

The Third Millennium Digital Commerce Act

Margot Saunders
National Consumer Law Center

Margot Saunders
Managing Attorney
National Consumer Law Center
1629 K Street, NW
Washington, D.C. 20006
(202) 986-6060
fax - (202) 463-9462
margot@nclcdc.org
www.nclc.org

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Re: Conference on S. 761 and HR 1714 - The Third Millennium Digital Commerce Act.

Dear Senator:

The undersigned national and state advocacy groups representing low and moderate income consumers seek your help regarding the resolution of the differences between the House and Senate versions of the Electronic Signature bill (HR 1714 and S. 761). We understand that there is strong support in the Senate for the language in the House bill, despite the fact that S. 761 passed unanimously.

The Senate Bill is the right vehicle. We fully support the Senate bill. This bill accomplishes the goal of facilitating electronic commerce and legitimizing contracts entered into over the Internet. S. 761 also allows states to ensure that consumers are protected and to maintain state record retention requirements so that the states can enforce their own rules and regulations.

The House Bill is very dangerous. Unlike the Senate bill, the House bill completely preempts states' rights to ensure that individual consumers are protected in both off-line and on-line transactions. Moreover, the House bill blocks the abilities of the states to ensure that records are retained in

an accessible manner to state regulators and in a format which can be used to protect individuals and businesses against fraud. HR 1714 preempts state laws regarding writing requirements, delivery requirements, requirements for originals, and requirements for record retention of all notices, contracts and signatures. The breadth and damage of this bill is overwhelming. The House bill passed despite the strong opposition of the Democratic leadership as well as a veto threat from the Administration.

The House Bill eviscerates consumer protections. The House bill would allow consumers who are engaged in real world transactions to be required, either explicitly or through product price, to accept the contract and all notices and disclosures on-line, *regardless of whether the transaction was in person, or whether the consumer even has a computer.* According to the U.S. Department of Commerce's recent study, Falling Through the Net, 74% of U.S. households still do *not* have access to the Internet. The House bill does not even require that the electronic record actually be provided to the consumer, or even be accessible by the consumer. The electronic record does not need to be tamper proof, so the consumer receiving it would not be able to reliably use it in court to prove the terms of the transaction.

State's record retention laws are summarily preempted. The House bill allows all state record retention requirements for paper documents, including originals and checks to be met by retaining an electronic record which "accurately reflects the information" in the original document. This would make prosecutions of forgery, or disputed documents, or proof of right ownership of life insurance policies virtually impossible to determine because the document with the original, physical signature would no longer be in existence.

The House bill would also negatively affect the enforcement of state insurance laws, banking regulations, mortgage broker rules, labor rules, environmental rules because of the record retention language. While there is nothing wrong with electronic storage of documents, states must be able to ensure long-term accessibility to the documents. States also must be able to require that documents are electronically kept in such a way that ensures all relevant information is maintained so that the authenticity and format requirements are assured. Further, the House bill does not allow states to require that records be properly preserved and migrated to technologies that will permit their continued accessibility. In other words, a record of information (as opposed to the original document) may be acceptable, but there is a need to control the media on which the record is kept and the technology for accessing it. For example, in the 1970's IBM mag card machines were ubiquitous, but few state regulators have the ability to retrieve data today from records stored in this way.

Unlike the Senate bill, the House completely preempts state law. The House bill would preempt states laws except to the extent that a state passes the Uniform Electronic Transactions Act or an alternative law recognizing the validity of electronic records and signatures, but only if the state law is not inconsistent with the House bill. Presumably, this means that state specific requirements regarding delivery of notices and disclosures to consumers, or regarding the retention requirements of paper records relating to state insurance laws, banking regulations, mortgage company rules, labor, environmental rules, etc., would be preempted, because they would be inconsistent with the House bill. The Senate bill, however, allows states some room, by providing that the preemption of state laws is lifted once the state passes a version of the Uniform Electronic Transactions Act which is *substantially similar* to the uniform law.

Compromise is possible. We have been told that the politics of the situation demand that some parts of the House bill must be included in the final legislation — specifically those portions that would allow notices and disclosures to be provided electronically. *We do not oppose this idea, so long as adequate protections are in place to ensure true parity between the electronic marketplace and the physical world.* Attached to this letter is a brief memo detailing how we think these compromises could be addressed.

Encouraging electronic commerce and protecting consumers need not be competing goals. Please tell the members of the Conference Committee that the basic elements of S. 761 must be maintained, and to reject the dangerous and far reaching aspects of HR 1714.

Sincerely,

National Advocacy Organizations Representing Consumers:

Ken McEldowney
Consumer Action

Frank Torres
Consumers Union

Travis Plunkett
Consumer Federation of America

Ed Mierzwinski
U.S. Public Interest Research Group

Margot Saunders
National Consumer Law Center

Wendy Weinberg
National Association of Consumer Agency Administrators

Susan Grant
National Consumers League
Kevin Dillard
Organization for a New Equality

Beth Givens
Privacy Rights Clearinghouse

Michael Shames
Utility Consumers Action Network

National Advocacy Organizations Representing Low Income People:

Dory Rand
National Center on Poverty Law

Donald Saunders
National Legal Aid and Defender Association

Burton Fretz
National Senior Citizens Law Center

Kathleen Boundy & Paul Weckstein
Center for Law & Education

Larry Lavin
National Health Law Program

Jim Williams
National Employment Law Project

Roger Rosenthal
Migrant Legal Action Program

Gideon Anders
National Housing Law Project

State Organizations Representing Low Income Consumers:

Chris Trimboli
Consumer Protection Division
The State of West Virginia

Steve Norman
Vermont Legal Aid

Sue Berkowitz
South Carolina Appleseed Legal Justice Center

Mark Budnitz,
Consumer Law Center of the South

Allan Rodgers
Massachusetts Law Reform Institute

Terri L. Stangl
Center for Civil Justice
Saginaw, Michigan

Kent R. Spuhler
Florida Legal Services, Inc.

Jamie Harmon
Access to Justice Foundation
Lexington, Ky

Jill Shinn
Northeast Missouri Client Council for Human Needs

Carlene McNulty
North Carolina Justice Center

Michael O. Nelson
Michigan Poverty Law Program

Michael Ferry
Gateway Legal Services
St. Louis, Missouri

Gordon Bonnyman
Tennessee Justice Center

Irv Ackelsberg
Community Legal Services, Philadelphia

Randall Chapman
Texas Legal Services Center

Marva E. Williams
Woodstock Institute

Major Issues Regarding HR 1714

1. Electronic records should only be provided in electronic transactions, not in person-to-person transactions. Under this bill consumers could sign a piece of paper in a person-to-person transaction -- even when the consumer does not own a computer -- and still find that all notices, disclosures and records relating to that transaction are posted on a website in their name. Over two thirds of this nation's households are not yet online, and the percentage of elderly and poor who do not own computers are much higher. Yet, HR 1714 would allow crucial notices now required to be on paper and handed to these consumers to be posted on a website. For example, FDA required information about a drug's side effects -- which now must accompany the drug -- could be posted on a website, or the notice of the right to cancel a door-to-door sale, as required by the FTC, could be posted on a website.

The bill should apply only to on-line transactions. All notices, disclosures, as well as the contract itself can be provided electronically, by delivering them to the consumer's previously established email address if the contract is negotiated and consummated on-line and not in person.

For person-to-person transactions (e.g., where a person is on the premises of the merchant), all notices, disclosures, as well as the contract itself must be provided on paper, to the consumer, as under the current law.

Proposed change to House Bill: *Electronic delivery of records prior to and at consummation of the contract, which are required to be in writing, is only permitted when the transaction is negotiated and consummated electronically.*

2. Consumers can agree that post transaction notices and disclosures can be provided electronically with electronic agreement. Even in person-to-person transactions, consumers may wish to receive post consummation notices electronically. However, to assure that consumers understand the consequences of this request, and have the capacity to access and receive the electronic records, the request to receive post consummation records electronically should only be permitted when the request originates from the consumer's email address to which the electronic records will be delivered. Nothing would prohibit a business from emailing the consumer the request, and having the consumer electronically respond.

Proposed change to House Bill *In person to person transactions, the request to receive post consummation records electronically must originate from the consumer's email address to which the electronic records will be delivered.*

3. There must be continued assurance that the consumer has the ability to receive important electronic notices, the failure to reply to which will lead to loss of service or property. There is still a very significant difference between receiving email and receiving mail through the U.S. Postal Service: it does not take any special equipment, or access to an Internet service provider (ISP) -- which carries a monthly fee -- to receive the U.S. mail. It does take access to a working computer and sufficient income to pay the monthly ISP fee to receive email. When a household hits a financial difficulty, the monthly fee for the ISP will probably be the first luxury item to be dropped. In this situation, the consumer's notices should bounce over to the U.S. Postal Service.

To address this, before a consumer is held in default for failing to respond to an electronic notice (required under other law to be in writing) an electronic request must be sent, asking if the consumer still can receive electronic notices. The consumer's failure to reply to the creditor's email consent form should trigger the requirement that the notice be provided by paper writing.

Proposed change to the House Bill: *Before a provider can be deemed to have provided any notice required by contract, state or federal law, except periodic billing statements, the consumer must have responded affirmatively to a request for consent, delivered with or after the notice; or if the consumer does not respond affirmatively, the notice must be delivered on paper, for which the provider may charge a fee equal to the actually incurred cost of delivering the notice on paper.*

4. Every reasonable effort must be made to assure that a consumer actually receives electronic records in a format which the consumer can access. Who among us has not received electronic transmissions that they were not able to access? If a consumer mistakenly consents to receive records electronically that the consumer cannot actually access, the consumer will be foreclosed from going back and requesting paper copies of these records. To assure that the consumer actually has software to access the records, the consent form itself must be separate from all other records and must be provided using the same format as the records.

Proposed change to the House Bill: *The consent form must be emailed to the consumer as a separate form from all other records and must be provided using the same format in which the electronic records will be provided.*

5. Consumers must be able to access, retain and use the electronic records to prove their terms in a court. All electronic records must be delivered to all parties in a form which all parties can keep and use in a court of law to prove the terms of those contracts and notices. The current language in Section 101(c) of the House bill does not require that both parties to a contract be able to access and retain the record, and does not require that the records be provided in a format which is designed to preclude alteration of the record after it was electronically transmitted.

Proposed change to the House Bill: *A record required to be provided to parties to a contract must be provided in a format which allows all parties to access and retain the record, and the record must be provided in a format which is designed to preclude alteration of the record after being electronically transmitted to the contracting parties.*

6. Special delivery requirements for consumer notices must be preserved. There are numerous instances in state law where a consumer must be provided a notice of important rights through certified mail, or another form of special delivery. These delivery requirements serve several purposes: to focus the consumer's attention on the importance of the notice and to provide an extra degree of

protection to ensure that the consumer actually receives the notice. The House bill completely ignores special delivery requirements in state law and would allow all notices to be delivered by email, or even posted to a website.

Proposed change to the House Bill: *If a law requires a record to be sent or posted by a specified method other than by regular United States mail, then the record must be sent or posted in the manner specified by such law.*

7. Reasonable rules must be developed for retention or records and originals. States must be allowed to establish rules regarding the retention of records to assure that single copies of originals are maintained, that electronic originals have all of the attributes of the paper originals, and that electronic records are reasonably accessible to regulators.