

**Statement of Daniel Greenwood, Deputy General Counsel For The Information Technology Division Of
The Commonwealth of Massachusetts Before The Domestic and International Monetary Policy
Subcommittee Of The Committee on Banking and Financial Services Of The United States House of
Representatives**

July 9, 1997

Mr. Chairman, members of the Subcommittee, I appreciate the opportunity to participate in this important hearing on a Federal Role in Electronic Authentication. I am pleased to share the views on legislation developed in the Commonwealth of Massachusetts based on our experiences both using and promoting authentication techniques for electronic commerce. As Deputy General Counsel for the Information Technology Division (ITD) for the Commonwealth, I have had ample occasion to focus on the ramifications of electronic commerce from a legal, practice, and technology oriented perspective. The Commonwealth of Massachusetts is home to several electronic commerce companies and our state government is a robust user of electronic commerce technology. In essence, the Commonwealth favors an incremental and pro-market policy in legislation and regulation at this time.

Many people are questioning whether electronic signature law should be enacted at the state level or preempted by federal law. The Commonwealth believes that electronic signatures are relevant as a part of broader electronic commerce policy and should be viewed in that context rather than in isolation. The question is not one of state versus federal law, but how each level of government should coordinate. The law, policy and practice related to electronic commerce are too important and pervasive to be under the sole jurisdiction or influence of any single level or branch of government.

The Commonwealth is having a very positive experience using electronic commerce to achieve cost savings and service quality enhancements by making important state government transactions available over the Internet for citizens and business. Citizens can use a credit card over a secure Internet connection to renew their vehicle registration, pay a citation and even to order a vanity license plate. Vendors that do business with the Commonwealth can access official requests for proposals over the state's web site and will be able to submit bids in the future. Our most recent transaction allows banks to conduct secure and authenticated Internet filings with the Massachusetts Division of Banks. We believe the citizens would rather be on-line than in line when dealing with government. There are a number of different information technologies that can be deployed for secure electronic commerce and our policy has been to promote use of multiple technologies and a competitive marketplace for electronic commerce services and products.

It is unrealistic to assume that all conflicts can be preempted out of existence. At the legislative, regulatory and policy levels, governments will have to coordinate actions because electronic commerce is multi-jurisdictional by nature. For instance, among state governments and between the states and the federal government, it is vital that a citizen or business dealing with the government not be burdened with inconsistent or conflicting technical or legal requirements. To this end, state and federal government must coordinate policies on electronic filings, registrations, licensing and other online transactions.

In the narrow but important area of public key cryptography, for instance, Massachusetts is cooperating with several other lead states and three national associations of state governments to accredit certification authorities. This accreditation project is aimed at producing consistent standards among states and other parties who would purchase or rely on digital certificates of identity in electronic commerce. This project serves as a market driven but coordinated approach to protect certification authorities from conflicting requirements by different governments and other large users. A wide array of private sector electronic commerce partners and the federal government have been part of the planning of this pilot. Such efforts can be far more fruitful than legislation for the purpose of accelerating electronic commerce by working out

practical obstacles.

Important though it may be, perhaps too much emphasis has been paid to the role of Government as law maker. An initial, and probably counterproductive, assumption is often made that the lack of a comprehensive statutory and regulatory framework is holding back electronic commerce. The Administration of Governor William Weld has found consistently over the past six years that restraining the government impulse to regulate private enterprise results in more, not less, economic activity. The Weld Administration has recently concluded an unprecedented phaseout of antiquated or overly burdensome regulation throughout every corner of the state bureaucracy. Particularly in an area as dynamic and fast growing as the information technology economy, government at all levels must temper the regulatory urge with a healthy respect for the power of markets to develop the least costly, highest quality most efficient technical, business and contractual solutions. Government remains, of course, a player in the online market by virtue of consumer power and transactional standards setting. However, the electronic commerce market will not be regulated or legislated into existence, but it will emerge as a result of supply and demand. As the market develops, legislation or regulation can be crafted to deal specifically with market failures that may emerge with respect to consumers, corporate market needs, criminality and other public concerns. To attempt to legislate solutions to problems that have largely not yet happened in a market that is still not fully formed risks harmful market distortions and other unintended consequences.

It is clear, however, that certain legislative reforms will be needed to remove legal obstacles from the path of private sector parties who use electronic commerce as part of their business. Some legal reforms are largely under the jurisdictions of the states. For instance, the law of contracts has traditionally been a matter for state law. Similarly, the specific question of electronic authentication often boils down to an issue of evidence. This is an issue of proof of the identity of a party to a transaction or other online activity. To the extent these matters are tried in state courts applying state rules of evidence, this too is a matter of state law. Just one month ago, in the case of *DOHERTY v. REGISTRY OF MOTOR VEHICLES*, a Massachusetts district court ruled that an e-mail message qualified as a writing signed under the pains of perjury. State courts have, for centuries, proven to be quite capable of adjudicating commercial disputes between parties from multiple jurisdictions and dealing with technological advances. Concerns over state government competence to continue in this field are not called for. In fact, states are often better suited to produce innovative, responsive and accountable policy models than the federal government.

In recognition of the novel issues raised by electronic transactions generally (including authentication issues) the states are in the process of drafting uniform state law governing electronic contracts, licenses and other private transactions. The uniform law drafting process affords an open, deliberate process that is necessary to arrive at sound, informed legislation in this area. However, while uniform law drafting proceeds, some legal reforms may be ripe for action in the mean time. For instance, the Massachusetts General Laws provide some 4,515 separate references to documents that must be in writing and/or signed. Some laws require writings "on paper" and signatures "in ink." These laws are strewn throughout the laws and regulations of states and the federal government. Such "quill pen" laws, in many cases, hale from an industrial age (and occasionally from agrarian times) and serve as antiquated senseless impediments to electronic commerce. The repeal or reform of such laws should be undertaken in a coordinated and consistent fashion at all levels of government. Similarly, federal and state tax policy should be tailored to promote electronic commerce and existing or contemplated regulation of electronic commerce should be seriously reconsidered in light of the importance of market driven solutions and robust competition in this field.

The Commonwealth of Massachusetts has proposed the creation of an online, web-based conference area to facilitate communication between and among states and the federal government regarding electronic signature and authentication legislation, regulation and policy. We are pleased to work with the newly formed United States Innovation Partnership on this project. The USIP is a joint effort of the National Governors

Association, the White House Office of Science and Technology Policy and the Secretary of the U.S. Department of Commerce. When this web site is operational, we will be happy to inform the Subcommittee of the http address. The Commonwealth has also drafted a survey to collect and share views on the proper balance between state, federal and international law for electronic signatures. This survey has been published on the Internet, in the BNA, and other periodicals and results are still coming in. When the results are complete, we will forward a report to the Subcommittee for your information.

There are many opportunities for state and federal law to form a consistent legal framework in support of the emerging information society. Needed international coordination will have to be spearheaded by the federal government. Such issues as export, copyright, patent, federal tax and federal procurement will also have an important impact. Areas such as uniform commercial law, general contract law and state rules of evidence, on the other hand, will need to be carefully evolved by the states in light of federal and international electronic commerce policy. On a going forward basis, more forums and opportunities for communication between levels of government are needed to avoid the crafting of inconsistent policy or misunderstandings about the roles of each stakeholder.

Mr. Chairman, thank you for the opportunity to testify today. If the Subcommittee would like deeper background on these matters, I would encourage you to visit the ITD web site, available at www.state.ma.us/itd/legal. As you continue to work on these important issues, the Commonwealth would be honored to provide the Subcommittee with assistance in the future. I would be pleased to answer any questions the Subcommittee may have at this time.

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