March 31, 2003

Josephine Scarlett, Attorney
Office of the Chief Counsel
National Telecommunications and Information Administration
14th Street and Constitution Ave. NW
Washington DC 20230

Re: American Bar Association, Section of Science & Technology Law, Comments for the Secretary of Commerce, National Telecommunications and Information Administration,
"ESIGN Notices, Requests for Comments: Court Documents Exception"

Dear Ms. Scarlett:

The Section of Science & Technology Law of the American Bar Association is pleased to submit the following comments in connection with the Secretary's public request for comments on "ESIGN Notices, Request for Comments: Court Documents Exception," located online at http://www.ntia.doc.gov/ntiahome/frnotices/2002/esign/index.html.

These views are being presented on behalf of the Science & Technology Law Section only and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the Association.

A. Introduction

The Secretary's Federal Register Notice identified nine exemptions from the Electronic Signatures in Global and National Commerce Act, 15 USC § 7001, ("the Act" or "ESIGN ") for which the Secretary was directed to prepare recommendations to Congress. This comment addresses only the exception set forth in Section 7003 (b)(1) and known as the "court documents exception." This exception specifically provides that "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings" are exempt from the requirements of the Act. ESIGN does not expressly define a court proceeding, though it is reasonably clear that court proceedings include

Article III court proceedings and Title 11 proceedings of Article I courts. See 28 U.S.C. §§ 2071-2077.

The Executive Office for United States Attorneys of the U.S. Department of Justice ("EOUSA") has taken the view in a comment to the Department of Commerce that a review of electronic signatures by the Department of Commerce is appropriate, but that actual removal of the Court Documents Exception is premature. Instead, the EOUSA has suggested that the Department of Commerce preliminarily distinguish various types of signatures that are affixed to court records under ESIGN in the event that the exception for court records is removed, and that it make appropriate determinations about the treatment that should be afforded to each of them under ESIGN before a consideration should be made whether to eliminate the exception.[1]

The Administrative Offices of the U.S. Courts ("AOC") has stated in its comment that as a practical and legal matter the "exception regarding materials submitted to courts should be retained, since it is consistent both with the purposes of the statute - which regulates transactions relating to the conduct of business, consumer and commercial affairs - and the federal judiciary's established role in regulating its own proceedings."[2]

The Science & Technology Law Section of the American Bar Association joins in the above comments and believes that the court documents exception should be retained. Because the impact of the court documents exception on the federal courts has been discussed by the other comments, this comment will focus first on the impact of the court documents exception in the state courts in order to complete the analysis.

The comment will address first the question of whether there is sufficient legal basis for ESIGN to apply to state court records at all. The comment will also discuss two peripheral legal issues that Congress may desire to clarify through amendment of

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[1] If such a review is undertaken, one appropriate source of law for such analysis is the Uniform Electronic Transactions Act ("UETA"). ESIGN is concerned with the enforceability and legal effect of electronic documents and signatures. It leaves to UETA the nature of electronic signature attribution. See UETA, § 9 (NCCUSL 1999 version); Fry, "A Preliminary Analysis of Federal and State Electronic Commerce Laws," http://www.bmck.com/ueta-esign.doc. See J. Epstein, "Cleaning Up A Mess On the Web: A Comparison of State and Federal Digital Signature Laws," 5 Legislation and Public Policy 491 at p. 508-9, http://www.nyu.edu/pubs/jlpp/articles/vol5num2/epstein.pdf ("E-Sign is utterly silent on attribution, leaving such determinations to the states and UCC rules.")

[2] In a joint comment, the National Consumer Law Center, the Consumers Union, the Consumer Federation of America, and the U.S. Public Interest Research Group took the position that electronic court records should be enabled and not required in order to protect the legal rights of those not technology aware or enabled.

the law. First, whether infomediary private entities to which court e-filing projects are outsourced fall within the exception, and second, whether administrative tribunals in state or federal executive branch departments are courts for purposes of the ESIGN court documents exception. Congressional action may be appropriate to clarify the intended scope of the exception in these two circumstances.

B. ESIGN and the State Courts

Congress can only fashion laws to regulate state court use of electronic documents and signatures in e-filing procedures if there is a Constitutional basis to do so. If Congress lacks the power to regulate the records of the state courts under ESIGN or otherwise, then the exception should probably be retained because eliminating it will be a useless legislative exercise. Though not directly raised or suggested by the Secretary's request for comments, the question of Congressional power over the state courts with regard to ESIGN is a fundamental one that deserves consideration.

Whether Congress has the power to prescribe electronic documents and signatures in state court records is a close question. Such Congressional power, if it exists, is founded upon the Commerce Clause, which gives Congress the power to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, Section(s) 8, cl. 3, see *United States v. Lopez*, 514 U. S. 549, 558 (1995). With regard to electronic documents and signatures, it is clear that Congress intended to facilitate global and national intercourse through digital commerce under the Commerce Clause, and that ESIGN generally is a legitimate exercise of that power. However, a nexus between the Congressional purpose in enacting ESIGN and state court rules governing state court documents is difficult to establish. Without such relationship, there is no constitutional basis for Congressional regulation under the Commerce Clause.

In *Pierce County, Washington v. Guillen*, No. 01-1229 (U.S. January 14,2003), http://supct.law.cornell.edu/supct/html/01-1229.ZO.html, the Supreme Court affirmed a Congressional bar against the admission into evidence or pre-trial discovery of materials in both state and federal courts that had been prepared for federal highway grant applications. The Court stated on the constitutional issue:

> It is well established that the Commerce Clause gives Congress authority to "regulate the use of the channels of interstate commerce." United States v. Lopez, 514 U. S. 549, 558 (1995) (citing United States v. Darby, 312 U. S. 100, 114 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 256 (1964)). In addition, under the Commerce Clause, Congress "is empowered to regulate and protect the

> instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Lopez, supra, at 558 (citing Shreveport Rate Cases, 234 U. S. 342 (1914); Southern R. Co. v. United States, 222 U. S. 20 (1911); Perez v. United States, 402 U. S. 146 (1971)).

In view of expressed concerns that such collected information could make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions, the Court held that:

> Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of §152 would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decision-making, and, ultimately, greater safety on our Nation's roads. Consequently, both the original §409 and the 1995 amendment can be viewed as legislation aimed at ***improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce***. As such, they fall within Congress' Commerce Clause power. (Emphasis added, footnotes omitted).[3]

In order to determine whether a sufficient interstate commerce connection exists in light of *Guillen* between the goals of ESIGN and its potential application to state court e-filing projects if the Section 7003 (b)(1) exemption were removed, it is helpful to review recent U.S. Supreme court pronouncements concerning the proper scope of the Commerce Clause. Such decisions have identified three broad categories of activity that Congress may regulate under its commerce power:

1) Congress may regulate the use of the channels of interstate commerce. See, *e. g.*, *Darby*, 312 U.S. at 114; *Heart of Atlanta Motel, supra*, at 256 ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no

[3] The Court declined to rule whether the federal statute also violated the Tenth Amendment in that it prohibited a State from exercising sovereign powers to establish discovery and admissibility rules in a state court for a state cause of action, in part on the grounds that the state had accepted the economic benefits of the statute.

The Tenth Amendment probably does not apply to the retention or removal of the court documents exception of ESIGN either. Congress can regulate the state courts in their sovereign capacities and not as sovereigns regulating their citizens' activities consistently with the Tenth Amendment. Removal of the court documents exception would result in congressional regulation of the state courts, not the citizens of the respective states. See, Reno v. Condon, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000), citing South Carolina v. Baker, 485 U. S. 505.

longer open to question"' (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917))).

2) Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e. g.*, *Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *Southern R. Co.* v. *United States*, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra*, at 150 ("For example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)").

3) Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, *i. e.*, those activities that substantially affect interstate commerce, *Wirtz, supra*, at 196, n. 27. The Supreme Court has concluded, consistent with the great weight of its case law, that the proper test under this category requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995).

The *Guillen* court held that the ban against admissibility and discovery in state court proceedings "is a proper exercise of Congress' Commerce Clause authority to 'regulate the use of the channels of interstate commerce' and 'to regulate and protect the instrumentalities of interstate commerce.'" It cited United States v. Lopez, supra, as authority. The Court did not also discuss whether an activity that substantially affected commerce was involved. To be sustained as a legitimate exercise of Congressional authority over state court documents consistently with these Supreme Court precedents, ESIGN must fall within one of the three permissible categories of regulatory powers under the Commerce Clause as applied to state court documents.

The Internet is a virtual highway not functionally dissimilar to the physical highway system before the *Guillen* Court, but there is no parallel identifiable threat to the channels of interstate commerce posed by state court e-filing projects similar to the unforeseen litigation side effect of the information-gathering requirements of the federal highway funding laws. State courts are attempting to implement e-filing through cooperative efforts of non-profit standards bodies and the development for adoption of uniform practices,[4] and are not insisting upon a continued use of paper for

[4] See e.g., the proposed and recommended standards of the state courts acting cooperatively at http://www.ncsconline.org/D_Tech/Standards/Standards.htm.

court documents. Such efforts recognize a need for a transition from paper to electronic documents and contemplate an acceptable electronic signature technology being developed and made generally available at a future time. These efforts are consistent with the goals of ESIGN, rendering Guillen distinguishable under current circumstances.

An argument could be constructed that in order to promote uniformity in the adoption of electronic records and signatures, Congress could require ESIGN to be applied to state court documents. Such an argument could point to the significant annual volume of state court legal decisions, their importance to the national economy, the impact of the courts as employers and contractors upon commerce, and the collective role of the state courts in helping to establish by example for the other sectors of the economy what is considered to be legal in terms of suitable electronic document formats and binding legal signatures. Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997). However, the Supreme Court in U.S. v. Lopez, supra, has criticized such reasoning as overlooking the historic requirement that impacts upon commerce be qualitatively "substantial". Otherwise, any perceived impact upon commerce could be considered sufficient to federalize state law on the grounds that the national economy is somehow affected.[5]

State courts have tended to promote XML document technologies over all other electronic document formats in their cooperative efforts to date.[6] Such bias in favor of a single technology arguably runs contrary to the policies of technology neutrality of ESIGN. Under this line of reasoning, the goal of establishing uniform technology neutral policies nationally for electronic documents and signatures as required by Section 7002 (a)2A(ii)[7] and 7004(b)2C(iii)[8], could arguably provide a constitutional basis under the Commerce Clause for Congress to remove the court

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[5] See United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740 (2000)(federal civil remedy for gender-based crime held unconstitutional under the Commerce Clause); Printz v. United States, 521 U.S. 98 (1997) (federal mandatory background checks for handgun purchases required of state officers held unconstitutional). But see the federal pre-emption discussion of Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532, (2001)

[6] The federal courts do not use XML as do the state courts but instead rely upon the Portable Document Format ("pdf") format originally developed by Adobe Systems, Inc. and HTTP 1.1 form uploads.

[7] "[S]uch 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."

[8] "[T]he 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."

documents exception as it applies to the state courts. The relationship between protection of a Congressional objective – here preventing a dominance or monopoly of one type of technology for electronic documents or signatures - might be sufficient under *Guillen* to support Congressional regulation. Just as highway safety necessitated a Congressional ban against the use of potentially damaging evidence against the state entities in state or federal courts, so a uniform national policy of technology neutrality could possibly justify the application of ESIGN to the state courts if the exception were removed.

Any action to remove the exception for court documents with regard to state courts, though, could result in questionable constitutionality under the recent Supreme Court decisions interpreting Congressional powers under the Commerce Clause. This conclusion supports the view that the courts record exemption of ESIGN should be retained. Even if removal of the ESIGN court documents exception were to withstand Constitutional challenges, parallel provisions of UETA that expressly are not pre-empted by ESIGN[9], could create a similar exception for court documents under applicable state law even in the absence of a continued exception for court documents under ESIGN itself. Furthermore, there is no reason to assume that acceleration adoption of electronic documents or signatures in the courts will take place if the exception is removed. For these reasons, the Science & Technology Law Section recommends that the exception for court documents be retained.

C. The Role and Status of Infomediary E-Filing Vendors

Outsourced e-filing services are sometimes performed by private application service providers, or infomediaries, under contract with the courts, and they have been referred to as Electronic Service Filing Providers (EFSP's).[10] These entities operate only with regard to state court initiatives at the present time.[11] Such infomediaries

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[9] "The drafters of UETA believed such [court] documents were not connected to transactions and thus were excluded from the scope of §§1-16 of the Act. To the extent that courts fall within the definition of governmental agency, §§17-19 of UETA authorize courts to establish rules governing all records subject to their authority. The exclusion in E-Sign has the effect of not mandating that courts accept electronic records or electronic signatures for their filings or records, leaving the courts free to establish their own rules and regulations governing electronic records and signatures. Thus the net effect of the exclusion in E-Sign and provisions of UETA are the same – courts have the authority to establish rules governing the use of electronic records and signatures." Fry, op. cit., p. 10.

[10] For an in-depth discussion of this model in the United States and elsewhere, see Feasibility Report: Electronic Filing Service Provider Model Commissioned by the Office of the Registrar, Supreme Court of Canada September 2002, http://www.google.com/search?q=cache:XkiGyBxqOUQC:www.scc-csc.gc.ca/aboutcourt/efiling/efsp_pub_e_v6.pdf+Electronic+Filing+Service+Provider&hl=en&ie=UTF-8.

[11] The federal courts for the most part have developed and operate the efiling systems themselves and make no provision for the EFSP's. The federal e-filing system thus is similar to traditional paper filings

include Lexis-Nexis CourtLink, WizNet, Bearing Point and Microsoft, to name a few. They operate as efiling application service providers positioned between the courts and the lawyers. Lawyers in such a system interact almost exclusively with the service provider rather than the Court. In this model, the provider may perform some or all of the following: collect the documents and related fees, transmit them to the courts, receive the receipts, and return them to the filers. Filers who want to review filed records often do so by accessing the infomediary's repository rather than the Court's. This allows the infomediaries to perform value added services, such as customized "My Documents" for a customer, tools to index, search, extract, mark-up and otherwise make use of the filed documents in a case for litigation preparation purposes.

Because the infomediaries act pursuant to arrangements with the Courts, a question can arise whether the documents held by the infomediaries do or should fall within the court documents exception of ESIGN . On the one hand, the courts have been generally insistent on asserting that a copy of an e-filed record in the court's repository is the official court record and that the infomediaries maintain a separate, duplicate set for their purposes. This requirement supports the view that the set of court documents held by the infomediary are unofficial duplicates, and not officially court records for purposes of the E-Sign exception. Under this view, the infomediary repository is bound by E-Sign and applicable provisions of state laws such as UETA, pursuant to the status as private parties. On the other hand, where the documents are in transit between the filers and the courts, or where the courts do not as a practical matter have sufficient facilities to house the "original" documents, the status of court filings in the hands of the infomediaries becomes less clear.

These transactions probably render the infomediary model of court filing a type of private electronic commercial transaction that falls within the scope of ESIGN apart from any of its exceptions. Inasmuch as the economic business model of the infomediaries is based upon a return of investment and profit based upon lawyer transactions involving transmission and use of the court records, the basic purposes and goals of the law are served by applying the law without exception to the infomediaries and their end users.[12] On the other hand, to avoid confusion for filers

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in that the attorneys or pro se litigants interact directly with the courts. In the future, however, law firms may need to file in many different courts in a single Internet session; and courts may receive pleadings from many different sources. In such environments, it may be useful and efficient for the infomediaries to collect the efilings and route them to their ultimate destinations, arrange for payments to the courts, and return receipts to the filers. Thus, it is probable that EFSP's will ultimately interact with the federal e-filing systems at some point in the future.

[12] "The federal legislation specifies that it applies to any transaction in or affecting interstate or foreign commerce '[n]otwithstanding any statute, regulation, or other rule of law'. It defines the term 'transaction' to refer to an action or set of actions relating to the conduct of business, consumer or commercial affairs between two or more persons. It explicitly includes the sale, lease, license, trade or

and other participants in e-filing services, it may be preferable to have a uniform rule applicable to all efiling transactions, without regard to the private or official status of the repository in which a filed document actually resides. Consequently, it may be appropriate for the Secretary to recommend to Congress an amendment expanding the scope of the present courts records exemption of ESIGN . Such an amendment could expressly state that the exception not only refers to the records that are actually within the document management and case management systems of the state and federal courts, but also extends to include duplicate originals or copies in the hands of infomediaries, as well as to the processes used to transmit the documents to the courts by the infomediaries or their affiliates. The amendment could also clarify the status of filing receipts and query results returned by the e-filing infomediaries to the end users, none of which appear to be within the exception as it was originally adopted.

D. Administrative Law Tribunals

A final area involving the courts records exemption concerns the records of so-called administrative courts. These "courts" are actually administrative law tribunals of executive branch departments. While the procedures of such tribunals generally include provisions for subsequent judicial review, the tribunals themselves are not considered part of the judicial branch. Executive branch agencies and their obligations under ESIGN are specifically dealt with under Section 104 of the Act, 15 U.S.C. § 7004, which have been summarized as follows:

> "Among other things, §104(c) provides that the agencies lack authority to impose or reimpose requirements for printed or paper records. This suggests that the agencies must begin the process of planning for migration to electronic systems. Future rules and regulations well may be interpreted to be barred by the provisions of subsection (c).
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> "Under E-Sign §104(b), the agencies retain their existing rulemaking authority, and may use that authority to interpret E-Sign §101 by regulation or by orders or guidance. Nevertheless, this interpretive power is limited under §104(b)(2) by a requirement that any regulation, order, or interpretive guidance be consistent with §101, not add to the requirements of §101, and that the agency finds substantial

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barter of all personal property, including intangibles, services and real property. Subject to the exclusions specified in §103, each body of State law which is applicable to the formation, enforcement, interpretation or construction of any sort of agreement is thus impacted by the federal Act. While E-Sign is limited in effect to transactions in or affecting interstate or foreign commerce, very few transactions in commerce, or between merchants and customers, are excluded by this limitation". Fry, op. cit. supra, p.12.

justification for the regulation, order or guidance, that the methods used to carry out its purpose are substantially equivalent to any burden on paper transactions, and will not impose unreasonable costs.

"The power of the agencies to establish performance standards is subject to somewhat different standards. Indeed, there is authority under §104(b)(3) to require retention of information in paper or printed form, upon a finding of a compelling interest relating to law enforcement or national security and that paper is essential to attaining those interests. In the absence of such a compelling interest, no agency has the authority to impose any requirement that a record be in a tangible or printed form. The agencies are given the authority to interpret §101(d) on retention of records by specifying standards to assure accuracy, record integrity and accessibility. The interpretive regulations may require specific formats or give special legal status or effect to the use of particular technologies if the requirement serves an important governmental objective and is substantially related to the achievement of that objective. This is limited, however, by a provision that the agency may not require use of a particular type of software or hardware in order to satisfy record-retention rules. And, finally, with the exception of cases where a the needs of law enforcement or national security establish a compelling interest that can be satisfied only with paper, all rulemaking powers are restricted to bar imposition of new paper or printing requirements."[13]

It seems reasonably clear that the records of the administrative law tribunals of governmental agencies were intended to be treated the same as other executive branch records.[14] However, it may be appropriate to treat the records of administrative law tribunals equivalently with the courts in order to allow uniformity of efiling procedures involving lawyers and legal proceedings, regardless of whether a traditional court of general or appellate jurisdiction, an Article III or Article I court, or an administrative tribunal is involved. Accordingly, the Secretary may wish to recommend to Congress that it also include the records of such administrative courts located in state or federal agencies or departments within the court records exemption instead of as agency records of the executive departments themselves.

Conclusion

[13] Fry, op. cit. supra, pp. 11-12.

[14] Cf. 15 U.S.C. § 7004 and 5 U.S.C. §552(f):"agency" as defined in section 551(1) of this title [5 U.S.C.] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency…

It is the view of the Science & Technology Law Section of the American Bar Association that the current exception for court documents should not be removed, but by amendment perhaps should be expanded to include within its scope both private efiling infomediaries and administrative tribunals of the executive branches of government.

Sincerely,

John H. Messing
Chair, Committee on Electronic Filing