David M. Gold *Legislative Service Commission*

Sub. H.B. 204

125th General Assembly
(As Passed by the General Assembly)

Reps. **Wolpert, Gilb, Seitz, McGregor, Collier, Barrett, Allen, Kearns, Seaver, Chandler, Daniels, Cirelli, Domenick, C. Evans, Fessler, Flowers, Olman, Schlichter, Sferra, Skindell, Wagner, Walcher, Carano, DePiero, Distel, Gibbs, Harwood, Hughes, Key, Miller, Niehaus, S. Patton, Raussen, Reidelbach, Schmidt, Schneider, G. Smith, J. Stewart, Sykes**

Sens. **Amstutz, Goodman, Stivers**

Effective date: *

ACT SUMMARY

- Requires a county office, before using electronic records and electronic signatures, to adopt a security procedure 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.

- Specifies that an electronic record must have the same force and effect as a paper filing in all cases where (1) the county office has authorized or agreed to the electronic filing and (2) the filing is made in accordance with applicable rules or an applicable agreement.

- Specifies that the act does not require and cannot be construed to require a county office to use or permit the use of electronic records and electronic signatures.

- Requires the Auditor of State, in conducting a required or permitted audit of a county office, to inquire into the method, accuracy, and effectiveness

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

of any security procedure adopted by that office for use with electronic records and electronic signatures.

- Excludes nonelectronic contracts to which a county office is a party from existing law's declaration that "conduct of transactions by electronic means" provisions are unenforceable against consumers who do not separately sign the provisions.

- Requires county records commissions to notify their county historical society and certain other local entities that request a notice, that certain county records approved for disposal may be selected and sent to the Ohio Historical Society and potentially distributed by the Society to them.

- Creates the Ohio Privacy/Public Record Access Study Committee.

- Modifies the law governing the payment of state expenses by a financial transaction device by expanding the definition of "financial transaction device" to include an automated clearinghouse network credit, debit, or e-check entry, changing the name of the state's "financial transaction device program" to the state's "financial transaction device acceptance and processing program," and requiring the Board of Deposit when it establishes a surcharge or convenience fee to follow the guidelines of the financial institution, issuer of financial transaction devices, or processor of financial transaction devices with which the Board of Deposit contracts.

- Allows a county or township to participate in contract offerings from the federal government that are available to a county or township, pursuant to which its acquisition of equipment, materials, supplies, or services is exempt from competitive selection requirements.

- Allows a county or township to purchase supplies and services outside of a joint purchasing program and without complying with competitive selection procedures if the purchase can be made at a lower price than is available through such a contract.

- Delays the effective date of the sales and use tax's new destination-based sourcing law until July 1, 2005.

- Authorizes vendors to begin sourcing sales under this new law on and after January 1, 2005.
- Delays until July 1, 2005, the operation of a law that requires sellers to determine sourcing under the new destination-based sourcing law.
- Defines the "Internet" for the purpose of the entire Revised Code and eliminates individual definitions of the term throughout existing law.

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CONTENT AND OPERATION

County-related provisions

Use of electronic records and signatures by county offices

Unless a law explicitly requires a transaction to be conducted by paper or other means, Chapter 1306. of the Revised Code, known as the Uniform Electronic Transactions Act (UETA), generally authorizes the state and various political subdivisions to conduct transactions electronically. If a specific statutory provision requires a document to be maintained in paper format or prescribes the exact manner in which a particular transaction must be conducted, that specific provision would rule over the general UETA authorization. Thus, under continuing law, political subdivisions, including county offices, may conduct business by electronic transaction, unless a statute specifically requires business to

be conducted in another manner. There is, however, no requirement that an office transact business electronically, and, thus, the extent to which an office transacts business electronically is left to its discretion (R.C. 1306.04--not in the act).

The act generally requires a county office, before it uses electronic records and electronic signatures under the UETA, to adopt a security procedure 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. A security procedure includes, but is not limited to, a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgement procedures. A security procedure adopted under this requirement must be adopted in writing. (R.C. 304.01 and 304.02.)

The act specifies that, whenever any rule or law requires or authorizes the filing of any information, notice, lien, or other document or record with any county office, a filing made by an electronic record has the same force and effect as a filing made on paper in all cases where (1) the county office has authorized or agreed to the electronic filing and (2) the filing is made in accordance with applicable rules or an applicable agreement (R.C. 304.01 and 304.03(A)).

Nothing in the act, however, authorizes or can be construed to authorize the use of a financial transaction device in an electronic transaction for the acceptance of payments for county expenses; continuing law permitting a board of county commissioners to authorize the acceptance of payments by financial transaction devices for county expenses and a county auditor to accept payment of dog and kennel registration fees by those devices via the Internet is not affected by the act (R.C. 304.01 and 304.03(B) and (C)). And, nothing in the act requires or can be construed to require a county office to use or permit the use of electronic records and electronic signatures (R.C. 304.01 and 304.04).

Auditing of electronic security procedures

If a county office uses electronic records and electronic signatures under the UETA, the act requires the Auditor of State, in conducting a required or permitted audit of that office, to inquire into the method, accuracy, and effectiveness of any security procedure adopted by that office (R.C. 117.111).

Consumers and electronic transactions

Under continuing law, if a provision in specified *nonelectronic* contracts involving a consumer authorizes the conducting of a transaction (in whole or in part) by electronic means, the provision is unenforceable against the consumer unless he or she separately signs it. Previously, this unenforceability applied to

such a provision in any nonelectronic contract to which a "state agency" was not a party. The act instead provides that this unenforceability applies to such a provision in any nonelectronic contract to which a state agency or a *county office* is not a party. For this purpose, "county office" means any officer, department, board, commission, agency, court, or other instrumentality of a county. (R.C. 1306.16(A) and (D).)

Notice to county historical societies and public and quasi-public entities about county records

Under continuing law, counties, among other public entities, must follow a prescribed procedure for retaining and disposing of their records. Each county has a county records commission that provides rules for retention and disposal of records of the county and reviews applications for one-time records disposal and schedules of records retention and disposal submitted by county offices. When the commission approves county records for disposal, a copy of the list of those records must be sent to the Auditor of State for approval. After the Auditor of State approves or disapproves the records' disposal, the Ohio Historical Society, which functions as the state archives administration for the state and its political subdivisions, has 60 days to select for its custody those records it considers to be of continuing historical value. As the archives administration, the Society can transfer public records in its possession to public libraries, county historical societies, state universities, or other public or quasi-public institutions, agencies, or corporations by written agreement, if they are capable of meeting accepted archival standards for housing and use. (R.C. 149.38; R.C. 149.31--not in, but referred to in, the act.)

The act provides that, when the Ohio Historical Society is informed that county records are to be disposed of, the county records commission also must notify the county historical society, and any public or quasi-public institutions, agencies, or corporations in the county that have provided the commission with their name and address for these notification purposes, that the Society has been so informed and may select records of continuing historical value, including records that may be distributed to those entities as provided in continuing law (R.C. 149.38(C)).

Ohio Privacy/Public Record Access Study Committee

The act creates the Ohio Privacy/Public Record Access Study Committee, consisting of 23 members. The President of the Senate appoints three members (two representing the Senate majority caucus and one representing the Senate minority caucus), the Speaker of the House appoints three members (two representing the House majority caucus and one representing the House minority caucus), the Chief Justice of the Supreme Court appoints a judge or other

representative of the judicial branch, and the Governor appoints 16 members (one representing the newspaper industry, one in broadcasting, one who is an attorney in private practice specializing in public records law, one who is a local elected official with responsibility for public records, one representing law enforcement agencies, one who is an attorney from the Attorney General's office who specializes in public records law, one representing the insurance industry in Ohio, one representing the media, one representing an information services company, one representing realtors, one representing the credit industry, one representing the legal records industry, one representing the financial services industry, one who is a consumers' advocate, one representing the Ohio Historical Society or who is the Records Information Management System Administrator from the Department of Administrative Services, and one representing the public). (Section 3(A).)

The Committee must study all of the following (Section 3(B)):

(1) The concerns associated with the dissemination of personal information contained in public records, including, but not limited to, identity theft, misuse, harassment, and fraud;

(2) The legitimate uses of personal information contained in public records by businesses, governments, the legal community, and others, including, but not limited to, its use in combating identity theft and fraud;

(3) The costs to state and local governments associated with placing restrictions on access to personal information contained in public records;

(4) The impact, including costs, on legitimate businesses, law enforcement, the legal community, government agencies, and others of access restrictions placed on personal information contained in public records;

(5) The impact of protecting the disclosure of personal information contained in public records through the sealing of documents by court rule;

(6) Electronic, internet, and bulk access to personal information contained in public records;

(7) Current and potential future misuse, fraud, harassment, and identity theft prevention and detection efforts, including programs to educate the public on ways to avoid becoming victims, as well as procedures to streamline recovery;

(8) Existing criminal and civil penalties for misuse of personal information contained in public records and an examination of whether those penalties should be increased as a deterrent.

The Committee is required to develop a unified approach to preventing theft, fraud, and the misuse of personal information contained in public records while maintaining access and use of public records for lawful purposes. The Committee must consult with the Supreme Court Advisory Committee on Technology and the Courts on issues relating to access to and use of court records and must make use of work product and recommendations developed by the Advisory Committee with regard to access to and use of court records. (Section 3(C).)

The Committee must submit a report of its findings to the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, the Minority Leader of the House of Representatives, the Governor, and the Chief Justice of the Supreme Court not later than 12 months after the appointment of all of the members of the Committee. The report must be approved by a majority of the members of the Committee and must include a detailed statement of the Committee's findings, conclusions, and recommendations. (Section 3(D).)

Vacancies in the membership will be filled in the same manner in which the original appointment was made. The President of the Senate and the Speaker of the House of Representatives will designate co-chairpersons of the Committee when the President and the Speaker appoint the members to the Committee. (Section 3(E) and (F).)

All meetings of the Committee are public meetings and must be open to the public at all times. A member of the Committee must be present in person at a meeting that is open to the public in order to be considered present or to vote at the meeting and for the purposes of determining whether a quorum is present. The Committee must promptly prepare, file, and maintain the minutes of the Committee meetings, and the Committee minutes must be public records. The Committee must give reasonable notice of Committee meetings so that any person may determine the time and place of all scheduled meetings. The Committee cannot hold a meeting unless the Committee gives at least 24 hours' advance notice to the news media organizations that have requested notification of the Committee's meetings. (Section 3(G).)

Financial transaction device

Continuing law allows the Board of Deposit to adopt a resolution authorizing the acceptance of payments by financial transaction device to pay for state expenses. The resolution must designate the State Treasurer as the administrative agent to solicit proposals, within guidelines established by the Board of Deposit in the resolution and in compliance with the procedures specified in law, from financial institutions, issuers of financial transaction devices, and

processors of financial transaction devices; to make recommendations about those proposals to the state elected officials; and to assist state offices in implementing the state's financial transaction device program. The act modifies the name of the program to the state's financial transaction device *acceptance and processing* program. (R.C. 113.40(B).)

Under continuing law, the Board of Deposit may establish a surcharge or convenience fee that may be imposed upon a person making payment by a financial transaction device. The surcharge or convenience fee cannot be imposed unless authorized or otherwise permitted by the rules prescribed under a contract, between the financial institution, issuer, or processor and the administrative agent, governing the use and acceptance of the financial transaction device. The act provides that the establishment of a surcharge or convenience fee must follow the guidelines of the financial institution, issuer of financial transaction devices, or processor of financial transaction devices with which the Board of Deposit contracts. (R.C. 113.40(E).)

Under prior law, "financial transaction device" included a credit card, debit card, charge card, or prepaid or stored value card. The act expands that definition to also include an automated clearinghouse network credit, debit, or e-check entry that includes, but is not limited to, accounts receivable and internet-initiated, point of purchase, and telephone-initiated applications. (R.C. 113.40(A)(1).)

County or township participation in contract offerings from the federal government

Continuing law allows a county or township to (R.C. 9.48): (1) permit one or more counties or townships to participate in contracts into which it has entered for the acquisition of equipment, materials, supplies, or services, and to charge such participating counties or townships a reasonable fee to cover any additional costs incurred as a result of their participation, or (2) participate in a joint purchasing program operated by or through a national or state association of political subdivisions in which the purchasing county or township is eligible for membership. In addition to these activities, the act also allows a county or township to participate in contract offerings from the federal government that are available to a county or township, including, but not limited to, contract offerings from the General Services Administration (R.C. 9.48(A)(3)).

Prior law provided that acquisition by a county or township of equipment, material, supplies, or services, through participation in a joint purchasing program operated by or through a national or state association of political subdivisions was exempt from any competitive selection requirements otherwise required by law if the program had employed a competitive selection procedure substantially similar to the procedure that would have been required of the purchasing county or

township acting alone. The act modifies prior law by providing that acquisition by a county or township of equipment, material, supplies, or services, through participation in a contract of another county or township or participation in an association program is exempt from any competitive selection requirements otherwise required by law, if the contract in which it is participating was awarded pursuant to a *publicly solicited request for a proposal or* a competitive selection procedure *of another political subdivision within this state or in another state. Acquisition by a county or township of equipment, materials, supplies, or services through participation in contract offerings from the federal government is exempt from any competitive selection requirements otherwise required by law* (italicized language is added by the act). (R.C. 9.48(B).)

The act further provides that a county or township that is eligible to participate in a joint purchasing program operated by or through a national or state association of political subdivisions in which the purchasing county or township is eligible for membership may purchase supplies or services from another party, including another political subdivision, instead of through a joint purchasing program, if the county or township can purchase those supplies or services from the other party upon equivalent terms, conditions, and specifications but at a lower price than it can through those contracts. Purchases that a county or township makes under this provision are exempt from any competitive selection procedures otherwise required by law. A county or township that makes any purchase under this provision must maintain sufficient information regarding the purchase to verify that the county or township satisfied the conditions for making a purchase under this provision. Nothing in this procedure restricts any action taken by a county or township as described above in clause (1) of the discussion of current law. (R.C. 9.48(C).)

The sales and use tax's destination-based sourcing law

Background

In 2002, the 124th General Assembly, in Am. Sub. S.B. 143, enacted the Simplified Sales and Use Tax Administration Act (R.C. Chapter 5740.), a model act recommended by the National Conference of State Legislatures for the development of a voluntary, streamlined system for the collection of sales and use taxes from remote sellers, i.e., sellers from whom sales or use taxes cannot be collected because they do not have a physical presence in or sufficient contacts with Ohio under the United States Constitution's Commerce Clause, Art. I, §8, cl. 3 (defined in state law as "substantial nexus"). S.B. 143 authorized Ohio to participate in discussions with other states to develop the tax collection system through an agreement that was already in the process of being drafted, known as the "Streamlined Sales and Use Tax Agreement," and to amend and enter into the final version of the Agreement, if it contained certain provisions. S.B. 143's

enactment of the model act made Ohio an "implementing state" under the Agreement, with the ability to amend and approve the final version of the Agreement.

On November 12, 2002, the Agreement was adopted by the implementing states and submitted to them for execution. The Agreement provides states with the blueprint for establishing the tax administration and collection systems envisioned by the model Act. States that are members of the Agreement are authorized to collect sales taxes from remote sellers that have registered with a central electronic registration system and have selected a certified service provider to perform their sales tax functions, or that use a certified automated system or their own system to calculate the taxes due to each taxing jurisdiction.

Generally, the Agreement contains provisions that purport to substantially reduce the burden of tax compliance. Specifically, the Agreement requires that states bring their sales and use tax laws, rules, regulations, and policies into substantial compliance with the provisions it contains. A state that desires to become a party to the Agreement must submit a petition for membership and a certificate of compliance to the governing board (comprised of states already found to be in compliance), with a proposed date of entry, which is the date on which all laws necessary for the state to be in substantial compliance with the Agreement are in effect. For the Agreement to come into effect, at least ten states comprising at least 20% of the total population of all states imposing a state sales tax must be in compliance with the Agreement.

Most important to this analysis, the Agreement requires that states adopt uniform sourcing standards for all retail sales. These standards must be used to determine where a sale occurred (the "source" of the sale) so that taxes are paid to the proper taxing jurisdiction. Under the Agreement, when a consumer receives tangible personal property or a service at a vendor's place of business, sales are generally sourced to that place of business, and the vendor collects the sales tax from the consumer and remits it to the state, at the tax rate that exists for the county in which the vendor is located. But when tangible personal property or a service is not received by a consumer at a vendor's place of business, the source of the sale is the location where the consumer received the property or services, and taxes are collected and remitted by the vendor for that location, at the tax rate that exists in that location. The manner in which sales are sourced under the Agreement is generally referred to as "destination-based sourcing."

Destination-based sourcing law adopted by Ohio, but effective date delayed

Ohio's sales and use tax sourcing law conflicts with the destination-based sourcing provision required by the Agreement. Ohio's law provides that if a

consumer takes possession of property other than at the vendor's place of business or takes possession at the vendor's warehouse, then the sale is deemed to have occurred at the vendor's place of business where the purchase contract or agreement was made or the purchase order was received. Sourcing sales in this manner is called "origin-based sourcing" because the law deems that the sale occurred at the vendor's place of business, i.e., the origin of the sale.

Because of the requirement that before becoming a member of the Agreement, a state must show that its laws are in substantial compliance with the Agreement, Ohio, in S.B. 143, amended its sourcing law to adopt destination-based sourcing, which was initially scheduled to take effect July 1, 2003 (R.C. 5739.033). However, implementation of the destination-based sourcing law was delayed twice after the enactment of S.B. 143. Am. Sub. H.B. 95 of the 125th General Assembly delayed its effective date until January 1, 2004, and Sub. H.B. 127 of the 125th General Assembly further delayed its effective date until January 1, 2005.

Ohio also enacted a law in S.B. 143 that requires sellers (who pay the use tax) to determine sourcing under the new destination-based sourcing law. That law, R.C. 5741.05, took effect July 1, 2003, but later the General Assembly indicated in Section 4 of Am. Sub. H.B. 168 of the 125th General Assembly, which will take effect on June 15, 2004, that it intended for the operation of R.C. 5741.05 to be coordinated with the effective date (January 1, 2005) of the destination-based sourcing law. The effective date of R.C. 5741.05 remains July 1, 2003, but its operation is therefore subject to interpretation. (R.C. 5739.033 and 5741.05--not in the act.)

Effective date further delayed under the act

The act again delays the effective date of the destination-based sourcing law until July 1, 2005. Thus, until that date, vendors may continue to source their sales using the current origin-based sourcing law. The act provides, however, that for sales made on or after January 1, 2005, but before July 1, 2005, vendors **may** source sales under the new destination-based sourcing law, as long as they comply with that law. Once the vendor begins sourcing sales under the destination-based sourcing law, the vendor must continue from that point forward to source all sales in that manner.

The act also further delays, until July 1, 2005, the operation of the law that requires sellers to determine the source of sales under the destination-based sourcing law.

Because the provisions that delay destination-based sourcing and delay the operation of the law that requires sellers to source sales in that manner are

essential to implementation of a tax levy, they are not subject to the referendum and take immediate effect under the act. (Sections 4 through 9 of the act.)

Definition of the "Internet"

The act eliminates each of the individual definitions of "Internet" found in various sections of the Revised Code and instead defines the term in the General Provisions that apply to the entire Revised Code. Under the act, the "Internet" is defined, for the purpose of the entire Revised Code, as the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork known as the world wide web. (R.C. 1.59(K) and also amended R.C. 9.08, 9.314, 101.691, 125.072, 149.432, 307.12, 341.42, 505.10, 718.07, 721.15, 753.32, 955.013, 2307.64, 3517.10, 3517.106, 3517.11, 5145.31, and 5703.49.)

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	05-29-03	p.	525
Reported, H. County & Township Government	10-15-03	pp.	1117-1118
Passed House (95-0)	12-02-03	pp.	1221-1223
Reported, S. Civil Justice	05-11-04	pp.	1881-1882
Passed Senate (33-0)	05-12-04	pp.	1896-1897
House concurred in Senate amendments (96-0)	05-12-04	pp.	1920-1922

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