the meaning of contested terms in the contract by providing evidence regarding the main purpose of the contract and the intent of the parties.

C. **Statement of Consideration.**

Every contract should include at least some description or recital of the consideration on which the contract is based. There must be consideration for a contract to be enforceable at law. *Iacono v. Lyons*, 16 S.W.3d 92, 94 (Tex. App. – Houston [1st Dist.] 2000, no pet.). Consideration may consist either in a detriment to the promisor or a benefit to the promisee. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 296 (Tex. 1991). The mutual covenants and obligations of the parties to a contract constitute sufficient consideration to make the contract binding. *See Hovas v. O’Brien*, 654 S.W.2d 801, 803 (Tex. App. – Houston [14th Dist.] 1983, ref. n.r.e.). Further, a recital of consideration in a contract gives rise to a presumption that the consideration for the contract was sufficient. *Hoagland v. Finholt*, 773 S.W.2d 740, 743 (Tex. App. Dallas 1989, no writ). Therefore, the following statement is often used as a simple and effective recital of consideration:

> NOW, THEREFORE, in consideration of the mutual covenants and obligations contained herein, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows: ….  

Some drafters also choose to include reference to a nominal sum of money in the recital of consideration. A common recital of consideration of this nature reads as follows:
NOW, THEREFORE, for $10.00 and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties do hereby agree as follows: …

However, the mere formal recital of consideration should be avoided. Although a recital of consideration in a contract will raise a presumption that the consideration for a contract was sufficient, the presumption may be rebutted. *Id.* While the parol evidence rule (which will be discussed in more detail below) prevents the introduction of extrinsic evidence to vary or contradict statements of contractual consideration, it does not bar a showing that recited consideration was not paid. *Jackson v. Hernandez*, 285 S.W.2d 184, 190 (Tex. 1955). If a formal recital that consideration was given is successfully contradicted, the contract may be unenforceable for want of consideration. *See Gary Safe Co. v. A. C. Andrews Co., Inc.*, 568 S.W.2d 166, 168 (Tex. Civ. App.–Dallas 1978, ref. n.r.e.).

D. **Place of Performance and Venue.**

1. **General Rules.**

As a general rule, the parties to a contract governed by Texas law may agree to venue in a county which would otherwise be a proper county of venue under either the permissive or mandatory venue statues. The venue statues are located in *TEX. CIV. PRAC. & REM. CODE*, Chapter 15.

Governing Texas law, including Texas Supreme Court precedent, holds that a party may not fix venue by private contract in contravention to Texas venue statues because such an agreement is void as against public policy. *See Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972). As succinctly stated in *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 673-674 (Tex. App.–Fort Worth 1997, pet. dism’d by agmt):

“First, venue is a procedural rule and not a substantive right. ... Second, venue for the trial of a lawsuit depends upon the nature of the suit and parties; it is a matter of public concern, and the venue statues are structured in accord with many public policy principles. *See Bonner v. Hearne*, 75 Tex. 242, 12 S.W. 38, 39 (1889).
Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy. *See Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972); *International Travelers Ass’n v. Branum*, 109 Tex. 543, 212 S.W. 630, 631 (1919); *cf. Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 73 (Tex. App.–Dallas 1996, no writ) (holding forum-selection clause dictating venue in another state valid unless enforcement unreasonable or public interest favors jurisdiction in another, noncontracted-for forum). In other words, an advance agreement regarding venue may not encroach on the statutory scheme for fixing mandatory venue. *See Evans*, 477 S.W.2d at 536.

In light of the strong public policy considerations, Texas law recognizes that parties may only agree to a county of venue which would otherwise be a proper county under a general, mandatory or permissive venue statute. *Fidelity Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972). *See* TEX. CIV. PRAC. & REM. CODE § 15.035. The only exception to the foregoing rule is that in a “major transaction” involving consideration over $1 million the parties may agree to venue. *See* TEX. CIV. PRAC. & REM. CODE § 15.020. 

**2. “Major Transactions.”**

In a breach of contract action which accrues on or after August 30, 1999, the parties to a “major transaction” may agree to venue in any specified Texas county regardless of the general venue statutes. *See* TEX. CIV. PRAC. & REM. CODE § 15.020. *Major Transactions: Specification of Venue by Agreement*. A “major transaction” is defined as a transaction evidence by a written agreement in which the consideration is greater than $1 million.

**E. Forum Selection Clause.**

The foregoing authorities regarding contractual selection of venue in Texas counties should not be confused with enforceable forum selection clauses in which the parties contractually agree to both the jurisdiction and the venue of another state. *See Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.–Dallas 1996, no writ). Forum selection clauses are
enforceable in Texas if: (1) the parties have contractually consented to submit to the exclusive jurisdiction of another state, and (2) the other state recognizes the validity of such provisions. See *Southwest Intelecom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. App.-Austin 1999, pet. denied).

**Practice Note:** A party which contractually agrees to a forum selection clause in another state may wish to also contractually agree to service of process at a designated address so as to limit its exposure to a later argument that it has submitted itself to the general jurisdiction of that state for other lawsuits unrelated to the breach of contract action. See, e.g., *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) (concluding that appointment of agent for service of process, as required by statute requiring foreign corporations wishing to transact business in the state to designate an agent, constituted consent to general jurisdiction in the state, whether or not the cause of action arose out of the defendant’s activities in the state). Compare *Leonard v. USA Petroleum Corp.*, 829 F.Supp. 882, 889 (S.D. Tex. 1993) (appointment of agent alone does not constitute a general business practice or consent to suit in Texas on every matter); *Gray Line Tours v. Reynolds Elec. & Eng’g Co.*, 193 Cal.App.3d 190, 194 (1987) (designation of agent for service does not constitute consent to general jurisdiction in forum state; “the contractor did not consent to exercise of jurisdiction for all purposes simply because it appointed an agent for service of process pursuant to Corp. Code, § 2105 (certificate of qualification of foreign corporation prerequisite to doing intrastate business).”).

**F. Choice of Law.**

In the absence of a choice of law provision, the law of the state with the most significant relationship to the substance of the contract will govern the enforcement of the contract. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984), see also *Tex. Bus. & Comm. Code §1.105*
Accordingly, the parties should carefully provide a choice of law provision based upon their knowledge of the state law chosen. An example of such a provision reads as follows:

This Agreement is made and entered into in the state of Texas and shall in all respects be interpreted, enforced and governed under the laws of the state of Texas.

The expressed intention of the parties will control which law is used to interpret the contract. See Austin Building Co. v. National Union Fire Ins. Co., 432 S.W.2d 697, 701 (Tex. 1968).

Furthermore, a contractual choice of law provision of a particular state will be interpreted to require application of both state and federal law of that jurisdiction. See Gavey Properties/762 v. First Financial S&L, 845 F.2d 519, 523 (5th Cir. 1988).

G. Covenants.

The covenants clauses in the contract should specify whether each covenant is dependent or independent. This distinction is significant in that if a covenant is dependent, a breach of contract by one party will excuse subsequent performance by the other party. However, if the covenant is independent, a breach by one party does not excuse performance by the other party (although the non-breaching party retains the right to bring suit for damages caused by the breach).

As a general rule, covenants are presumed to be dependant rather than independent unless a contrary intent is shown. Acme Pest Control Co. v. Youngman, 216 S.W.2d 259, 262-263 (Tex. Civ. App.-Waco 1948, no writ).

H. Conditions.

Conditions in a contract may be conditions precedent, conditions subsequent, or concurrent conditions. A condition precedent is an event or occurrence that must come into existence before an agreement becomes a binding contract. A condition subsequent is of occurrence of an event after performance has begun that discharges the duty of further performance. A concurrent condition is a
condition which is mutually dependent on performance by both parties. Accordingly, a concurrent condition is actually just another mutually dependant covenant.

Since contracts are based upon mutuality and agreement, both conditions precedent and conditions subsequent are not favored by the law. Accordingly, if there is an ambiguity or confusion as to whether a “condition” has failed to occur the court may construe the “condition” as a covenant in order to avoid a forfeiture or loss of rights by the other party.

I. Disclaimer of Warranties, Exculpatory Clauses, and Limitation of Liability Clauses.

As a general rule, exculpatory clauses and limitation of liability clauses and not favored and are therefore strictly construed against the party seeking the benefit of the clause. Accordingly, any waiver of warranties, limitation of remedies, or limitation of liability should be stated in the contract in conspicuous language such as ALLCAPS and/or bold lettering. See TEX. BUS. & COM. CODE § 1.201(10) which defines “conspicuous.”

J. Time of Performance.

When no time of performance is specified in the contract, the court will presume that the parties intended a reasonable time for performance. Rusk County Elec. Co-op, Inc. v. Flanagan, 538 S.W.2d 498, 499-500 (Tex. Civ. App.-Tyler 1976, ref. n.r.e.). However, failing to specify a time or date for performance leaves uncertainty that exposes both parties to misunderstanding. Additionally, the failure to specify a time leaves the determination of a “reasonable time” open to the fact finder.

1. Time of the Essence.

In order to avoid the uncertainties referenced above, the contract should always provide a time and/or date upon which performance is due. The contract should also specifically provide that “time is of the essence.” Absent a statement that time is of the essence, it is generally assumed that
time is not of the essence. *Siderius, Inc. v. Wallace Co., Inc.*, 583 S.W.2d 852, 863 (Tex. Civ. App.-Tyler 1979, no writ). An acceptable clause should provide:

> The obligation of _______ to _______________ must be rendered within ________ days of the date of execution of the agreement. The parties expressly agree that time is of the essence.

**K. Third Party Beneficiaries.**

There is a presumption under Texas law that parties intend to contract solely for their own benefit and not for the benefit of third parties. However, in order to avoid and/or defeat a claim by a third party, the contract should expressly state that no third party beneficiaries are intended. For example:

> **No Third-Party Beneficiaries.** Except as otherwise expressly provided for in this Agreement, nothing herein, expressed or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation or legal entity, other than the parties hereto, any rights, remedies or other benefits under or by reason of this Agreement.

**L. Indemnity.**

While perhaps not needed in every contract, the parties should always evaluate the need for the insertion of an indemnity clause/agreement in the contract. An indemnity clause is one by which one or more parties to a contract agrees to secure the other(s) against an anticipated loss or to prevent the other(s) from being damaged by the legal consequences of an act or forbearance on the part of the indemnifying party or parties or some third person. *Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, 33 S.W.3d 658, 668 (Tex. App.–Houston [1st Dist.] 2000, ). If the parties choose to include such a provision in their contract, certain drafting guidelines must be remembered.

that indemnity clauses are adequately conspicuous where they are on the front page of a contract under a bold heading referring to indemnity). Section 1.201(10) of the Texas Business and Commerce Code provides that:

[a] term of clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is “conspicuous” if it is in larger or other contrasting type or color. . .

Second, the “express negligence rule” must be observed in order to effectively obtain indemnity for one’s own negligence. The express negligence rule dictates that “a party seeking indemnity from the consequences of that party’s own negligence must express that intent in specific terms within the four corners of the contract.” Texaco, Inc., 33 S.W.3d at 668. Therefore, it is necessary to expressly provide in the contract that the indemnity provision is intended to cover and provide indemnity to a party for the consequences of that party’s own negligence.

The express negligence rule applies equally to all degrees of negligence whether sole, concurrent, comparative or contributory negligence. Accordingly, an indemnity clause seeking to comply with the express negligence doctrine should specify each degree of negligence and an intent to cover each and all forms of negligence.

M. Assignment / Successors and Assigns.

Contracts are generally assignable except where specifically prohibited by statute and where the contract expressly and specifically restricts or prohibits assignment. Accordingly, it is usually advisable to specify that no assignment shall be valid without the prior written consent of the other party.

Binding Effect; Assignment. This Agreement and the various rights and obligations arising hereunder shall inure to the benefit of and be binding upon Seller, its successors and permitted assigns, and Buyer and their successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder shall be
transferred or assigned (by operation of law or otherwise) by either of the parties hereto without the prior written consent of the other party.

Practice Note: Since most contracts provide that the obligations are binding upon a parties “successors and assigns,” a consent to assignment clause should always be used in order to make it clear that assignment is restricted.

N. **Merger and Integration Clause.**

The merger and integration clause is another provision that should be included in every contract. A common merger clause reads as follows:

>This Agreement modifies and supersedes all other preceding agreements, oral or written, between the parties and constitutes the entire agreement of the parties regarding the subject matter of contract.

The reason for placing a merger clause in a written agreement is to invoke the protection of the parole evidence rule. See *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 615 (Tex. App.−Waco 2000, pet. denied).


*Marantha Temple*, 893 S.W.2d at 101; *TEX. BUS. & COMM. CODE § 2.202*. The parole evidence rule generally prohibits the enforcement of and/or the introduction of extrinsic evidence regarding any inconsistent agreement that occurred prior to or contemporaneously with a subsequent writing intend as the parties’ final written expression of their agreement with respect to the

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1 Article 2 of the UCC governs domestic contracts for the purchase and sale of “goods.” *TEX. BUS. & COMM. CODE § 2.102.*

The absence of a merger clause in a written agreement does not preclude the application of the parole evidence rule. However, by failing to include a merger clause in a written agreement, the parties leave it to a judge to decide if the parties to a contract intended the subject writing to be a final, integrated expression of their agreement, sufficient to invoke the parole evidence rule. By including a sufficient merger clause in all contracts, each party to the contract can much more effectively guard against another party’s attempt to vary, contradict or add to the terms of the contract through the use of extrinsic evidence. See Ragland v. Curtis Matthews Sales Company, 446 S.W.2d 577, 578 (Tex. Civ. App.–Waco 1969, no writ).

O. Severability.

In the absence of express terms to the contrary, there is a presumption that a single written agreement is indivisible and that each of its stipulations or provisions is dependent. Frankfurt Finance Co. v. Treadaway, 159 S.W.2d 514, 516 (Tex. Civ. App.–Dallas 1942, ref. w.o.m.). Therefore, if one provision of a contract is found by a court to be invalid, illegal or otherwise unenforceable, the contract could become unenforceable as a whole. However, the covenants in a contract may be divisible if the parties expressly so provide. Chapman v. Tyler Bank & Trust Company, 396 S.W.2d 143, 146-147 (Tex. Civ. App.–Tyler 1965, ref. n.r.e.). A contract can potentially be made severable by including in the contract a provision similar to the following:

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall not be deemed to be a part of the Agreement.
P. **Notice.**

In order to avoid any misunderstanding or uncertainty regarding notices and communications between the parties, a contract should always specify a method of notice which is contractually deemed to be sufficient. For Example,

Notice. All notices and other communications required or permitted under this Agreement shall be deemed to have been duly given and made if in writing and if served either by personal delivery to the party for whom intended or by being deposited, postage prepaid, certified or registered mail, return receipt requested, in the United States mail bearing the address shown in this Agreement for, or such other address as may be designated in writing hereafter by, such party:

If to _____:  
____________________  
____________________  
____________________  
Attn: ________________

with a copy to:  
____________________  
____________________  
____________________  
Attn: ________________

If to _____:  
____________________  
____________________  
____________________  
Attn: ________________

with a copy to:  
____________________  
____________________  
____________________  
Attn: ________________
Such a notice provision may become important where one of the parties moves its physical address during the term of the contract and/or cannot be readily located for purposes of notice of default, breach, etcetera.

Q. **Alternative Dispute Resolution (ADR).**

Where the parties seek to avoid the uncertainty and expense of litigation and possibly diminish their exposure to punitive damages, they should consider agreeing to submit all disputes arising under the contract to binding arbitration. The arbitration clause should be specific as to the scope of the arbitration and should also specify and/or adopt the rules of the chosen arbitration forum including:


b. **Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.**

c. **Arbitration Under the Commercial Arbitration Rules of the American Arbitration Association.**

III. **RULES OF CONTRACT INTERPRETATION.**

A. **Distinction Between “Interpretation” and “Construction”.**

“Interpretation” is the ascertainment of the meaning of the words used by the parties by the parties and applying appropriate standards to determine the meaning of the words. “Construction” involves the court determining, as a matter of law, the legal meaning of the entire contract. In short, interpretation involves ascertaining the meaning of the contractual words, while construction involves determining their legal effect. Accordingly, interpretation is a question of fact, while construction is a question of law.²

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² *See 11 Williston On Contracts, § 30:1 (4th Ed.)*
B. **Primary Rules of Contract Interpretation.**

1. **The Main Purpose Doctrine.**

The Main Purpose Doctrine provides that when interpreting the meaning of an agreement, the primary intent and purpose of the parties must prevail and the court may not re-write the agreement. With the primary intent and purpose in mind, plain words will be given their plain meaning, while technical terms or words of art will be given their technical meaning.

2. **The “Four Corners Rule.”**

A contract will be read as a whole and every part must be interpreted with reference to the whole document and in such a way as to give effect to the main purpose of the agreement. Furthermore, when interpreting the meaning of the contract, the court should not look beyond the four corners of the contract in order to interpret the meaning. When the contract contains pre-printed, typed and handwritten words which are arguably conflicting or ambiguous; preference should be given in the following order: (1) handwritten, (2) typed, and then (3) pre-printed words.

C. **Secondary Rules of Contract Interpretation.**

1. **Ejusdem Generis.**

The rule of interpretation *ejusdem generis* means that where there is a listing of specific things followed by more general words relating to the same subject matter, the more general words will be interpreted as meaning the same class of things in the more specific listing. ³

2. **Expressio unius est exclusio alterius.**

The term *expressio unius est exclusio alterius* is a maxim of interpretation that the expression of one thing is to the exclusion of another. ⁴

3. **Noscitur a Sociis Doctrine.**

The doctrine of *noscitur a sociis* means that “words are known from their associates.” In other words, the context and subject matter of a contract may indicate that the ordinary and plain meaning of a word was not intended by the parties. Accordingly, application of this doctrine may determine that a word of otherwise clear meaning has been incorrectly used by the parties in the agreement.

4. **Lawful, Effective and Reasonable Interpretations Are Preferred.**

Consistent with the doctrines providing that all parts of a contract should be given effect where possible, an interpretation which renders the contract lawful, effective, and reasonable is preferred over interpretations which render the contract unlawful, invalid, or impossible to perform.

5. **Interpretation Should Take Into Account CircumstancesExisting At Contract Formation.**

In order to interpret the main purpose and primary intent of the parties, a court should take into account the circumstance existing at the time and place of its execution.

6. **Contra Proferentem: Ambiguities Are Construed Against The Drafting Party.**

The party drafting the contract should always include a provision that the general rule of construction that any uncertainty in a contract will be construed against the drafter will not apply to the subject contract. In Texas, a contract is generally construed against its drafter. *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). This is particularly true in cases where the drafter will be relieved from liability. *Manzo v. Ford*, 731 S.W.2d 673, 676 (Tex. App.–Houston [14th Dist.] 1987, no writ.). However, this is merely a general rule of interpretation and the parties are therefore free to agree that the rule shall not apply.
IV. SUMMARY AND CONCLUSION

Careful contract drafting and attention to each clause is crucial to a successful and litigation-free transaction. Furthermore, attention to detail in every clause of the contract, including the so-called “boiler-plate” language, will allow for more certain and effective strategy in the event of default, allegations of breach, and/or litigation arising from the contract. In fact, in many instances the resolution of a breach of contract action will involve the interpretation of only a few specific clauses or phrases in the entire contract. Accordingly, the contracting party should carefully select and understand the importance of each contract clause and should never allow superfluous clauses to remain in the final executed contract.

V. APPENDIX


Exhibit A
§ 43.001. Short Title

This chapter may be cited as the Uniform Electronic Transactions Act.


§ 43.002. Definitions

In this chapter:

(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 chapter and other applicable law.

(5) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) "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.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "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.

(9) "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.
(10) "Information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(11) "Information processing system" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.

(12) "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.

(13) "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.

(14) "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.

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

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*

**§ 43.003. Scope**

(a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

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

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

(2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.

(c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).

(d) A transaction subject to this chapter is also subject to other applicable substantive law.

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*
§ 43.004. Prospective Application

This chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2002.


§ 43.005. Use of Electronic Records and Electronic Signatures; Variation by Agreement

(a) This chapter 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.

(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this chapter and other applicable law.


§ 43.006. Construction and Application

This chapter must be construed and applied:

(1) to facilitate electronic transactions consistent with other applicable law;

(2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

§ 43.007. Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts

(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.


§ 43.008. Provision of Information in Writing; Presentation of Records

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) the record must be posted or displayed in the manner specified in the other law;

(2) except as otherwise provided in Subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law; and

(3) the record must contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record is not enforceable against the recipient.

(d) The requirements of this section may not be varied by agreement, but:

(1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under Subsection (a) that the information be in the form of an electronic record capable of retention may also be varied by agreement; and
(2) a requirement under a law other than this chapter to send, communicate, or transmit a record by first class mail may be varied by agreement to the extent permitted by the other law.


§ 43.009. Attribution and Effect of Electronic Record and Electronic Signature

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.


§ 43.010. Effect of Change or Error

(a) If a change or error in an electronic record occurs in a transmission between parties to a transaction, the rules provided by this section apply.

(b) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure, but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(c) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

(1) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(2) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(3) has not used or received any benefit or value from the consideration, if any, received from the other person.

(d) If neither Subsection (b) nor Subsection (c) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.
(e) Subsections (c) and (d) may not be varied by agreement.


§ 43.011. Notarization and Acknowledgment

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.


§ 43.012. Retention of Electronic Records; Originals

(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

(1) 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

(2) remains accessible for later reference.

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

(c) A person may satisfy Subsection (a) by using the services of another person if the requirements of that subsection are satisfied.

(d) 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 (a).

(e) 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 (a).

(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose.

(g) 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.

§ 43.013. Admissibility in Evidence

In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*

§ 43.014. Automated Transaction

(a) In an automated transaction, the rules provided by this section apply.

(b) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(c) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(d) The terms of the contract are determined by the substantive law applicable to it.

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*

§ 43.015. Time and Place of Sending and Receipt

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:

(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) is in a form capable of being processed by that system; and

(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*
(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) it is in a form capable of being processed by that system.

(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under Subsection (d).

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

(1) if the sender or the recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) if the sender or the recipient does not have a place of business, the place of business is the sender's or the recipient's residence, as the case may be.

(e) An electronic record is received under Subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in Subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under Subsection (a), or purportedly received under Subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.


§ 43.016. Transferable Records

(a) In this section, "transferable record" means an electronic record that:

(1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and

(2) the issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.
(c) A system satisfies Subsection (b), and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in Subdivisions (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the transferable record was issued; or

(B) if the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Section 1.201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the Uniform Commercial Code, including, if the applicable statutory requirements under Section 3.302(a), 7.501, or 9. 330 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record has the same rights and defenses as an equivalent obligor under equivalent records or writings under the Uniform Commercial Code.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

§ 43.017. Acceptance and Distribution of Electronic Records by Governmental Agencies

(a) Except as otherwise provided by Section 43.012(f), each state agency shall determine whether, and the extent to which, the agency 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.

(b) To the extent that a state agency uses electronic records and electronic signatures under Subsection (a), the Department of Information Resources and Texas State Library and Archives Commission, pursuant to their rulemaking authority under other law and giving due consideration to security, may specify:

(1) 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;

(2) 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;

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

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

(c) Except as otherwise provided in Section 43.012(f), this chapter does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.


§ 43.018. Interoperability

The Department of Information Resources may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application.

§ 43.019. Exemption to Preemption by Federal Electronic Signatures Act

This chapter modifies, limits, or supersedes the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001 et seq.) as authorized by Section 102 of that Act (15 U.S.C. Section 7002).

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*

§ 43.020. Applicability of Penal Code

Text of section as added by Acts 2001, 77th Leg., ch. 702, § 1

This chapter does not authorize any activity that is prohibited by the Penal Code.

*Added by Acts 2001, 77th Leg., ch. 702, § 1, eff. Jan. 1, 2002.*

For text of section as added by Acts 2001, 77th Leg., ch. 1158, § 2, see § 43.020, post.

§ 43.020. Certain Requirements Considered to be Recommendations

Text of section as added by Acts 2001, 77th Leg., ch. 1158, § 2

Any requirement of the Department of Information Resources or the Texas State Library and Archives Commission under this chapter that generally applies to one or more state agencies using electronic records or electronic signatures is considered to be a recommendation to the comptroller concerning the electronic records or electronic signatures used by the comptroller. The comptroller may adopt or decline to adopt the recommendation.

*Added by Acts 2001, 77th Leg., ch. 1158, § 2, eff. Jan. 1, 2002.*

For text of section as added by Acts 2001, 77th Leg., ch. 702, § 1, see § 43.020, ante.
Exhibit B
ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT (E-SIGN),

Sec. 7001. - General rule of validity

(a) In general

Notwithstanding any statute, regulation, or other rule of law (other than this
subchapter and subchapter II of this chapter), 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) 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.

(b) Preservation of rights and obligations

This subchapter does not -

(1) 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 nonelectronic form; or

(2) require any person to agree to use or accept electronic records or electronic signatures,
other than a governmental agency with respect to a record other than a contract to which it
is a party.

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other
rule of law requires that information relating to a transaction or transactions in or
affecting interstate or foreign commerce be provided or made available to a
consumer in writing, the use of an electronic record to provide or make available
(whichever is required) such information satisfies the requirement that such
information be in writing if -

(A) the consumer has affirmatively consented to such use and has not withdrawn
such consent;
(B) the consumer, prior to consenting, is provided with a clear and conspicuous statement

(i) informing the consumer of

(I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and

(II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal;

(ii) informing the consumer of whether the consent applies

(I) only to the particular transaction which gave rise to the obligation to provide the record, or

(II) to identified categories of records that may be provided or made available during the course of the parties' relationship;

(iii) describing the procedures the consumer must use to withdraw consent as provided in clause (i) and to update information needed to contact the consumer electronically; and

(iv) informing the consumer

(I) how, after the consent, the consumer may, upon request, obtain a paper copy of an electronic record, and

(II) whether any fee will be charged for such copy;

(C) the consumer -

(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and

(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent; and

(D) after the consent of a consumer in accordance with subparagraph (A), if a change in the hardware or software requirements needed to access or retain electronic records creates a material risk that the consumer will not be able to access
or retain a subsequent electronic record that was the subject of the consent, the person providing the electronic record -

(i) provides the consumer with a statement of

(II) the revised hardware and software requirements for access to and retention of the electronic records, and

(II) the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed under subparagraph (B)(i); and

(ii) again complies with subparagraph (C).

(2) Other rights

(A) Preservation of consumer protections

Nothing in this subchapter affects the content or timing of any disclosure or other record required to be provided or made available to any consumer under any statute, regulation, or other rule of law.

(B) Verification or acknowledgment

If a law that was enacted prior to this chapter expressly requires a record to be provided or made available by a specified method that requires verification or acknowledgment of receipt, the record may be provided or made available electronically only if the method used provides verification or acknowledgment of receipt (whichever is required).

(3) Effect of failure to obtain electronic consent or confirmation of consent

The legal effectiveness, validity, or enforceability of any contract executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii).

(4) Prospective effect

Withdrawal of consent by a consumer shall not affect the legal effectiveness, validity, or enforceability of electronic records provided or made available to that consumer in accordance with paragraph (1) prior to implementation of the consumer's withdrawal of consent. A consumer's withdrawal of consent shall be effective within a reasonable period of time after receipt of the withdrawal by the provider of the record. Failure to comply with paragraph (1)(D) may, at the election
of the consumer, be treated as a withdrawal of consent for purposes of this paragraph.

(5) Prior consent

This subsection does not apply to any records that are provided or made available to a consumer who has consented prior to the effective date of this subchapter to receive such records in electronic form as permitted by any statute, regulation, or other rule of law.

(6) Oral communications

An oral communication or a recording of an oral communication shall not qualify as an electronic record for purposes of this subsection except as otherwise provided under applicable law.

(d) Retention of contracts and records

(1) Accuracy and accessibility

If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that -

(A) accurately reflects the information set forth in the contract or other record; and

(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being accurately reproduced for later reference, whether by transmission, printing, or otherwise.

(2) Exception

A requirement to retain a contract or other record in accordance with paragraph (1) does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received.

(3) Originals

If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided, available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).
(4) Checks

If a statute, regulation, or other rule of law requires the 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 paragraph (1).

(e) Accuracy and ability to retain contracts and other records

Notwithstanding subsection (a) of this section, if a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be in writing, the legal effect, validity, or enforceability of an electronic record of such contract or other record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the contract or other record.

(f) Proximity

Nothing in this subchapter affects the proximity required by any statute, regulation, or other rule of law with respect to any warning, notice, disclosure, or other record required to be posted, displayed, or publicly affixed.

(g) Notarization and acknowledgment

If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

(h) Electronic agents

A contract or other record relating to a transaction in or affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents so long as the action of any such electronic agent is legally attributable to the person to be bound.

(i) Insurance

It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.

(j) Insurance agents and brokers
An insurance agent or broker acting under the direction of a party that enters into a contract by means of an electronic record or electronic signature may not be held liable for any deficiency in the electronic procedures agreed to by the parties under that contract if -

(1) the agent or broker has not engaged in negligent, reckless, or intentional tortious conduct;

(2) the agent or broker was not involved in the development or establishment of such electronic procedures; and

(3) the agent or broker did not deviate from such procedures

Sec. 7002. - Exemption to preemption

(a) In general

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law -

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, 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 subchapter and subchapter II of this chapter; and

(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 or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.

(b) Exceptions for actions by States as market participants
Subsection (a)(2)(A)(ii) of this section shall not apply to the statutes, regulations, or other rules of law governing procurement by any State, or any agency or instrumentality thereof.

(c) Prevention of circumvention

Subsection (a) of this section does not permit a State to circumvent this subchapter or subchapter II of this chapter through the imposition of nonelectronic delivery methods under section 8(b)(2) of the Uniform Electronic Transactions Act

Sec. 7003. - Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by -

(1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or

(3) the Uniform Commercial Code, as in effect in any State, other than sections 1-107 and 1-206 and Articles 2 and 2A.

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to -

(1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;

(2) any notice of -

(A) the cancellation or termination of utility services (including water, heat, and power);

(B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities); or
(D) recall of a product, or material failure of a product, that risks endangering health or safety; or

(3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.

(c) Review of exceptions

(1) Evaluation required

The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall review the operation of the exceptions in subsections (a) and (b) of this section to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers. Within 3 years after June 30, 2000, the Assistant Secretary shall submit a report to the Congress on the results of such evaluation.

(2) Determinations

If a Federal regulatory agency, with respect to matter within its jurisdiction, determines after notice and an opportunity for public comment, and publishes a finding, that one or more such exceptions are no longer necessary for the protection of consumers and eliminating such exceptions will not increase the material risk of harm to consumers, such agency may extend the application of section 7001 of this title to the exceptions identified in such finding.

Sec. 7004. - Applicability to Federal and State governments

(a) Filing and access requirements

Subject to subsection (c)(2) of this section, nothing in this subchapter limits or supersedes any requirement by a Federal regulatory agency, self-regulatory organization, or State regulatory agency that records be filed with such agency or organization in accordance with specified standards or formats.

(b) Preservation of existing rulemaking authority

(1) Use of authority to interpret

Subject to paragraph (2) and subsection (c) of this section, a Federal regulatory agency or State regulatory agency that is responsible for rulemaking under any other statute may interpret section 7001 of this title with respect to such statute through -

(A) the issuance of regulations pursuant to a statute; or
(B) to the extent such agency is authorized by statute to issue orders or guidance, the issuance of orders or guidance of general applicability that are publicly available and published (in the Federal Register in the case of an order or guidance issued by a Federal regulatory agency).

This paragraph does not grant any Federal regulatory agency or State regulatory agency authority to issue regulations, orders, or guidance pursuant to any statute that does not authorize such issuance.

(2) Limitations on interpretation authority

Notwithstanding paragraph (1), a Federal regulatory agency shall not adopt any regulation, order, or guidance described in paragraph (1), and a State regulatory agency is preempted by section 7001 of this title from adopting any regulation, order, or guidance described in paragraph (1), unless -

(A) such regulation, order, or guidance is consistent with section 7001 of this title;

(B) such regulation, order, or guidance does not add to the requirements of such section; and

(C) such agency finds, in connection with the issuance of such regulation, order, or guidance, that -

(i) there is a substantial justification for the regulation, order, or guidance;

(ii) the methods selected to carry out that purpose -

(I) are substantially equivalent to the requirements imposed on records that are not electronic records; and

(II) will not impose unreasonable costs on the acceptance and use of electronic records; and

(iii) the methods selected to carry out that purpose 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.

(3) Performance standards

(A) Accuracy, record integrity, accessibility

Notwithstanding paragraph (2)(C)(iii), a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to specify
performance standards to assure accuracy, record integrity, and accessibility of records that are required to be retained. Such performance standards may be specified in a manner that imposes a requirement in violation of paragraph (2)(C)(iii) if the requirement

(i) serves an important governmental objective; and

(ii) is substantially related to the achievement of that objective. Nothing in this paragraph shall be construed to grant any Federal regulatory agency or State regulatory agency authority to require use of a particular type of software or hardware in order to comply with section 7001(d) of this title.

(B) Paper or printed form

Notwithstanding subsection (c)(1) of this section, a Federal regulatory agency or State regulatory agency may interpret section 7001(d) of this title to require retention of a record in a tangible printed or paper form if -

(i) there is a compelling governmental interest relating to law enforcement or national security for imposing such requirement; and

(ii) imposing such requirement is essential to attaining such interest.

(4) Exceptions for actions by government as market participant

Paragraph (2)(C)(iii) shall not apply to the statutes, regulations, or other rules of law governing procurement by the Federal or any State government, or any agency or instrumentality thereof.

(c) Additional limitations

(1) Reimposing paper prohibited

Nothing in subsection (b) of this section (other than paragraph (3)(B) thereof) shall be construed to grant any Federal regulatory agency or State regulatory agency authority to impose or reimpose any requirement that a record be in a tangible printed or paper form.

(2) Continuing obligation under Government Paperwork Elimination Act

Nothing in subsection (a) or (b) of this section relieves any Federal regulatory agency of its obligations under the Government Paperwork Elimination Act (title XVII of Public Law 105-277).

(d) Authority to exempt from consent provision
(1) In general

A Federal regulatory agency may, with respect to matter within its jurisdiction, by regulation or order issued after notice and an opportunity for public comment, exempt without condition a specified category or type of record from the requirements relating to consent in section 7001(c) of this title if such exemption is necessary to eliminate a substantial burden on electronic commerce and will not increase the material risk of harm to consumers.

(2) Prospectuses

Within 30 days after June 30, 2000, the Securities and Exchange Commission shall issue a regulation or order pursuant to paragraph (1) exempting from section 7001(c) of this title any records that are required to be provided in order to allow advertising, sales literature, or other information concerning a security issued by an investment company that is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), or concerning the issuer thereof, to be excluded from the definition of a prospectus under section 77b(a)(10)(A) of this title.

(e) Electronic letters of agency

The Federal Communications Commission shall not hold any contract for telecommunications service or letter of agency for a preferred carrier change, that otherwise complies with the Commission’s rules, to be legally ineffective, invalid, or unenforceable solely because an electronic record or electronic signature was used in its formation or authorization.

Sec. 7005. - Studies

(a) Delivery

Within 12 months after June 30, 2000, the Secretary of Commerce shall conduct an inquiry regarding the effectiveness of the delivery of electronic records to consumers using electronic mail as compared with delivery of written records via the United States Postal Service and private express mail services. The Secretary shall submit a report to the Congress regarding the results of such inquiry by the conclusion of such 12-month period.

(b) Study of electronic consent

Within 12 months after June 30, 2000, the Secretary of Commerce and the Federal Trade Commission shall submit a report to the Congress evaluating any benefits provided to consumers by the procedure required by section 7001(c)(1)(C)(ii) of this title; any burdens imposed on electronic commerce by that provision; whether the benefits outweigh the burdens; whether the absence of the procedure required by section 7001(c)(1)(C)(ii) of this title would increase the incidence of fraud directed against consumers; and suggesting any revisions to the provision deemed appropriate by the Secretary and the Commission.
In conducting this evaluation, the Secretary and the Commission shall solicit comment from the general public, consumer representatives, and electronic commerce businesses

Sec. 7006. - Definitions

For purposes of this subchapter:

(1) Consumer. The term "consumer" means an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual.

(2) Electronic. The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) Electronic agent. The term "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 at the time of the action or response.

(4) Electronic record. The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

(5) Electronic signature. The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

(6) Federal regulatory agency. The term "Federal regulatory agency" means an agency, as that term is defined in section 552(f) of title 5.

(7) Information. The term "information" means data, text, images, sounds, codes, computer programs, software, databases, or the like.

(8) Person. The term "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.

(9) Record. The term "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.

(10) Requirement. The term "requirement" includes a prohibition.

(11) Self-regulatory organization. The term "self-regulatory organization" means an organization or entity that is not a Federal regulatory agency or a State, but that is under the supervision of a Federal regulatory agency and is authorized under Federal law to adopt and administer rules applicable to its members that are enforced by such
organization or entity, by a Federal regulatory agency, or by another self-regulatory organization.

(12) State. The term "State" includes the District of Columbia and the territories and possessions of the United States.

(13) Transaction. The term "transaction" means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct -

(A) the sale, lease, exchange, licensing, or other disposition of

(i) personal property, including goods and intangibles,

(ii) services, and

(iii) any combination thereof; and

(B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.