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OFFICE OF THE DIRECTOR

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MAR 19 2008
State Controller's Office
Legal

Date: March 18, 2008

To: Valerie Varzos
FI$Cal Project Manager

From: Rick Chivaro, Chief Counsel, State Controller's Office
Molly Arnold, Chief Counsel, State Department of Finance

Subject: Electronic Signatures

Question:

You have asked whether the FI$Cal Project can rely on or require the use of electronic signatures, and, if not, what changes in law will be necessary to support such reliance or requirement.

Summary of Existing Law:

There exists in State law the Uniform Electronic Transactions Act[1]. This Act was enacted in 1999 to address the expansion in electronic commerce and, in summary terms, provides that:

- parties may *voluntarily agree* to conduct a transaction by electronic means;
- a record or signature may not be denied legal effect or enforceability solely because it is in electronic form;
- a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation;
- a law requiring a record to be in writing is satisfied by an electronic record;
- a law requiring a signature is satisfied by an electronic signature;
- a law requiring a signature to be notarized is satisfied if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public and all other information required for the notarization; and
- a law requiring a statement to be signed under penalty of perjury may be satisfied by an electronic signature if the record includes all of the information to which the declaration pertains; and
- in litigation, evidence of a record or signature may not be excluded solely because it is in electronic form.[2]

The Act 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. It applies *only* to transactions between parties *each of*

[1] Title 2.5 of Part 2 of Division 3 of the Civil Code (Civil Code sections 1633.1 *et seq.*) A copy of this Act is attached for your reference.
[2] Civil Code sections 1633.7, 1633.11 and 1633.13..

which has agreed to conduct the transaction by electronic means. That agreement cannot be included in a standard form contract.[3] **No state agency may** require, prohibit or regulate the use of an electronic signature in a transaction *in which the agency is not a party* unless the requirement, prohibition or regulation is specifically authorized by some other law.[4]

In addition, the Act, by its terms, does not apply to transactions *subject to* the following laws:

- laws governing the creation and execution of wills, codicils, and testamentary trusts;
- certain provisions the Uniform Commercial Code (including those pertaining to negotiable instruments, bank deposits and collections, letters of credit, investment securities and secured transactions); and
- any law that requires that specifically identifiable text or disclosure be separately signed or initialed. [5]

Though the Act *does* apply to electronic records or signatures so excluded when used for a transaction "subject to a law other than those specified".[6]

The Act does not apply to any *specific transaction described in* a wide variety of laws, including laws pertaining to securing an interest in a mobile home; obtaining medical information; notifications related to real property sales; automobile sales brokerage agreements; retail installment accounts and other loans; consumer credit reporting; rental agreements, insurance, the termination of utility services, and healthcare service plans, among others.[7]

Neither these exclusions prohibit a transaction from being conducted by electronic means if the transaction may be conducted by electronic means under any other

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[3] Civil Code section 1633.5, subdivisions (a) and (b).
[4] Civil Code section 1633.17.
[5] Civil Code section 1633.3, subdivision (b).
[6] Civil Code section 1633.3, subdivision (d). In explaining what this means, a senate bill analysis provided:

> "For example, this act would not apply to an electronic record of a check when used in a transaction governed by UCC Division 4 (this Act would not validate a so-called electronic check); however, for purposes of check retention statutes, the same electronic record of the check would be covered by this Act, so that retention of an electronic image/record of a check will satisfy the retention statutes." (Senate Judiciary Committee, 1999-2000 Regular Session, S.B. 820, as amended May 6, 1999; hearing date: May 11, 1999.)

[7] Civil Code section 1633.3, subdivision (c). We note the difference between a transaction is "subject to" a particular law (as referenced in subdivision (b) of this statute) and a "specific transaction" that is "described in" a law (as referenced in subdivision (c)). There is no case law that explains this distinction.
[8] Civil Code section 1633.3, subdivision (f).
[9] Civil Code section 1633.5, subdivision (d).
[10] See 85 Ops. Cal. Atty. Gen. 191.

applicable law.[8]

Some of the Act's requirements may be varied by the agreement of the parties, but agreement to vary other terms is prohibited.[9]

Applicability To FI$Cal Project:

It is our understanding that a great number and variety of transactions are anticipated to be undertaken using the FI$Cal project, that the processes that currently relate to each potential FI$Cal transaction may undergo changes as the FI$Cal project is developed, and that these changes may require authorizing legislation. For these reasons, this memorandum does not attempt to list each potential FI$Cal transaction and conclude whether, under current law, that transaction could be completed using electronic signatures. What we have provided is a summary of existing law and a proposal of "next steps" to use in determining whether a change in law would be needed, if deemed appropriate by the Legislature, to permit the use of electronic signatures for any particular transaction.

1. **Reliance on Electronic Records or Signature:**

Pursuant to the Act, the FI$Cal Project will be able to rely on electronic signatures and writings except for those pertaining to an "excluded transaction". For the purposes of this memorandum, the term "excluded transaction" refers to a transaction either (i) subject to the laws set forth in Civil Code section 1633.3, subdivision (b) that is not used for a transaction subject to another law or (ii) described in the laws set forth in Civil Code section 1633.3, subdivision (c) and which is not otherwise permitted as an electronic transaction under other another state law.

What changes in law will be necessary to support the FI$Cal Project's reliance on electronic signatures in "excluded transactions" will depend on the facts that pertain to that transaction. First, to determine whether any particular transaction is an excluded transaction, the FI$Cal Project will need to identify the transactions it anticipates engaging in. At that point, research pertaining to whether there are other state laws that specifically permit reliance upon electronic signatures and writings that pertain to those transactions can take place. If no such law exists, the FI$Cal Project will then need to determine whether to seek a change in law, which will require consideration of the policy reasons behind the "excluded transaction" restrictions and whether they apply to the FI$Cal Project's transaction.

2. **Requiring the Use of Electronic Records or Signatures:**

As noted, the Act provides that no state agency, board, or commission may *require*, prohibit, or regulate the use of an electronic signature in a transaction in which the agency, board, or commission *is not a party* unless a law other than the Act expressly authorizes the requirement, prohibition, or regulation. A central question to answer in determining whether an electronic signature may be required under current law is whether the state entity involved is a "party" to the transaction reflected in the document executed by electronic signature. The Attorney General has opined that:

> "While a government agency may be a party to a transaction, as when it enters into such conduct or agreement with another public or private entity, the filing or recordation of a document concerning the transaction does not render the act of filing or recordation itself a new 'transaction' or make the public agency a 'party' to the original transaction."[10]

Thus neither the FI$Cal Project nor any participating state agency, board, or commission may, without legislative authority, require all documents filed or recorded with it to be signed electronically.
Even as a party to a transaction, it does not appear that either the FI$Cal Project or any participating state agency, board or commission can do more than *agree* with the other parties to the transaction to engage in an electronic transaction or accept electronic signatures.

This limitation becomes most difficult in relation to transactions engaged in by the FI$Cal Project or one of its participating entities with parties outside of State government. As to State agency interagency transactions, its possible that this restriction could be addressed by agreements between FI$Cal participants and the program. Likewise, a Governor's executive order should be sufficient for Executive Branch agency agreements, if obtaining a large number of agreements is deemed to be cumbersome. Alternatively, this could be addressed in legislation.

3. Next Steps

As noted, despite the statutory language described above that broadly authorizes the *reliance on* electronic records and signatures there may be instances where amendments to specific statutes and regulations are necessary to permit reliance – particularly in the case of currently "excluded transactions". In addition, there may be instances when the FI$Cal Project may want to *require* the use of electronic signatures, which will require legislation or consensus among the transaction parties.

The various forms currently used by the four control agencies should be examined for suitability as electronic records with electronic signatures, as required. The initial review is best undertaken by the individual control agency using the form. In addition to any legal requirements, the agency should consider from a policy standpoint whether it would be desirable for the paper form to be converted to an electronic record bearing electronic signatures. The individual agency is in the best position to assess the risks of using electronic records and signatures.

In addition to the question asked of us, we note that the Act speaks to other important considerations such as the mechanics of sending, receiving and using electronic records, issues with transmitting electronic records, and retention of records. Those are beyond the specifics of this memorandum. However, we suggest that FI$Cal Project staff acquaint themselves with these requirements.