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From:
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To:
Cc:
Subject: FW: Question on IRC 6695

Here's what I mentioned.

Section 3-202(1) of the Uniform Commercial Code (UCC) provides that negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer, it is negotiated by delivery. Historically, section 3 of the UCC does not apply to electronic fund transfers.

To address the situation of updating the UCC to include electronic transfers, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Electronic Transactions Act (UETA) on July 29, 1999. The UETA defines the terms "record," "electronic record," and "electronic signature" and provides as a general rule that electronic records and signatures satisfy legal requirements that a record be in writing or signed. The UETA also applies only to transactions between parties when each has agreed to conduct transactions by electronic means.

The UETA § 16(a) creates a form of electronic negotiable instrument, called a "transferable record." As long as an entity has "control" of the transferable record, it is a holder of the record as defined by UCC § 1-201(20) and has the same rights and defenses as a holder of a negotiable instrument or document under UCC Articles 3, 7 and 9. The requirements of delivery, possession and endorsement are eliminated. A person has "control" over the record if "a system employed for evidencing the transfer of interests in the transferable record reliably established that person as the person to which the transferable records was issued or transferred." This requirement can be met by a system that creates, stores, and assigns the transferable record in a manner that satisfies six specific conditions enumerated in the UETA.

Similarly, the banking rules, under 31 CFR 103, have begun to treat “electronic transfers” as negotiable instruments. See 31 CFR 103.11. Additionally, in implementing the Bank Security Act, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5330, the Financial Crimes Enforcement Network (FinCEN) amended its regulations to treat electronic funds transfers the same as negotiable instruments. See 63 Fed. Reg. 1919.

Section 6695(f) specifically prohibits a practitioner from endorsing or negotiating a tax refund check on behalf of a taxpayer. Given that section 6695(f) uses the term "negotiate", it is acceptable to look to outside sources, such as the UCC and banking laws, to interpret that term. Those sources now provide that electronic transfers are to be treated as negotiable instruments. Using those sources discussed above, I conclude that section 6695(f) applies to prohibit a preparer exercising control of electronic refunds.