

DRAFT

FOR DISCUSSION ONLY

UNIFORM ELECTRONIC TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MARCH 19, 1999

UNIFORM ELECTRONIC TRANSACTIONS ACT

With Reporter's Notes

Copyright© 1999

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth, in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

**DRAFTING COMMITTEE ON
UNIFORM ELECTRONIC TRANSACTIONS ACT**

PATRICIA BRUMFIELD FRY, University of North Dakota, School of Law, P.O. Box 9003, Grand Forks, ND 58201, *Chair*

STEPHEN Y. CHOW, 30th Floor, One Beacon Street, Boston, MA 02108

KENNETH W. ELLIOTT, City Place Building, 22nd Floor, 204 N. Robinson Avenue, Oklahoma City, OK 73102

HENRY DEEB GABRIEL, JR., Loyola University, School of Law, 526 Pine Street, New Orleans, LA 70118

BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021, Sacramento, CA 95814-4996

JOSEPH P. MAZUREK, Office of the Attorney General, P.O. Box 201401, 215 N. Sanders, Helena, MT 59620

PAMELA MEADE SARGENT, P.O. Box 846, Abingdon, VA 24212

D. BENJAMIN BEARD, University of Idaho, College of Law, 6th and Rayburn, Moscow, ID 83844-2321, *Reporter*

EX OFFICIO

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709, *President*

HENRY M. KITTLESON, P.O. Box 32092, 92 Lake Wire Drive, Lakeland, FL 33802-2092, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

C. ROBERT BEATTIE, 150 S. 5th Street, Suite 3500, Minneapolis, MN 55402, *Business Law Section*

AMELIA H. BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122, *Advisor*

THOMAS J. SMEDINGHOFF, 500 W. Madison Street, 40th Floor, Chicago, IL 60661-2511, *Science and Technology Section*

EXECUTIVE DIRECTOR

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019, *Executive Director*

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

UNIFORM ELECTRONIC TRANSACTIONS ACT

TABLE OF CONTENTS

PART 1

NON-GOVERNMENTAL ELECTRONIC RECORDS AND SIGNATURES

SECTION 101. SHORT TITLE.

SECTION 102. DEFINITIONS.

SECTION 103. SCOPE.

**SECTION 104. USE OF ELECTRONIC RECORDS AND ELECTRONIC SIGNATURES;
VARIATION BY AGREEMENT.**

SECTION 105. APPLICATION AND CONSTRUCTION.

**SECTION 106. LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC
SIGNATURES AND ELECTRONIC CONTRACTS.**

~~**SECTION 107. EFFECT OF SECURITY PROCEDURE.**~~

~~**SECTION 107 108. PROVISION OF INFORMATION IN WRITING.**~~

~~**SECTION 108 109. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND
ELECTRONIC SIGNATURE TO PARTY.**~~

~~**SECTION 109 110. DETECTION EFFECT OF CHANGES AND ERRORS.**~~

~~**SECTION 111. EFFECT OF ELECTRONIC SIGNATURES.**~~

~~**SECTION 110 112. NOTARIZATION AND ACKNOWLEDGMENT.**~~

~~**SECTION 111 113. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.**~~

~~**SECTION 112 114. ADMISSIBILITY IN EVIDENCE.**~~

~~**SECTION 113 115. FORMATION OF CONTRACT.**~~

~~**SECTION 114 116. OPERATIONS OF ELECTRONIC AGENTS; AUTOMATED
TRANSACTIONS.**~~

~~**SECTION 115 117. TIME AND PLACE OF SENDING AND RECEIPT.**~~

~~**SECTION 116 118. CONTROL OF TRANSFERABLE RECORDS.**~~

PART 2

GOVERNMENTAL ELECTRONIC RECORDS AND SIGNATURES

**SECTION 201. CREATION AND RETENTION OF ELECTRONIC RECORDS AND
CONVERSION OF WRITTEN RECORDS BY GOVERNMENTAL
AGENCIES.**

**SECTION 202. RECEIPT AND DISTRIBUTION OF ELECTRONIC RECORDS BY
GOVERNMENTAL AGENCIES.**

SECTION 203. INTEROPERABILITY.

PART 3

MISCELLANEOUS PROVISIONS

SECTION 301. SEVERABILITY.

SECTION 302. EFFECTIVE DATE.

SECTION 303. SAVINGS AND TRANSITIONAL PROVISIONS.

1 **PART 1**

2 **GENERAL PROVISIONS**

3 **SECTION 101. SHORT TITLE.** This [Act] may be cited as the Uniform Electronic
4 Transactions Act.

5 **SECTION 102. DEFINITIONS.**

6 In this [Act]:

7 (1) "Agreement" means the bargain of the parties in fact as found in their
8 language or inferred from other circumstances, and rules, regulations, and procedures given the
9 effect of agreements under ~~rules of law~~ otherwise applicable to a particular transaction.

10 ~~[Whether an agreement has legal consequences is determined by this [Act], if applicable, or~~
11 ~~otherwise by other applicable rules of law.]~~

12 (2) "Automated transaction" means a transaction conducted ~~formed~~ or performed,
13 in whole or in part, by electronic means or electronic records in which the acts or records of one
14 or both parties are not reviewed by an individual in the ordinary course in forming a contract,
15 performing under an existing contract, or fulfilling any obligation required by the transaction.

16 (3) "Computer program" means a set of statements or instructions to be used
17 directly or indirectly in an information processing system in order to bring about a certain result.
18 The term does not include informational content.

19 ~~(4) "Consumer" means an individual involved in a transaction primarily for~~
20 ~~personal, family, or household purposes.~~

21 ~~(5) "Consumer transaction" means a transaction in which a consumer is involved.~~

22 ~~(4 6) "Contract" means the total legal obligation resulting from the parties'~~

1 agreement as affected by this [Act] and other applicable ~~rules of~~ law.

2 (5 7) "Electronic" means of or relating to technology having electrical, digital,
3 magnetic, wireless, optical, electromagnetic, or similar capabilities.

4 (6 8) "Electronic agent" means a computer program, electronic, or other
5 automated means used to initiate or respond to electronic records or performances in whole or in
6 part without review by an individual in the ordinary course of a transaction.

7 (7 9) "Electronic record" means a record created, stored, generated, received, or
8 communicated by electronic means.

9 (8 10) "Electronic signature" means an electronic identifying sound, symbol or
10 process signature in electronic form, attached to or logically connected ~~associated~~ with an
11 electronic record and executed or adopted by a person with the intent to associate the person with
12 the electronic record.

13 (9 11) " Governmental agency" means an executive, legislative, or judicial
14 agency, department, board, commission, authority, institution, or instrumentality of the federal
15 government or of a state or of any county, municipality, or other political subdivision of a state.

16 (10 12) "Information" means data, text, images, sounds, codes, computer
17 programs, software, databases, or the like.

18 (11 13) "Information processing system" means an electronic system for creating,
19 generating, sending, receiving, storing, displaying, or processing information.

20 (12 14) "Informational content" means information that is intended to be
21 communicated to or perceived by an individual in the ordinary use of the information.

22 (13 15) "Person" means an individual, corporation, business trust, estate, trust,

1 partnership, limited liability company, association, joint venture, ~~two or more persons having a~~
2 ~~joint or common interest,~~ governmental agency, or public corporation, or any other legal or
3 commercial entity.

4 (14 16) "Record" means information that is inscribed on a tangible medium or
5 that is stored in an electronic or other medium and is retrievable in perceivable form.

6 ~~[(17) "Rule of law" means a statute, regulation, ordinance, common-law rule,~~
7 ~~court decision, or other law enacted, established, or promulgated by this State, or by any~~
8 ~~governmental agency of this State.]~~

9 (15 18) "Security procedure," means a procedure employed for the purpose of
10 verifying that an electronic signature, record, or performance is that of a specific person or for
11 detecting changes or errors in the informational content of an electronic record. The term
12 includes a procedure that requires the use of algorithms or other codes, identifying words or
13 numbers, encryption, callback or other acknowledgment procedures.

14 (19) "Sign" means ~~execute or adopt a signature.~~

15 (20) "Signature" means ~~an identifying symbol, sound, or process that is attached~~
16 ~~to or associated with a record and executed or adopted by a person to associate the person with~~
17 ~~the record.~~

18 (16 21) "Transaction" means an action or set of actions relating to the conduct of
19 business or governmental affairs and occurring between two or more persons ~~relating to the~~
20 ~~conduct of business or governmental affairs.~~

21 (17 25) "Transferable record" means an electronic record, ~~other than a writing,~~
22 that (a) if the electronic record were in writing would be a note under [Article 3 of the Uniform

1 Commercial Code], or chattel paper under [Article 9 of the Uniform Commercial Code], or a
2 document of title under [Article 1 of the Uniform Commercial Code] and (b) the obligor has
3 agreed expressly is subject to the provisions of this Act. , if the record were in writing.

4 (18 26) "Writing" includes printing, typewriting, and any other intentional
5 reduction of a record to tangible form. "Written" has a corresponding meaning.

6 **Sources:** Definitions in this Act have been derived from Uniform Commercial Code definitions,
7 Article 2B drafts, and from other models, specifically the UNCITRAL Model Law, Illinois
8 Model, Oklahoma Model and Massachusetts Model.

9 **Reporter's Notes:**

10 1. "Agreement"

11 **Committee Votes:**

- 12 1. To delete the concept of manifestation of assent from the definition - By consensus (no
13 formal vote) (Sept. 1997)
14 2. To delete course of performance, course of dealing and usage of trade: Committee 4 Yes -
15 2 No; Observers 6 Yes - 1 No. (Jan. 1998)

16 **NOTES TO THIS DRAFT:**

17 The second sentence of this definition has been deleted from the definition and moved to
18 section 104(d). **THE STYLE COMMITTEE VIEWS THE PROVISION AS**
19 **SUBSTANTIVE AND CONTENDS THAT IT SHOULD NOT BE INCLUDED IN THE**
20 **DEFINITION.** The provision is derived from the Uniform Commercial Code. It does help
21 guide a court in construing the parties' agreement in light of applicable law. FOR THAT
22 REASON, **THE PROVISION HAS BEEN RETAINED IN SECTION 104(d) FOR**
23 **DISCUSSION BY THE DRAFTING COMMITTEE AT ITS NEXT MEETING.**

24 Although the definition of agreement does not specifically include usage of trade and
25 other party conduct as informing their agreement, this definition is not intended to change the
26 construction of the parties' agreement under the substantive law applicable to a particular
27 transaction where that law takes account of such conduct in informing the terms of the parties'
28 agreement. Such conduct would be included in this definition under "other circumstances." The
29 second clause in the definition is intended to assure that where the law applicable to a given
30 transaction provides that system rules and the like qualify as part of the agreement of the parties,
31 that such rules will be considered in determining the parties agreement under this act.

32 **Reporter's Notes:**

33 At the September, 1997 Meeting the definition of agreement which included terms to which a
34 party manifested assent was rejected. The consensus of both the Committee and observers was
35 that there was no need to separate manifestations of assent from the language and circumstances

1 which comprise the bargain in fact of the parties as part of the definition of agreement. Rather
2 the Reporter was directed to return to the definition of agreement in the Uniform Commercial
3 Code. Accordingly, the definition in the November, 1997 Draft was taken from the most recent
4 revision to Article 1.

5 At the January, 1998 Meeting, the Committee more specifically defined the policy
6 guiding this Act: the Act is a *procedural* act providing for the means to effectuate transactions
7 accomplished via an electronic medium, and, unless absolutely necessary because of the unique
8 circumstances of the electronic medium, the Act should leave all questions of substantive law to
9 law outside this Act. In light of this principle the prior reference to usage evidence as informing
10 the content of an agreement was considered substantive, and therefore, best left to other law
11 outside this Act.

12 The need for a definition of agreement arises because the provisions of the Act are
13 variable by agreement, and the agreement will inform the construction of the parties use of
14 electronic records and signatures, security procedures and similar aspects of the transaction.
15 However, the facts and evidence which establish an agreement are left to other law, e.g., the
16 Uniform Commercial Code, common law, etc.

17 Whether the parties have reached an agreement is determined by their express language
18 and surrounding circumstances. The Restatement of Contracts §3 provides that

19 "An agreement is a manifestation of mutual assent on the part of two or more persons. A
20 bargain is an agreement to exchange promises or to exchange a promise for a
21 performance or to exchange performances."

22 The Uniform Commercial Code specifically includes in the circumstances from which an
23 agreement may be inferred "course of performance, course of dealing and usage of trade..." as
24 defined in the UCC.

25 The provisions in the last clause of the first sentence are intended to include
26 circumstances where the law deems agreements to exist as a matter of a rule, regulation or
27 otherwise. For example, Article 4 (Section 4-103(b)) provides that Federal Reserve regulations
28 and operating circulars and clearinghouse rules have the effect of agreements. Such agreements
29 by law are properly included in the definition in this Act.

30 2. "Automated Transaction."

31 **Committee Vote:** To delete references to governmental and commercial: Committee 4 Yes
32 (Chair broke tie) - 3 No; Observers 19 Yes - 1 No. (Jan. 1998)

33 **NOTES TO THIS DRAFT:** This definition has been revised for clarity. A transaction is an
34 action or set of actions between people. Actions are not formed, but rather are conducted or
35 performed.

36 **Reporter's Notes:**

37 Article 2B has conformed its terminology with this Act by adopting "automated transaction" in
38 place of "electronic transaction." The definitions in each are conceptually the same. The
39 definition in this Act is broader, going beyond contract formation to performances under a
40 contract and other obligations accomplished by electronic means in a transaction, because of the
41 diversity of transactions to which this Act may apply.

1 As with electronic agents, this definition addresses the circumstance where electronic
2 records may result in action or performance by a party although no human review of the
3 electronic records is anticipated. Section 113 provides specific contract formation rules where
4 one or both parties do not review the electronic records.

5 3. **"Computer program."** This definition is derived from Article 2B. The term is used
6 principally with respect to the definition of "electronic agent" and "information."

7 4. **"Consumer."** **NOTES TO THIS DRAFT:** This definition has been deleted since all
8 references to consumers have been deleted by the Committee.

9 5. **"Consumer transaction."** **NOTES TO THIS DRAFT:** This definition has been deleted
10 since all references to consumers have been deleted by the Committee.

11 6. **"Electronic."** This definition serves to assure that the Act will be applied broadly as new
12 technologies develop. While not all technologies listed are technically "electronic" in nature
13 (e.g., optical fiber technology), the need for a recognized, single term warrants the use of
14 "electronic" as the defined term.

15
16 7. **"Electronic agent."**

17 **NOTES TO THIS DRAFT:** The definition has been revised to clarify that the relevant time
18 frame for lack of individual review is bounded by the temporal limitations of the transaction.

19 **Reporter's Notes:**

20 This Act used the term "electronic device" (rather than "electronic agent" used in Article
21 2B) in order to avoid connotations of agency. However, in Article 2B and in other contexts the
22 term "electronic agent" has come to be recognized as a near term of art. The term "electronic
23 device" has not been widely hailed as a significant improvement. Accordingly, the Chair and
24 Reporter of UETA agreed in the coordination meeting to adopt "electronic agent" in order to be
25 consistent with Article 2B. (Article 2B will adopt the language in the definition and the only
26 point of difference will be the phrase "in whole or in part" after the word "performances" which
27 will not be included in Article 2B.) Comments made at UETA Drafting Committee meetings
28 from members of the Committee and observers highlight that the key aspect of this term is its
29 function as a tool of a party. As the term "electronic agent" has come to be recognized, it is
30 limited to the tool function.

31 The definition has been revised to reflect comments that, for purposes of the definition, it
32 is irrelevant who employs the agent. Rather the definition establishes that an electronic agent is a
33 machine. The effect on the party using the agent is addressed in the operative provisions of the
34 Act (e.g., Section 114)

35 An electronic agent, such as a computer program or other automated means employed by
36 a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the
37 results obtained by the use of that tool since the tool has no independent volition of its own.
38 However, an electronic agent by definition is capable, within the parameters of its programming,

1 of initiating, responding or interacting with other parties or their electronic agents once it has
2 been activated by a party, without further attention of that party. This Act (Section 114) provides
3 that a person is responsible for actions taken and accomplished through electronic agents in the
4 absence of human intervention.

5 While this Act proceeds on the paradigm that an electronic agent is capable of performing
6 only within the technical strictures of its preset programming, it is conceivable that, within the
7 useful life of this Act, electronic agents may be created with the ability to act autonomously, and
8 not just automatically. That is, through developments in artificial intelligence, a computer may
9 be able to "learn through experience, modify the instructions in their own programs, and even
10 devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" *9 Harv.*
11 *J.L.&Tech* 25 (Winter, 1996). If such developments occur, courts may construe the definition of
12 electronic agent accordingly, in order to recognize such new capabilities.

13 **8. "Electronic record."** An electronic record is a subset of the broader defined term "record."
14 Unlike the term "electronic message" used in Article 2B, the definition is not limited to records
15 intended for communication, but extends to any information contained or transferred in an
16 electronic medium. It is also used in this Act as a limiting definition in those provisions in which
17 it is used.

18 Electronic means for creating, storing, generating, receiving or communicating electronic
19 records include information processing systems, computer equipment and programs, electronic
20 data interchange, electronic mail, or voice mail, facsimile, telex, telecopying, scanning, and
21 similar technologies.

22 **9. "Electronic signature."**

23 **NOTES TO THIS DRAFT:** This definition has been revised and broadened in light of the
24 Committee's deletion of the defined terms "signature" and "signed." It now includes the idea of
25 symbols, sounds and processes, which previously were supplied through the definition of
26 signature. The definition also includes the requirement that the signer execute or adopt the
27 symbol, etc., indicating an intention to make the symbol, process, etc. its own, with the intent to
28 associate the person with the record. These attributes of an electronic signature were viewed as
29 the minimum requirements in the discussions in Richmond. **THE QUESTION FOR THE**
30 **COMMITTEE WHICH WAS LEFT UNRESOLVED IN RICHMOND IS WHETHER**
31 **THE DEFINITION REQUIRES MORE IN TERMS OF AN "INTENTION TO BE**
32 **BOUND", OR "AN INTENTION TO DO A LEGALLY SIGNIFICANT ACT," OR**
33 **MERELY "AN INTENT TO SIGN."** As currently drafted, the precise effect of the adopted
34 electronic signature will be determined based on the surrounding circumstances under section
35 108(b).

36 It is important to realize that this definition is intended to and does cover the standard
37 webpage click through process, where the process includes identification of the person. For
38 example, when a person orders goods or services through a vendor's website, the person will be
39 required to provide identifying information as part of a process which will result in receipt of the
40 goods or services. When the customer ultimately gets to the last step and clicks "I agree," the
41 person has adopted the process which identifies the person, and has done so with the intent to

1 associate the person with the record of that process. The actual effect of the electronic signature
2 will be determined from all the surrounding circumstances, however, the person adopted an
3 identifying process which the circumstances indicate s/he intended to have the effect of getting
4 the goods/services and being bound to pay for them.

5 The harder question raised at meetings involves a completely anonymous click-through
6 process. While such a process would not constitute an electronic signature since there would be
7 no identification, such a process may bind a person under other provisions of this act. See
8 Section 113 and notes thereto.

9 **Reporter's Notes:**

10 A key aspect of this definition lies in the necessity that the electronic signature be linked
11 or logically associated with the electronic record. For example, in the paper world, it is assumed
12 that the symbol adopted by a party is attached to or located somewhere in the same paper that is
13 intended to be authenticated. These tangible manifestations do not exist in the electronic
14 environment, and accordingly, this definition expressly provides that the symbol must in some
15 way be linked to, or connected with, the electronic record being signed. This linkage is
16 consistent with the regulations promulgated by the Food and Drug Administration. 21 CFR Part
17 11 (March 20, 1997).

18 A digital signature using public key encryption technology would qualify as an electronic
19 signature, as would the mere appellation of one's name at the end of an e-mail message - so long
20 as in each case the signer executed or adopted the symbol and it identified the signer.

21 **10. "Governmental agency."**

22 **Committee Vote:** To include legislative and judicial agencies - 3 Yea - 0 Nay (October, 1998)

23 **Reporter's Notes:** This definition is important in the context of Part 2. The definition has also
24 been expanded to be a generic description unrelated to any particular State. This was
25 necessitated by the use of the term in Section 203 on Interoperability. Where governmental
26 agencies of the enacting state are relevant this has been clarified in the operative provisions.

27 **11. "Information processing system."** This term is used in Section 115 regarding the time and
28 place of receipt of an electronic record. It has been revised to conform with Article 2B.

29 **12. "Informational Content."** This definition has been added to differentiate information in an
30 electronic record, which includes all data forming part of an electronic record, with the
31 informational content of an electronic record which is the portion of the electronic record
32 intended actually to be used by a human being. An example from Article 2B establishing this
33 distinction is the Westlaw user who uses the search program to retrieve a case. The search
34 program would be information, but only the case retrieved would be informational content. It
35 has been revised to conform with Article 2B.

36 **13. "Person." NOTES TO THIS DRAFT:** This definition has been revised for clarity based
37 on the suggestions of the Style Committee.

1 14. **"Record."** This is the standard Conference formulation for this definition.

2 15. **"Rule of Law."** **NOTES TO THIS DRAFT:** At the February, 1999 meeting, the
3 Committee voted unanimously to delete this term and rely on the undefined term "law" in the
4 Act, in accordance with the suggestion of the Committee on Style.

5 16. **"Security procedure."** It was suggested at the Annual Meeting that the way in which a
6 security procedure becomes applicable should be referenced in the substantive rule and not set
7 forth as part of the definition. Accordingly, this clause has been deleted and the definition
8 revised for clarity and to more closely parallel Article 2B.

9 The key aspects of a security procedure include verification of an electronic signature in
10 addition to verification of the identity of the sender, and assurance of the informational integrity,
11 of an electronic record. The definition does not identify any particular technology. This permits
12 the use of procedures which the parties select or which are established by law. It permits the
13 greatest flexibility among the parties and allows for future technological development.

14
15 **17. Signature."**

16 **Committee Vote:** To delete the definition of signature and signed and expand the definition of
17 electronic signature as necessary (February 1999) unanimous.

18 **NOTES TO THIS DRAFT:** See Notes to Electronic Signature above. The Committee viewed
19 the definition as unnecessary provided the definition of electronic signature was clarified.

20 **Reporter's Notes:** As part of the coordination meeting regarding Article 2B, the differences
21 between the definition of authentication in 2B (and revised Article 9) and UETA were noted. It
22 was suggested that the UETA consider adopting a definition of "signature" which deferred to the
23 applicable definition of signature provided by the substantive law applicable to a given
24 transaction or in the alternative, that UETA not define the term.

25 At the September, 1997 Drafting Meeting, the consensus of the Committee and observers
26 was to go back to the definition of signature, and to delete the definition of "authenticate." Given
27 the purpose of this Act to equate electronic signatures with written signatures, the sense was that
28 retaining signature as the operative word would better accomplish that purpose. However, the
29 idea of fleshing out the concept of authenticate present in the existing UCC definition of
30 signature was thought to be wise. Therefore, the definitional concepts set forth in the definition
31 of authenticate in Article 2B were carried into the definition of signature.

32 At the April 1998 meeting a good deal of discussion related to the propriety of delineating
33 the specific functions of a signature. The Committee deleted from former Section 302 a
34 provision establishing the specific effects of an electronic signature. The one critical aspect of a
35 signature that was recognized was its purpose of identifying a person. Accordingly, the
36 definition has been revised to reflect the principal function of a signature as an identifying mark.
37 In addition, some volition must attach to application of a mark and this is noted by the
38 requirement that the mark be "executed or adopted" by a person. This draft also requires that the
39 mark, etc, be executed or adopted for the purpose of associating the person with the record, in
40 order to distinguish a signature from a mere autograph.

1 At the Annual Meeting it was suggested that an unrecorded statement over the phone
2 might qualify as a signature under this broadened definition. In order to address this concern the
3 definition now indicates that the symbol or sound must be attached to or associated with the
4 record. The effect of the signature is left to the underlying substantive law in light of the facts
5 and circumstances. See Section 111. In short, the definition here reflects the bare minimum as
6 to the function of a signature, with the substantive effect being treated in Section 111 and the
7 substantive law underlying the transaction.

8 **18. "Transaction."** **NOTES TO THIS DRAFT:** This definition has been revised for clarity
9 based on the comments of the Style Committee.

10 **Reporter's Notes:** The definition has been limited to actions between people taken in the context
11 of commercial or governmental activities.

12 **19. "Transferable record."** **NOTES TO THIS DRAFT:**

13 1. This definition has been revised and limited based on the discussions in Richmond.
14 The Committee has yet to finally determine whether this Act will cover transferable records.
15 However, the discussions in Richmond made clear that any coverage would be limited to the
16 minimum necessary to facilitate the use of these types of records. A fuller statement of the
17 concerns involving coverage of transferable records in this Act is set forth in David Whitaker's
18 memorandum which has been distributed with this draft. The guiding principles informing this
19 draft can be summarized as follows:

20 A. Any provision must be a stand-alone provision which does not affect Articles
21 3 or 4 of the UCC.

22 B. In keeping with the general tenor of this Act, any provision should be as
23 simple and straight-forward as possible.

24 C. The manner of coverage in the UETA must not affect an expedited review of
25 the area by NCCUSL in the context of possible revisions to Articles 3, 4 and 7 to fully
26 accomodate electronic transactions under those Articles.

27 D. Establishing the enforceability and transferability of electronic notes under a
28 NCCUSL process is preferred to federal intervention in this area.

29 E. There currently exists significant commercial interest in providing a method
30 for the transferability and enforceability of electronic notes as against the maker in order to
31 provide the requisite legal certainty so that systems and processes, which involve significant
32 expenditures of time and resources, will be developed.

33 2. The definition has been revised to delete coverage of chattel paper and documents of
34 title. As to chattel paper, revised Article 9 addresses the concept of electronic chattel paper. The
35 concept of chattel paper is uniquely an Article 9 concept, and it is felt that treatment of chattel
36 paper is best left to Article 9 in light of the current revision. Regarding documents of title, these
37 records can be included with little difficulty. However, considering the limited scope and impact
38 of state law in this area, the lack of any significant evidence of commercial demand that these
39 records be covered in the UETA, and the activity of federal regulators (e.g., electronic cotton
40 warehouse receipts), these records have also been eliminated from coverage. Accordingly, the
41 scope of coverage in the UETA is limited to electronic records which would be promissory notes

1 under Article 3 if they were in writing.

2 Further, the scope has been limited by requiring, as part of the definition of a transferable
3 record, that the obligor expressly agree in the electronic record that the provisions of this act,
4 which would include section 116 relating to transferable records, will apply. This limitation is
5 intended to assure that an obligor on a note will not be confronted with the conversion of that
6 note to electronic form without his/her express agreement.

7 20. **"Writing."** This definition reflects the current UCC definition.
8

9 **SECTION 103. SCOPE.** (a) Except as otherwise provided in subsection (b), this [Act]
10 applies to electronic records and electronic signatures that relate to any transaction.

11 (b) This [Act] does not apply to electronic records and electronic signatures ~~related to a~~
12 ~~transaction~~ when used for purposes of transactions governed by the following laws: to the extent
13 ~~that the transaction is governed by:~~

14 (1) ~~a rule of law governing the creation and execution of wills, and codicils, and~~
15 testamentary trusts;

16 ~~(2) a rule of law governing the creation and execution of testamentary trusts;~~

17 ~~(2 3)~~ [Articles ~~4~~, 5, 7 and 8 of the Uniform Commercial Code];

18 ~~(3 4)~~ [Articles 3, 4, and 4A of the Uniform Commercial Code except that writing
19 and signature ~~the requirements of a written agreement~~ in the following sections may be satisfied
20 with electronic records and electronic signatures:

21 [(A) Revised Article 3 Sections 3-119; 3-311; 3-312(a)(3); 3-505(a)(2); 3-
22 604(a);

23 (B) Revised Article 4 Sections 4-212(a); 4-301(a)(2); 4-403(b); and

24 (C) Article 4A Sections 4A-202(b and c); 4A-203(a)(1); 4A-207(c)(2);
25 4A-208(b)(2); 4A-305(c); and 4A-305(d)]

1 (4) [Revised Articles 2, 2A and 9 and new Article 2B, when enacted]

2 (5) ~~a rule of law governing the issuance, transfer, negotiation, or enforcement of~~
3 ~~orders as defined in [Article 3 of the Uniform Commercial Code];~~

4 (6) ~~a rule of law which expressly authorizes the use of other than written records~~
5 ~~or manual signatures in satisfaction of the rule;~~

6 (7) ~~[Other transactions identified by ETA Task Force on excluded transactions];~~

7 (5 8) [other laws transactions, if any, identified by State]; and

8 (6 9) laws Transactions specifically excluded by any governmental agency of this
9 State under Part 2.

10 (c) This [Act] does apply to electronic records and electronic signatures otherwise subject
11 to subsection (b) when used for purposes of transactions governed by laws other than those
12 specified in subsection (b). ~~In a statute, rule, or regulation containing a rule of law described in~~
13 ~~paragraph (b)(6), any express requirement elsewhere in that statute, rule, or regulation that a~~
14 ~~record be in writing is not affected by this [Act] if the court determines that application of this~~
15 ~~[Act] would be contrary to the purpose of the requirement.~~

16 (d) This Act does not affect a requirement in a ~~rule~~ of law relating to a specific means
17 ~~mode~~ of delivery or display of information.

18 (e) A transaction subject to this [Act] is also subject to other applicable substantive rules
19 ~~of law~~. These ~~rules~~ of laws must be construed whenever reasonable as consistent with this [Act].
20 ~~If this construction is unreasonable, the rule of law governs.~~

21 **Source:** UETA Sections 103 and 104 (Sept., 1998 Draft); Section 103 of Revised Draft of
22 Article 1.

1 **Committee Votes:**

2 1. In former Section 103:

3 a. To delete references to commercial and governmental transactions - Committee
4 4 Yes - 3 No (Chair broke tie) Observers 19 Yes - 1 No (Jan. 1998).

5 b. To incorporate supplemental principles as part of Scope section - Committee
6 Yes Unanimous Observers 12 Yes - 0 No (Jan. 1998).

7 c. To delete reference to supplemental principles (April 1998)

8 2. In former Section 104

9 a. To delete "repugnancy" language, and provide that Act will apply except for
10 specific exclusions. Committee 4 Yes - 1 No Observers 14 Yes - 1 No (with a number of
11 abstentions)(Jan. 1998)

12 b. To delete former subsection (b)(6) and former section (c) (February 1999)
13 unanimous.

14 **NOTES TO THIS DRAFT:**

15 1. This act affects the medium in which information, records and signatures may be
16 presented and retained under current legal requirements. While it covers all electronic records
17 and signatures which are used between two people, the operative provisions of the act relate to
18 requirements for writings and signatures under law.

19 Accordingly, the exclusions in subsection (b) focus on those legal rules requiring certain
20 writing and signature requirements which will *not* be affected by this act. Because an electronic
21 record/signature may be used for purposes of more than one legal requirement, it is important to
22 make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for
23 purposes of a law which is unaffected by this act under subsection (b) may nonetheless be used
24 and validated for purposes of other laws not excluded by subsection (b). For example, this Act
25 does not apply to an electronic record of a check when used in a transaction governed by Article
26 4 of the UCC, i.e., the Act does not validate so-called electronic checks. However, for purposes
27 of check retention statutes, the same electronic record of the check is covered by this Act, so that
28 retention of an electronic image/record of a check will satisfy such retention statutes, so long as
29 the requirements of Section 111 are fulfilled.

30 2. The exclusions listed in subsection (b) reflect the discussions at the last several
31 meetings. Over the entire course of this project, the desire for as much clarity and certainty
32 regarding the laws which are and are not affected by this Act has been paramount. This draft
33 carries that policy to fruition by providing for specific laws which are affected and leaving the
34 balance subject to this Act. As can be seen in a review of the Reporter's Notes below, at each
35 stage, the Committee has deleted provisions which might leave any doubt as to the applicability
36 of this Act to a particular law.

37 Paragraph (1) excludes wills, codicils and testamentary trusts. Paragraph (2) excludes
38 UCC Articles 5, 7 and 8. Articles 5 and 8 are excluded because they already provide significant
39 media neutrality. Article 7 is excluded for the reasons noted in the notes to the definition of
40 Transferable Record, notably the limited impact of state law on this area, and the lack of pressure
41 for inclusion as part of this act. Paragraph (3) excludes Articles 3, 4 and 4A in toto, except for
42 specific sections considered "ministerial" and so amenable to the use of electronic records and
43 signatures. **THESE SECTIONS HAVE BEEN NOTED IN BRACKETS FOR THE**

1 **COMMITTEE’S CONSIDERATION.** If the Committee determines that inclusion of such
2 sections creates more problems than it solves, then articles 3, 4 and 4A can be included in
3 paragraph (2) and excluded totally from the operation of this act.

4 The exclusion of Articles 3 and 4 will not affect the act’s coverage of Transferable
5 Records. The provisions in Section 116 operate as free standing rules, establishing the rights of
6 parties using Transferable Records *under this Act*. The references in 116 to Section 3-302 and 9-
7 308 of the UCC are designed to incorporate the substance of those provisions into this act for the
8 limited purposes noted in section 116. Accordingly, an electronic record which is also a
9 Transferable Record, would not be used for purposes a transaction governed by Articles 3 and 4,
10 but would be an electronic record used for purposes of a transaction governed by Section 116.

11 Paragraphs (4) and (5) highlight specific laws to be identified by the states for exclusion.
12 Paragraph (4) excludes revised articles 2, 2A and 9, and proposed article 2B when enacted. This
13 is consistent with the approach that this Act should not affect legislation drafted in consideration
14 of the use of electronic records, e.g., Articles 5 and 8. These paragraphs were considered
15 necessary to assure that when enacted this Act would have clear boundaries concerning the laws
16 to be affected and those to be left excluded. The provision in former paragraph (6) relating to a
17 generic description of statutes which provided for the use of other than written records was
18 considered unworkably vague and so was deleted by vote of the committee. Similarly, the
19 limited repugnancy clause in former subsection (c) also was viewed as unworkably vague and
20 deleted.

21 The types of laws which may be considered by states for exclusion include other, more
22 recent statutes which address the use of electronic records and signatures; powers of attorney of
23 various kinds, e.g., durable powers of attorney, powers related to health care decisions, powers
24 associated with living wills; laws relating to real estate transactions; trusts other than
25 testamentary trusts. However, any suggestion that a state may wish to consider these or other
26 laws for exclusion, should be accompanied by the explanations for not excluding them in this
27 draft contained in the Task Force Report on Exclusions from the UETA.

28 The suggestion was made in Richmond that paragraph 6 might permit governmental
29 agencies to exclude entire bodies of law, e.g., Article 2 of the UCC. Part 2 relates to electronic
30 records and signatures which may be used *by government*, either within the government or in
31 transactions between the government and non-governmental entities. Consequently, Part 2 does
32 not authorize governmental agencies to make determinations of excluded transactions or laws,
33 except to the extent the transaction involves a governmental agency.

34 3. Subsection (d) provides that, apart from the medium in which information is
35 conveyed, laws providing for the means of delivering or displaying that information are not
36 affected by the act. For example, if a law requires delivery of notice by first class US mail, that
37 means of delivery is not affected by this act. The information to be delivered may be provided on
38 a disc, i.e., in electronic form, but the particular means of delivery must still be via the US postal
39 service. The section was revised to clarify that it is only the means of delivery that is not
40 affected. For example, if a law requires that particular records be delivered together, or attached
41 to other records, this Act does not preclude the delivery of the records together in an electronic
42 communication, so long as the records are connected or associated with each other. That the
43 records must be attached is not a “means” of delivery, but may be considered a “mode or

1 method” of delivery. The change was made to clarify the intent to not preclude electronic
2 delivery so long as the records are attached and connected to each other as provided by the
3 underlying law.

4 4. Subsection (e) is a standard construction clause. Based on comments raised at the last
5 meeting that the last sentence may suggest a “repugnancy” type standard, the last sentence has
6 been deleted to avoid any invitation to such a construction. However, as a matter of standard
7 statutory construction, the result in the deleted sentence may obtain in any event.

8 **Reporter's Note:**

9 1. The scope of the Act is limited to electronic records and electronic signatures. The
10 underlying premise of this section is that this Act applies to all electronic records and signatures
11 unless used in a transaction governed by laws which are specifically excluded.

12 2. At the May, 1997 meeting, the Drafting Committee expressed strong reservations
13 about applying this Act to *all* writings and signatures. These same reservations were again raised
14 at the September, 1997 Meeting. An attempt was made in the Nov. 1997 draft to address those
15 concerns by limiting applicability of the Act to only those records and signatures arising in the
16 context of a "commercial transaction" or "governmental transaction," as therein defined.
17 However, the view of a majority of the committee and most observers was that defining the terms
18 "commercial transactions" and "governmental transactions" was not possible with any degree of
19 precision. Rather, a specific delineation of excluded transactions was considered preferable to an
20 attempt to redefine commercial and governmental transactions.

21 3. In order to identify specific transactions and transaction types to be excluded, a Task
22 Force comprised of a number of observers and the Chair and Reporter for the Committee was
23 formed under the leadership of R. David Whittaker. The Task Force was charged with reviewing
24 selected statutory compilations (Massachusetts and Illinois being two states where significant
25 work had already been started) to determine the types of transactions requiring writings and
26 manual signatures which should be excluded from the coverage of this Act.

27 4. The Task Force Report was completed at the end of September and was extensively
28 discussed at the October, 1998 meeting. Subsection (b) reflects specific exclusions and
29 limitations to the coverage of this Act based on the Task Force Report, the discussions at the
30 October 1998 meeting and subsequent meetings and comments with other interested parties.

31 **SECTION 104. USE OF ELECTRONIC RECORDS AND ELECTRONIC**
32 **SIGNATURES; VARIATION BY AGREEMENT.**

33 (a) This [Act] does not require that records or signatures be generated, stored, sent,
34 received, or otherwise processed or used by electronic means or in electronic form.

35 (b) The use of an electronic record or electronic signature in a transaction must be
36 reasonable. Whether the use of an electronic record or electronic signature in a transaction is

1 reasonable must be determined from the circumstances and context in which it is used, including
2 the parties' statements and agreement, if any, and other applicable law. The obligation of
3 reasonableness prescribed in this subsection may not be disclaimed by agreement.

4 (cb) Except as otherwise provided in this [Act], sections 107 and 108, as the effect of any
5 provision of this [Act] may be varied by agreement between parties involved in generating,
6 storing, sending, receiving, or otherwise processing or using electronic records or electronic
7 signatures, ~~provisions of this [Act] may be varied by agreement.~~ The presence in certain
8 provisions of this [Act] of the words "unless otherwise agreed", or words of similar import, does
9 not imply that the effect of other provisions may not be varied by agreement.

10 [(d) Whether an agreement has legal consequences is determined by this [Act], if
11 applicable, or otherwise by other applicable rules of law.]

12 **Source:** UCC Section 1-102(3); Illinois Model Section 103.

13 **NOTES TO THIS DRAFT:**

14 1. Based on comments at the February 1999 drafting committee meeting, this section has
15 been expanded to clarify that this act is intended to facilitate the use of electronic means, but does
16 not require the use of electronic records and signatures. First, subsection (a) removes any doubt
17 that this is a voluntary statute and parties retain the right to refuse to use electronic records and
18 signatures for any reason or no reason.

19 2. Since the fundamental purpose of this Act is to remove barriers to electronic
20 commerce, the use of electronic records and signatures must be generally available. To permit a
21 person to refuse electronic records when the circumstances indicate that the person is capable and
22 willing to use electronics, would itself raise unwarranted barriers to electronic transactions.
23 Therefore, it must be relatively easy to establish that a person has acquiesced in the use of
24 electronic records. That in turn requires that an objective standard for use be established. A
25 standard of reasonableness based on the context and circumstances surrounding use, which would
26 include any statements or agreements of the parties, seems the most flexible approach. It has been
27 noted that reasonable may be spelled l-a-w-s-u-i-t, and that the use of a reasonableness standard
28 introduces a level of uncertainty that will itself create barriers to electronic commerce. However,
29 absolute certainty in this case would require that one obtain express agreement before permitting
30 use, and that itself seems unreasonable. Courts have addressed the issue of reasonableness in
31 many contexts and will be able to deal with the concept in this context as well. Further,
32 businesses deal with reasonableness in commerce as well, and can weigh the risks in doing

1 business electronically in the absence of express agreement.

2 A number of scenarios were discussed in Richmond which fell short of express agreement
3 to use electronics, but which the consensus was would permit the justifiable use of electronic
4 records. For example, if Joe gives out his business card with his business e-mail address, it is
5 then reasonable for a recipient of the card to communicate electronically with Joe for business
6 purposes using the e-mail address on the card, unless and until Joe affirmatively indicates to the
7 contrary. However, it would not necessarily be reasonable to communicate electronically with Joe
8 for purposes outside the scope of the business indicated by use of the business card. As a further
9 example, Sally may have several e-mail addresses - home, main office, office of a non-profit
10 organization on whose board Sally sits. In each case, it would only be reasonable to communicate
11 via e-mail with Sally with respect to business related to the business/purpose associated with the
12 respective e-mail addresses. Similarly, if a person's e-mail address is listed in a directory for a
13 particular organization, it would be reasonable to communicate with that person, for purposes
14 related to that organization, through the e-mail listed in the directory.

15 3. Subsection (c) has been revised for clarity based on the comments of the Committee on
16 Style.

17 4. Subsection (d) is moved from the last sentence of the definition of agreement. The
18 Committee on Style insists that the provision is substantive and does not belong in the definition.
19 It has been bracketed for the committee's consideration as to whether it is necessary. **IN THE
20 ABSENCE OF ANY INSTRUCTION FROM THE DRAFTING COMMITTEE, THE
21 REPORTER WILL RETAIN THIS PROVISION UNBRACKETED IN THE ANNUAL
22 MEETING DRAFT.**

23 **Reporter's Note:**

24 1. Subsection (a) makes clear that this Act is intended to permit the use of electronic
25 media, but does *not require* any person to use electronic media. For example, if Chrysler Corp.
26 were to issue a recall of automobiles via its internet website, it would not be able to rely on this
27 Act to validate that notice in the case of a person who never logged on to the website, or indeed,
28 had no ability to do so.

29 2. Given the principal purpose of this Act to validate and effectuate the use of electronic
30 media, it is important to preserve the ability of the parties to establish their own requirements
31 concerning the method of generating, storing and communicating with each other. This Act
32 affects substantive rules of contract law in very limited ways by giving effect to actions done
33 electronically. Even in those cases, the parties remain free to alter the timing and effect of their
34 communications.

35 **SECTION 105. APPLICATION AND CONSTRUCTION.** This [Act] must be
36 construed and applied consistently with reasonable practices under the circumstances, ~~and~~ to
37 facilitate electronic transactions, and to effectuate its general purpose to make uniform the law
38 with respect to the subject of this [Act] among states enacting it.

1 **Source:** UCC Section 1-102

2 **NOTES TO THIS DRAFT:** THE COMMITTEE ON STYLE CONTINUES TO INSIST THIS
3 SECTION SHOULD BE DELETED. The additional language is from a standard provision
4 usually included in Part 3 on Miscellaneous provisions.

5 **Reporter's Note:**

6 The purposes and policies of this Act are

7 a) to facilitate and promote commerce and governmental transactions by validating
8 and authorizing the use of electronic records and electronic signatures;

9 b) to eliminate barriers to electronic commerce and governmental transactions
10 resulting from uncertainties relating to writing and signature requirements;

11 c) to simplify, clarify and modernize the law governing commerce and
12 governmental transactions through the use of electronic means;

13 d) to permit the continued expansion of commercial and governmental electronic
14 practices through custom, usage and agreement of the parties;

15 e) to promote uniformity of the law among the states (and worldwide) relating to
16 the use of electronic and similar technological means of effecting and performing commercial and
17 governmental transactions;

18 f) to promote public confidence in the validity, integrity and reliability of electronic
19 commerce and governmental transactions; and

20 g) to promote the development of the legal and business infrastructure necessary to
21 implement electronic commerce and governmental transactions.

22 **SECTION 106. LEGAL RECOGNITION OF ELECTRONIC RECORDS,
23 ELECTRONIC SIGNATURES AND ELECTRONIC CONTRACTS.**

24 (a) A record or signature may not be denied legal effect or enforceability solely because it
25 is in electronic form.

26 (b) A contract may not be denied legal effect or enforceability solely because an electronic
27 record was used in its formation.

28 (c) If a ~~rule of~~ law requires a record to be in writing, or provides consequences if it is not,
29 an electronic record satisfies the ~~rule of~~ law.

30 (d) If a ~~rule of~~ law requires a signature, or provides consequences in the absence of a
31 signature, the ~~rule of~~ law is satisfied with respect to an electronic record if the electronic record
32 includes an electronic signature.

1 [(e) ~~In~~ As part of a transaction, nothing in this [Act] precludes a person from establishing
2 may establish reasonable requirements regarding the type of records or signatures acceptable to
3 it.]

4 **Source:** UETA Sections 201, 301 and 401(a) (Sept. 1998 Draft).

5 **NOTES TO THIS DRAFT:**

6 1. In the last draft the words “validity and enforceability” were deleted from subsections
7 (a) and (b) to conform more closely with Article 2B, but with no intent to alter the meaning. On
8 reconsideration it is necessary to include the word enforceability. Under Restatement 2d
9 Contracts Section 8, a contract may have legal effect and yet be unenforceable. Indeed, one
10 circumstance where a record or contract may have effect but be unenforceable is in the context of
11 the Statute of Frauds. The Statute of Frauds is one of the critical motivations for this entire
12 project to validate electronic records. Though a contract may be unenforceable, the records may
13 have collateral effects, as in the case of a Buyer that insures goods purchased under a contract
14 unenforceable under the Statute of Frauds. The insurance company may not deny a claim on the
15 ground that the Buyer is not the owner, though the Buyer may have no direct remedy against seller
16 for failure to deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

17 2. This section sets forth the fundamental premise of this Act: namely, that the medium in
18 which a record, signature, or contract is created, presented or retained does not affect it’s legal
19 significance. Subsections (a) and (b) are phrased in a manner to eliminate the single element of
20 medium as a reason to deny effect or enforceability to a record, signature, or contract. It is phrased
21 in the negative since it only eliminates a single ground for denying effect. To state that electronic
22 records and signatures shall be given effect and enforceability overstates the effect to be given, as
23 there may be many other reasons to deny effect or enforceability to the record or signature or
24 contract.

25 3. Subsections (c) and (d) do provide the positive assertion that electronic records and
26 signatures do satisfy legal requirements for writings and signatures. The provisions are limited to
27 requirements in laws that a record be in writing. If a law imposes requirements other than the
28 medium in which a record must be contained, these provisions do not address that requirement.
29 Similarly, Section 104 of this Act provides that whether the use of electronics is reasonable in a
30 particular transaction is to be determined from the circumstances. Accordingly, while this section
31 would validate an electronic record for purpose of a statute of frauds, if a person is unreasonable
32 in using electronic records in the formation of a contract, section 104 would preclude enforcement
33 of the electronic records as outside the scope of authorized use in the particular transaction.

34 4. Section 107 is another example of additional requirements which may prevent the
35 validity of an electronic record in a particular case. In section 107 the legal requirement addressed
36 in *the provision of information* in writing. The section then sets forth the standards to be applied
37 in determining whether the provision of information by an electronic record is the equivalent of
38 the provision of information in writing. The requirements in section 107 are in addition to the
39 bare validation that occurs in this section. Subsections (c and d) could be prefaced to make them
40 subject to Section 104 and Section 107 if that is considered necessary.

1 5. Subsection (e) has been revised to reflect comments at the February 1999 meeting. It
2 has been BRACKETED FOR RECONSIDERATION by the Committee in light of the revision to
3 Section 104. **IN THE ABSENCE OF DIRECTION FROM THE COMMITTEE, THE**
4 **REPORTER WILL DELETE SUBSECTION (e) IN THE ANNUAL MEETING DRAFT.**

5 **Reporter's Note:**

6 1. Under different provisions of substantive law the legal effect of an electronic record
7 may be separate from the issue of whether the record contains a signature. For example, where
8 notice must be given as part of a contractual obligation, the effectiveness of the notice will turn on
9 whether the party provided the notice regardless of whether the notice was signed. An electronic
10 record attributed to a party under Section 108 would suffice in that case, notwithstanding that it
11 may not contain an electronic signature.

12 2. Subsections (a) and (b) establish the fundamental premise of this Act: That the form in
13 which a record, signature or contract is generated, presented, communicated or stored may not be
14 the only reason to deny it legal recognition. On the other hand, subsections (a) and (b) should not
15 be interpreted as establishing the legal effectiveness of any given record, signature or contract. For
16 example, where a rule of law requires that the record contain minimum substantive content, the
17 legal effect will depend on whether the record meets the substantive requirements. However, the
18 fact that the information is set forth in an electronic, as opposed to paper record, is irrelevant.

19 3. Subsections (c and d) are particularized applications of subsection (a). The purpose is
20 to validate and effectuate electronic records and signatures as the equivalent of writings, subject to
21 all of the rules applicable to the efficacy of a writing, except as such other rules are modified by
22 the more specific provisions of this Act.

23 **Illustration 1:** A sends the following e-mail to B: "I hereby offer to buy widgets from
24 you, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your
25 offer to buy widgets for delivery next Tuesday. /s/ B." The e-mails may not be denied
26 effect solely because they are electronic. In addition, the e-mails do qualify as records
27 under the Statute of Frauds. However, because there is no quantity stated in either record,
28 the parties' agreement would be unenforceable under existing UCC Section 2-201(1).

29 **Illustration 2:** A sends the following e-mail to B: "I hereby offer to buy 100 widgets for
30 \$1000, delivery next Tuesday. /s/ A." B responds with the following e-mail: "I accept your
31 offer to purchase 100 widgets for \$1000, delivery next Tuesday. /s/ B." In this case the
32 analysis is the same as in Illustration 1 except that here the records otherwise satisfy the
33 requirements of UCC Section 2-201(1). The transaction may not be denied legal effect
34 solely because there is not a pen and ink "writing" or "signature".
35

36 The purpose of the section is to validate electronic records and signatures in the face of legal
37 requirements for paper writings and manual signatures. Where no legal requirement of a writing
38 or signature is implicated, electronic records and electronic signatures are subject to the same
39 proof issues as any other evidence.

40 4. Subsection (e) is a particularized application of Section 104, to make clear that parties
41 retain control in determining the types of records to be used and accepted in any given transaction.

1 For example, in the Chrysler recall hypothetical referred to in Note 2 to Section 104, although
2 Chrysler cannot unilaterally require recall notices to be effective under this Act, it may indicate
3 the method of recall in a purchase agreement with a customer. If the customer objects, the
4 customer would have the right to establish reasonable requirements for such notices.

5 **~~SECTION 107. EFFECT OF SECURITY PROCEDURE.~~**

6 ~~ALTERNATIVE 1~~

7 (a) ~~[In a consumer transaction] If a person (the "requiring party") imposes as a condition of~~
8 ~~entering into a transaction with [a consumer] [another person], or otherwise is responsible for a~~
9 ~~particular security procedure being used in a transaction, the following rules apply:~~

10 (1) ~~— (A) If the [consumer] [other party] reasonably relies to its detriment on an~~
11 ~~electronic record or electronic signature purporting to be that of the requiring party and;~~

12 ~~(B) application of the security procedure verified~~

13 ~~(i) the source of the electronic record or electronic signature; or~~

14 ~~(ii) the integrity of the informational content of the electronic~~
15 ~~record;~~

16 ~~the requiring party may not deny the source, or integrity of the informational content, of the~~
17 ~~electronic record or electronic signature to which the security procedure was applied.~~

18 (2) ~~If the requiring party relies on an electronic record or electronic signature~~
19 ~~purporting to be that of the [consumer] [other party], the [consumer] [other party] retains the right~~
20 ~~to deny the source of the electronic record or electronic signature, or the integrity of the~~
21 ~~informational content of the electronic record.~~

22 ~~ALTERNATIVE 2~~

23 (a) ~~An agreement to be bound by the results of a security procedure is unenforceable [in a~~

1 ~~consumer transaction].~~

2 ~~END OF ALTERNATIVES~~

3 ~~(b) The provisions of this section may not be varied by agreement.~~

4 **NOTES TO THIS DRAFT:** This section was deleted in February 1999 by unanimous vote of the
5 Drafting Committee. The Committee determined that this Act should leave to the agreement of
6 the parties and other law the issue of the effect that a security procedure would have in a given
7 transaction.

8 **SECTION 107 ~~108~~. PROVISION OF INFORMATION IN WRITING.**

9 (a) If a ~~rule~~ of law requires a person to provide information in writing to another person,
10 that requirement is satisfied if the information is provided to the person in an electronic record
11 that the person is capable of accessing and retaining for subsequent reference. is

12 ~~(1) under the control of the person to which it is provided; and~~

13 ~~(2) capable of retention for subsequent reference by the person to which it is~~
14 ~~provided.~~

15 (b) The effect ~~provisions~~ of this section may not be varied by agreement in ~~[a consumer~~
16 ~~transaction].~~

17 **Source:** UETA Section 104(d) (Sept., 1998 Draft); Canadian Draft Uniform Electronic
18 Commerce Act

19 **NOTES TO THIS DRAFT:**

20 1. This section has been revised to reflect the comments at the February 1999 Meeting.
21 Fundamentally the consensus was that to meet a requirement that information be provided in
22 writing, the recipient of the information by an electronic record must be able to get to the
23 electronic record and read it, and must have the ability to get back to the information in some way
24 at a later date. Accordingly, the section now requires that the recipient have the ability to access
25 and retain the information for later review.

26 2. As noted above, this section is independent of the prior section. Section 106(c) refers
27 to legal requirements for a writing. This section refers to legal requirements for the provision of
28 information in writing. It is a more specific requirement and provides the standards for satisfying
29 a more particular legal requirement.

30 **Reporter's Notes:** This section is included in response to suggestions made in the Report of the

1 Task Force on State Law Exclusions to protect parties entitled to receipt of notice in writing. The
2 provision allows parties to provide information electronically so long as the recipient has the
3 ability to retain or dispose of the information once received. The concern was prompted by the
4 recognition that electronic information may be given to a person while the person lacks the ability
5 to copy or download the information.

6 **SECTION ~~108 109~~. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD**
7 **AND ELECTRONIC SIGNATURE TO PERSON.**

8 (a) An electronic record or electronic signature is attributable to a person if it was in fact
9 ~~the electronic record resulted from~~ the act of the person, or its electronic agent. Attribution may
10 be proved in any manner, including by a showing of the efficacy of any security procedure applied
11 to determine the person to which the electronic record or electronic signature was attributable.

12 (b) The effect of an electronic record or electronic signature attributed to a person under
13 subsection (a) must be determined from the context and surrounding circumstances at the time of
14 its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as
15 provided by law.

16 ~~(b) attribution of an electronic record to a person under subsection (a) has the effect~~
17 ~~provided for by law, regulation, or agreement regarding the security procedure.~~

18 **Source:** UETA Section 109 and 111 (Feb. 1999 Draft); UETA Section 202 Alternative 2 (Sept.
19 1998 Draft); Originally derived from Article 2B.

20 **NOTES TO THIS DRAFT:**

21 1. This section now combines the substance of former section 109 and 111 regarding the
22 attribution and effect of both electronic records and electronic signatures. The provisions for both
23 attribution and effect are now the same regarding both records and signatures - a primary criticism
24 of the prior draft.

25 2. Nothing in this section affects the use of a signature as an attribution device. Indeed, a
26 signature is often the primary method for attributing a record to a person. However, it is not the
27 only method for attribution, and there may be circumstances where attribution of an electronic
28 signature is necessary, e.g., in the face of a claim of forgery or unauthorized signature.
29 Accordingly, attributing electronic records and signatures are now subject to the same attribution
30 in fact standard, provable by any means including evidence of the efficacy of security procedures.
31 The inclusion of a specific reference to security procedures as a means of proving attribution is

1 salutory because of the unique importance of security procedures in the electronic environment.
2 Indeed, in certain processes, a technical and technological security procedure may be the only way
3 to convince a trier of fact that a particular electronic record or signature was that of a particular
4 person. The reference to security procedures is not intended to suggest that other forms of proof
5 of attribution should be accorded less persuasive effect, and the comment will so indicate.

6 3. The effect of a record or signature must first be determined in light of the context and
7 surrounding circumstances, including the parties' agreement, if any. See Section 104. Also
8 informing the effect of any attribution will be legal requirements considered in light of the
9 context. Subsection (b) addresses the effect of the record or signature once attributed to a person.

10 4. This section does apply in determining the effect of a click-through transaction. In the
11 case where a click-through transaction includes a process and identification, the click-through will
12 be an electronic signature directly covered. See definition of Electronic Signature and related
13 Notes. In the context of an anonymous click-through (See Section 113 and related Notes), this
14 section will be relevant to establish that the resulting electronic record (no electronic signature
15 because no identification) is attributable to a particular person upon the requisite proof, including
16 security procedures which may track the source of the click-through.

17 **Reporter's Note:** The draft retains the idea of attribution, including attribution to a person acting
18 through an electronic agent. It also indicates that the use of a security procedure will be an
19 important aspect in establishing attribution. However, it does not set forth any rule of attribution
20 under particular circumstances.

21 **SECTION 109 110. ~~DETECTION OF EFFECT OF CHANGES AND ERRORS~~.**

22 Unless otherwise agreed, if a change or error in an electronic record occurs in a transmission
23 between parties to a transaction, the following rules apply:

24 _____ (a) If the parties have agreed to use act in conformity with a security procedure to detect
25 changes or errors in the informational content of an electronic record, between the parties, the
26 following rules apply: (1) ~~If and one party a sender~~ has conformed to the security procedure, but
27 the other party has not, and the nonconforming party would have detected the change or error had
28 that party also conformed, the effect of the changed or erroneous electronic record is avoidable by
29 the conforming party. ~~sender is not bound by the change or error.~~

30 (b) In an automated transaction involving an individual, the individual may avoid ~~is not~~
31 responsible for the effect of an electronic record that resulted from an error by the individual made

1 in dealing with the electronic agent of another person only if the electronic agent did not provide
2 an opportunity for the prevention or correction of the error and, at the time the individual learns
3 of the error, the individual:

4 (1) promptly notifies the other person of the error and that the individual did not
5 intend to be bound by the electronic record received by the other person;

6 (2) takes reasonable steps, including steps that conform to the other person's
7 reasonable instructions, to return to the other person or, if instructed by the other person, to
8 destroy the consideration received, if any, as a result of the erroneous electronic record; and

9 (3) has not used or received the benefit or value of the consideration, if any,
10 received from the other person.

11 (c) If neither subsection (a) nor (b) applies, the change or error has the effect provided by
12 law, including the law of mistake, and the parties' contract, if any. ~~If the other party notifies the~~
13 ~~sender in a manner required by the security procedure which describes the informational content~~
14 ~~of the record as received, the sender shall review the notification and report in a reasonable~~
15 ~~manner any change or error detected by it. Failure so to review and report any change or error~~
16 ~~binds the sender to the informational content of the record as received.~~

17 **Source:** New; Derived from UETA Section 110 (Feb. 1999 Draft)(Originally derived from Article
18 2B); Restatement 2d, Contracts, Sections 152-155.

19 **NOTES TO THIS DRAFT:**

20 1. This section has been revised to address the comments and concerns raised at the
21 February 1999 meeting. First, the section now clearly is subject to the agreement of the parties and
22 so operates as a default rule. Subsection (a) now operates against the non-conforming party, i.e.,
23 the party in the best position to have caught the change or error, regardless of whether the sender
24 or recipient. Former subsection (2) has been deleted because it merely stated that which possibly
25 may have been included as part of the agreement of the parties relating to their security procedure.
26 Finally, the provision on inadvertent error, from former section 116 (a and d) has been moved to
27 this section on error.

28 2. Substantively, the section is now limited to changes and errors occurring in

1 transmissions between parties - whether person-person or in an automated transaction involving
2 an individual and a machine. This focus is consistent with the focus of the previous draft, i.e., the
3 effect of changes and errors occurring when records are exchanged between parties. In cases
4 where changes and errors occur in contexts other than transmission, the law of mistake is
5 expressly made applicable to resolve the conflict.

6 3. Subsection (a) deals with any transmission where the parties have agreed to use a
7 security procedure to detect changes and errors. The source of the error/change is not indicated,
8 and so in this context both human and machine errors/changes would be covered. It is limited to
9 the situation where a security procedure would detect the error/change but one party fails to use
10 the procedure and does not detect the error/change. In such a case, consistent with the law of
11 mistake generally, the record is made avoidable at the instance of the party who did everything
12 possible to avoid the mistake. See Restatement Section 152-154. With respect to errors or changes
13 that would not be caught by the security procedure even if applied, the parties are left to the
14 general law of mistake to resolve the dispute.

15 4. Making the erroneous record avoidable by the conforming party is consistent with
16 Section 154 of the Restatement since the non-conforming party was in the best position to avoid
17 the problem, and would bear the risk of mistake (risk allocated to him by court as proper under
18 circumstances). This would constitute mistake by one party (Section 153) and the mistaken party
19 (the conforming party) would be entitled to avoid any resulting contract under Section 153
20 because he does not have the risk of mistake and the non-conforming party had reason to know of
21 the mistake.

22 5. Subsection (b) has been moved from former Section 116 (a) and (d). The purpose of
23 the move is to gather in one place all the provisions dealing with mistake. The key in prior
24 discussions has been the context of mistakes in transmission - whether between two people or an
25 individual and a machine. The substance of the former definition of "inadvertent error" has simply
26 been incorporated into the preamble. The substance of former section 116(d) has not been
27 changed. Under this subsection (b) an individual must satisfy all three requirements before
28 avoiding the effect of the erroneous electronic record.

29 6. As with subsection (a), subsection (b), when applicable, allows the mistaken party to
30 avoid the effect of the erroneous electronic record. However, the subsection is limited to human
31 error on the part of an individual when dealing with the machine of the other party. This
32 limitation is based on the consideration that security procedures may be developed to address
33 system errors, and that in an individual to individual context there is a greater ability to correct the
34 error before parties have acted on the error. Where a system error occurs, the issue of the effect of
35 that error would be resolved under subsection (a) if applicable, otherwise under subsection (c) and
36 the general law of mistake.

37 7. The most important limitation on the operation of subsection (b) relates to the ability of
38 the party acting through the electronic agent/machine, to build in safeguards which enable the
39 individual to prevent the sending of an erroneous record, or correct the error once sent. For
40 example, the electronic agent may be programmed to provide a "confirmation screen" to the
41 individual setting forth all the information the individual initially approved. This would provide
42 the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the
43 electronic agent might receive the record sent by the individual and then send back a confirmation
44 which the individual must again accept before the transaction is completed. This would allow for

1 correction of the erroneous record. In either case, the electronic agent would “provide an
2 opportunity for prevention or correction of the error,” AND THE SUBSECTION WOULD NOT
3 APPLY.

4 8. Subsection (b) also places additional requirements on the mistaken individual before
5 the section may be invoked to avoid an erroneous electronic record. The individual must take
6 prompt action to advise the other party of the error and the fact that the individual did not intend
7 the electronic record. Whether the action is prompt must be determined from all the
8 circumstances including the individual’s reason to know the manner of contacting the other party.
9 The individual should advise the other party both of the error and of the lack of intention to be
10 bound (i.e., avoidance) by the electronic record received.

11 The individual must also return or destroy any consideration received, adhering to
12 instructions from the other party in any case. This is to assure that the other party retains control
13 over the consideration sent in error.

14 Finally, and most importantly in regard to transactions involving intermediaries which may
15 be harmed because transactions cannot be unwound, the individual cannot have received the
16 benefit of the transaction. The Bank Working Group expressed concern that this section would
17 allow for the unwinding of transactions after the delivery of value and consideration which could
18 not be returned or destroyed. Under subsection (b)(3) in such a case, the individual would have
19 received the benefit of the consideration and would NOT be able to avoid the erroneous electronic
20 record.

21 9. This section is now parallel in drafting with Section 107 (Effect of Electronic Records
22 and Signatures) since it addresses of the effect of the change or error.

23 10. In all cases not covered by subsection (a) or (b), where error and change to a record
24 may occur, the parties contract applies, or other law, specifically including mistake is made
25 applicable. If the error occurs in the context of record retention, new Section 111 will apply. In
26 that case the standard is one of accuracy and retrievability of the information. If an error occurs in
27 an electronic record between parties, but the error does not occur as part of a transmission,
28 subsection (c) refers to other applicable law, including specifically the law of mistake.

30 ~~SECTION 111. EFFECT OF ELECTRONIC SIGNATURES.~~

31 ~~(a) An electronic signature may be proven in any manner, including by showing that the~~
32 ~~electronic signature was signed in conformity with a security procedure for validating electronic~~
33 ~~signatures, or that a procedure existed by which the person, or its electronic agent, must have~~
34 ~~engaged in conduct or operations that signed the record or term in order to proceed further in the~~
35 ~~processing of the transaction.~~

36 ~~[(b) A person bound by the operations of an electronic agent under Section 116 is deemed~~
37 ~~to have signed an electronic record produced by the agent on its behalf, whether or not the~~

1 ~~operations result in the attachment or application of an electronic signature to the electronic~~
2 ~~record].~~

3 ~~(c) The effect of an electronic signature must be determined from the context and~~
4 ~~surrounding circumstances at the time of its execution or adoption.~~

5 **NOTES TO THIS DRAFT:** This section has been deleted and the substance of subsections (a)
6 and (c) incorporated into Section 108. The Committee voted unanimously to delete Subsection
7 (b) as inappropriate and going too far in deeming a signature.

8 **SECTION 110 ~~H2~~. NOTARIZATION AND ACKNOWLEDGMENT.** If a ~~rule of~~
9 law requires that a signature be notarized or acknowledged, or provides consequences in the
10 absence of a notarization or acknowledgment, the ~~rule of~~ law is satisfied with respect to an
11 electronic signature if a security procedure was applied ~~to the electronic signature~~ which
12 establishes the identity of the person signing the electronic record [and that the electronic record
13 has not been altered since it was electronically signed].

14 **Source:** New

15 **NOTES TO THIS DRAFT:** This section was generally favorably received at the February, 1999
16 meeting. **A QUESTION REMAINS FOR THE COMMITTEE** concerning the deletion or
17 retention of the bracketed language. The language does go beyond what is generally the purpose
18 of notarization, but was favored by some members of the Committee.

19 **Reporter's Note:** This provision was added in response to the Task Force Report. The last clause
20 has been bracketed because there is a question whether notarization and acknowledgment have the
21 purpose of assuring content integrity. The purpose of a notary is generally one of identification,
22 and so long as a security procedure establishes identity by the normal preponderance of the
23 evidence standard, that should be sufficient.

24 **SECTION 111 ~~H3~~. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.**

25 (a) If a ~~rule of~~ law requires that certain records be retained, that requirement is met by
26 retaining an electronic record of the information in the record, if the electronic record ~~is shown to~~
27 reflects accurately the information set forth in the record after it was first generated in its final

1 form as an electronic record or otherwise, and the electronic record remains accessible for later
2 reference.

3 ~~(b) An electronic record reflects accurately the information in a record under subsection~~
4 ~~(a), if:~~

5 ~~(1) the information contained in the electronic record remains accessible for later~~
6 ~~reference;~~

7 ~~(2) the information is retained in the format in which it originally was generated;~~
8 ~~stored, sent, or received, or in a format that can be demonstrated to reflect accurately the~~
9 ~~information as originally generated, stored, sent, or received; and~~

10 ~~(3) information, if any, that enables the identification of the source of origin and~~
11 ~~destination of the record, the authenticity and integrity of the information in the record, and the~~
12 ~~date and time the record was sent or received, is retained.~~

13 ~~(b e)~~ A requirement to retain records in accordance with subsection (a) does not apply to
14 any information whose sole purpose is to enable the record to be sent or received.

15 ~~(c d)~~ A person satisfies subsection (a) by using the services of any other person if the
16 conditions set forth in subsection (a) are met.

17 ~~(d e)~~ If a ~~rule of~~ law [or a commercial practice] requires a record to be presented or
18 retained in its original form, or provides consequences if the record is not presented or retained in
19 its original form, that ~~rule of~~ law [or commercial practice] is satisfied by an electronic record
20 retained in accordance with subsection (a).

21 [(e) If a law requires retention of a check, that requirement is satisfied by retention of an
22 electronic record of the front and back of the check in accordance with subsection (a).]

1 _____ (f) A record retained as an electronic record in accordance with subsection (a) satisfies
2 ~~rules of laws~~ requiring a person[, other than a governmental agency,] to retain records for
3 evidentiary, audit, or like purposes, unless a law promulgated after the effective date of this [Act]
4 ~~until a governmental agency of this State adopts rules of law specifically prohibits~~ the use of an
5 electronic records for a specified purposes within the jurisdiction of the governmental agency.

6 (g) ~~However,~~ This section does not preclude a governmental agency of this State from
7 specifying additional requirements for the retention of records, either written or electronic, subject
8 to the agency's jurisdiction.

9 **Source:** UETA Sections 205 and 206 (Sept. 1998 Draft); Uncitral Model Articles 8 and 10;
10 Illinois Model Sections 204 and 206.

11 **NOTES TO THIS DRAFT:**

12 1. This section has been revised to include the critical elements for retention discussed at
13 the February, 1999 meeting. Subsection (a) requires accuracy and the ability to access at a later
14 time. The requirement of accuracy is derived from the Uniform and Federal Rules of Evidence.
15 The requirement of continuing accessibility addresses the issue of technology obsolescence and
16 the need to update and migrate information to developing systems. The other requirements in
17 former subsection (b) have been deleted based on comments that they were unnecessary and did
18 not advance the cause of accuracy. The subsection still refers to the information contained in an
19 electronic record, rather than relying on the term electronic record, as a matter of clarity that the
20 critical aspect in retention is the information itself.

21 **2. THE BRACKETED LANGUAGE IN SUBSECTION (d) HAS BEEN RETAINED**
22 **FOR THE COMMITTEE'S CONSIDERATION. BASED ON COMMENTS THAT IT IS**
23 **INNAPPROPRIATE TO OVERRIDE COMMERCIAL PRACTICE BY STATUTE,**
24 **UNLESS THE COMMITTEE ADVISES OTHERWISE THE BRACKETED LANGUAGE**
25 **WILL BE DELETED IN THE ANNUAL MEETING DRAFT.**

26 3. Subsection (e) has been added for the committee's consideration. The provision was
27 suggested at the Richmond meeting to address particular concerns regarding check retention
28 statutes identified by the Federal Reserve Bank of Boston. **IT HAS BEEN BRACKETED FOR**
29 **THE COMMITTEE'S CONSIDERATION WHETHER AN INDUSTRY SPECIFIC**
30 **PROVISION SUCH AS THIS IS NECESSARY OR APPROPRIATE. IN THE ABSENCE**
31 **OF INSTRUCTION FROM THE COMMITTEE THE REPORTER WILL DELETE THE**
32 **BRACKETED LANGUAGE BECAUSE THE LANGUAGE IS NOT NECESSARY AND**
33 **THE ACT SHOULD AVOID SUCH INDUSTRY SPECIFIC RULES.**

34 4. The bracketed language in subsection (f) regarding an exclusion for governmental
35 agencies is also **RETAINED FOR THE COMMITTEE'S CONSIDERATION. IN THE**
36 **ABSENCE OF OTHER INSTRUCTION THIS LANGUAGE ALSO WILL BE DELETED**

1 **IN THE ANNUAL MEETING DRAFT.** A governmental agency is able to exempt itself
2 generally, and specifically under Part 2, and it is not necessary to provide an exclusion here.

3 **Reporter's Note:** This section deals with the serviceability of electronic records as retained
4 records and originals. As was noted at the May, 1997 meeting, the concept of an original
5 electronic document is problematic. For example, as I draft this Act the question may be asked
6 what is *the* "original" draft. My answer would be that the "original" is either on a disc or my hard
7 drive to which the document has been initially saved. Since I periodically save the draft as I am
8 working, the fact is that at times I save first to disc then to hard drive, and at others vice versa. In
9 such a case the "original" may change from the information on my disc to the information on my
10 hard drive. Indeed, as I understand computer operations, it may be argued that the "original"
11 exists solely in RAM and, in a sense, the original is destroyed when a "copy" is saved to a disc or
12 to the hard drive. In any event, the concern focuses on the integrity of the information, and not
13 with its "originality."

14 A second question raised at the May, 1997 meeting related to when the law requires an
15 "original." Except in the context of paper tokens such as documents of title and negotiable
16 instruments, most requirements for "originals" derive from commercial practice where the
17 assurance of informational integrity is a concern. The comment to Illinois Model Law Section 204
18 (derived largely from Uncitral Model Law Summary Paragraph 62) identifies some of these
19 situations as follows:

20 The requirement that a document be "an original" occurs in a variety of contexts for a
21 variety of reasons. Documents of title and negotiable instruments, for example, typically
22 require the endorsement and presentation of an original. But in many other situations it is
23 essential that documents be transmitted unchanged (i.e., in their "original" form), so that
24 other parties, such as in international commerce, may have confidence in their contents.
25 Examples of such documents that might require an "original" are trade documents such as
26 weight certificates, agricultural certificates, quality/quantity certificates, inspection reports,
27 insurance certificates, etc. Other non-business related documents which also typically
28 require an original form include birth certificates and death certificates. When these
29 documents exist on paper, they are usually only accepted if they are "original" to lessen the
30 chance that they have been altered, which would be difficult to detect in copies.

31 Since requirements for "originals" are often the result of commercial practice and not an actual
32 rule of law, the section includes the bracketed language regarding requirements derived from
33 commercial practice. As a policy matter it is not at all clear that legislation should override
34 established commercial practice.

35 So long as there exists reliable assurance that the electronic record accurately reproduces
36 the information, this section continues the theme of establishing the functional equivalence of
37 electronic and paper-based records. This is consistent with Fed.R.Evid. 1001(3) and Unif.R.Evid.
38 1001(3) (1974) which provide:

39 If data are stored in a computer or similar device, any printout or other output readable by
40 sight, shown to reflect the data accurately, is an "original."

1 This draft adopts as the appropriate standard that noted in the rules of evidence.

2 Another issue relates to the use of originals for evidentiary purposes. In this context the
3 concern principally relates to the "best evidence" or "original document" rule. The use of
4 electronic records in evidence is addressed in the next Section and its notes.

5 At the May, 1997 meeting concern was expressed that retained records may become
6 unavailable because the storage technology becomes obsolete and incapable of reproducing the
7 information on the electronic record. Subsection (b)(1) addresses this concern by requiring that
8 the information in the electronic record "remain" accessible, and subsection (b)(2) addresses the
9 need to assure the integrity of the information when the format is updated or changed.

10 This section would permit parties to convert original written records to electronic records
11 for retention so long as the requirements of subsection (a) are satisfied. Accordingly, in the
12 absence of specific requirements to retain written records, written records may be destroyed once
13 saved as electronic records satisfying the requirements of this section.

14 SECTION 112 ~~114~~. ADMISSIBILITY IN EVIDENCE.

15 (a) In a legal proceeding, evidence of an electronic record or electronic signature may not
16 be excluded because: ~~(1) on the sole ground that it is an electronic record or electronic signature;~~
17 ~~or (2) on the ground that it is not in its original form or is not an original or it is not in its original~~
18 form.

19 [(b) In assessing the persuasive effect ~~evidentiary weight~~ of an electronic record or
20 electronic signature, the trier of fact shall consider the manner in which the electronic record or
21 electronic signature was generated, stored, communicated, or retrieved, the reliability of the
22 manner in which the integrity of the electronic record or electronic signature was maintained, the
23 manner in which its originator was identified or the electronic record was signed, and any other
24 relevant circumstances.]

25 **Source:** UETA Section 404 (Sept. 1998 Draft); Uncitral Model Article 9; Illinois Model Section
26 205.

27 **NOTES TO THIS DRAFT:** This section has been revised for clarity based on comments
28 received from the Committee on Style. **THE BRACKETED LANGUAGE IS PRESENTED**
29 **FOR THE COMMITTEE'S CONSIDERATION AS TO THE PROPRIETY OF**
30 **STATUTORILY DIRECTING A COURT ON THE MATTERS TO BE CONSIDERED IN**
31 **DETERMINING THE PERSUASIVE EFFECT OF EVIDENCE.**

1 **Reporter's Note:** Like section 106, subsection (a)(1) prevents the nonrecognition of electronic
2 records and signatures solely on the ground of the media in which information is presented.
3 Subsection (a)(2) also precludes inadmissibility on the ground an electronic record is not an
4 original.

5 Nothing in this section relieves a party from establishing the necessary foundation for the
6 admission of an electronic record.

7
8 **SECTION 113 ~~115~~. FORMATION OF CONTRACT.**

9 (a) If an offer in an electronic record initiated by a person, or by its electronic agent,
10 evokes an electronic record in response, a contract is formed in the same manner and with the
11 same effect as if the electronic records were not electronic, except that a . A contract is formed, if
12 at all:

13 (1) when ~~the~~ an acceptance is received; or

14 (2) if the response consists of electronic performance of the requested
15 consideration in whole or in part, when the requested consideration, to be performed
16 electronically, is received unless the offer ~~initiating electronic record~~ prohibited that form of
17 response.

18 (b) In an automated transaction, the following rules apply:

19 (1) A contract may be formed by the interaction of electronic agents of the parties,
20 even if no individual was aware of or reviewed the electronic agents' actions or the resulting
21 terms and agreements.

22 (2) A contract may be formed by the interaction of a person's electronic agent and
23 an individual, including by an . ~~A contract is formed by the~~ interaction in which if the individual
24 performs actions that it is free to refuse to perform and that it ~~which the individual~~ knows or has
25 reason to know will cause the electronic agent to complete the transaction or performance.

26 (c) ~~(b)~~ The terms of a contract are determined by the substantive ~~rules of~~ law applicable to

1 the particular contract.

2 **Source:** UETA Section 401(b) and (a)(3) (Sept. 1998 Draft); Uncitral Model Article 11.

3 **NOTES TO THIS DRAFT:**

4 1. The revision in subsection (a) is to clarify that the only change in the rules for
5 formation in the electronic environment relate to the timing of the formation. The separate
6 sentence of the prior draft was viewed as inadequately conveying this limited intent. The section
7 makes clear that the rules regarding contract formation are not to be altered in the electronic
8 environment except that the time of formation occurs on receipt of acceptance or performance.

9 2. Subsection (b) has been moved from former Section 116(c) in order to gather the
10 operative contract formation rules of this Act in one place. The revision in Subsection (b)(2) was
11 made for clarification.

12 3. Inclusion of these provisions in the contract formation section better focuses the
13 purpose of the provisions. The intent of the provisions is to assure that contracts can be formed
14 by machines. The emphasis is on contract formation methods and not on the fact that machines
15 are involved. Like the move of the individual error provision to the general provision on
16 resolution of errors, the focus is being taken off the operations of the machines and placed on the
17 substantive issue, which is being accomplished by, or complicated because of, the use of a
18 machine. This is in keeping with the purpose of the Act to deal with removing barriers to
19 electronic transactions while leaving the substantive law, e.g., law of mistake, law of contract
20 formation, unaffected to the greatest extent possible.

21 4. The process in subsection (b)(2) will validate an anonymous click-through transaction.
22 In the first place, an anonymous click-through process may simply result in no recognizable legal
23 relationship, e.g., I go to a person's site and acquire access to information without in any way
24 identifying myself, and the owner's site grants me the access. In such a case, what legal
25 relationship has been created?

26 On the other hand it may be possible that my actions indicate agreement to a particular
27 term. For example, I go to a person's site and am confronted by an initial screen which advises
28 me that the information at this site is proprietary, that I may use the information for my own
29 personal purposes, but that, by clicking below, I agree that any other use without the site owner's
30 permission is prohibited. If I click "agree" and download the information and then use the
31 information for other, prohibited purposes, should I be bound by the click? It seems the answer
32 properly should be yes. If the owner can show that the only way I could have obtained the
33 information was from his website, and that the process to access the subject information required
34 that I must have clicked the I "agree" button after having the ability to see the conditions on use, I
35 have performed actions which I was free to refuse, which I knew would cause the site to grant me
36 access. The terms of the resulting contract would be determined under general contract principles,
37 but would include the limitation on my use of the information, as the *quid pro quo* for granting me
38 access to the information. There would NOT be an electronic signature, because the process
39 included no identification. If a "signed writing" were required this would be unenforceable.
40 However, it may be sufficient to establish that the electronic record showing this process is
41 attributable to me under section 108, and that may be done in any manner reasonable including
42 showing that, of necessity, I could only have gotten the information through the process at the
43 website - a very difficult proof, but available nonetheless.

1 **SECTION ~~114~~ 116. OPERATIONS OF ELECTRONIC AGENTS; ~~AUTOMATED~~**
2 **TRANSACTIONS.** (a) ~~In this section, "inadvertent error" means an error by an individual~~

3 ~~made in dealing with an electronic agent of another person if the electronic agent of the other~~
4 ~~person did not allow for the prevention or correction of the error.~~

5 (b) [Operations of an electronic agent are the acts of a person if the person [knowingly]
6 used the electronic agent for such purposes.]

7 (c) ~~In an automated transaction, the following rules apply:~~

8 (1) ~~A contract may be formed by the interaction of electronic agents of the parties,~~
9 ~~even if no individual was aware of or reviewed the electronic agent's actions or the resulting terms~~
10 ~~and agreements.~~

11 (2) ~~A contract may be formed by the interaction of a person's electronic agent and~~
12 ~~an individual. A contract is formed by the interaction if the individual performs actions that it is~~
13 ~~free to refuse to perform which the individual knows or has reason to know will cause the~~
14 ~~electronic agent to complete the transaction or performance.~~

15 (d) ~~In an automated transaction involving an individual, the individual is not responsible~~
16 ~~for an electronic record that the individual did not intend but which was caused by an inadvertent~~
17 ~~error if, on learning of the error other person's reliance on the erroneous electronic record, the~~
18 ~~individual:~~

19 (1) ~~promptly notifies the other person of the error and that the individual did not~~
20 ~~intend the electronic record received by the other person;~~

21 (2) ~~takes reasonable steps, including steps that conform to the other person's~~
22 ~~reasonable instructions, to return to the other person or, if instructed by the other person, to~~

1 ~~destroy the consideration received, if any, as a result of the erroneous electronic record; and~~
2 ~~(3) has not used or received the benefit or value of the consideration, if any,~~
3 ~~received from the other person.~~

4 **Source:** UETA Section 116(b) (Feb. 1999 Draft).

5 **NOTES TO THIS DRAFT:**

6 1. Subsections (a) and (d) have been moved to section 109 Changes and Errors.
7 2. Subsection (c) has been moved to prior section 113 Contract Formation.
8 3. Remaining subsection (b) has been bracketed for Committee's consideration. Is this
9 subsection necessary? The definition of electronic agent notes that it is used to initiate or respond
10 to records or performances without review by an individual. It has been defined as a tool. Is it
11 necessary in this context to state the obvious? While this act does reiterate the obvious in a
12 number of contexts, the question is whether the reiteration is necessary here. The act does
13 address individual interactions and interactions between machines in the contract formation
14 process, and that is appropriate to clarify that discrete context, particularly as it may implicate
15 issues of intention on the part of the person using the machine. Also, the effect of errors resulting
16 when machines are involved has been addressed, at least in part, in Section 109, and the general
17 law of mistake has been expressly referenced.

18 Questions have been raised about the propriety of addressing electronic agents more
19 broadly in this Act. Comments have indicated that there may be difficulty in determining who is
20 the actual user of an e-agent (hence the sub-bracketed provision for "knowing" use). Further there
21 is a question whether a person found to have "used" an e-agent, e.g., the person setting a java
22 applet resident on her computer in motion, is even aware that it was so used. Would it be better to
23 leave the development of the general responsibility of parties in such cases to the development of
24 the law? After all, it is fairly certain that where a computer program is used by a vendor on the
25 web or as part of an EDI transaction, there should be little doubt that that vendor will be held
26 responsible for the operations of that machine/tool. **THIS SECTION PRESENTS A**
27 **FUNDAMENTAL POLICY QUESTION FOR RESOLUTION BY THE COMMITTEE.**

28 **SECTION 115 ~~H7~~. TIME AND PLACE OF SENDING AND RECEIPT.**

29 (a) Unless otherwise agreed between the sender and the recipient, an electronic record is
30 sent when the information is addressed or otherwise directed properly to the recipient and enters
31 an information processing system outside the control of the sender or of a person that sent the
32 electronic record on behalf of the sender.

33 (b) Unless otherwise agreed between the sender and the recipient, an electronic record is
34 received when the electronic record enters an information processing system ~~in a form capable of~~

1 ~~being processed by that system~~ that the recipient has designated or uses or has designated for the
2 purpose of receiving electronic records or information of the type sent, in a form capable of being
3 processed by that system, and from which the recipient is able to retrieve the electronic record. ~~An~~
4 ~~electronic record is also received when the recipient learns of its content from a record.~~

5 (c) Subsection (b) applies even if the place the information processing system is located is
6 different from the place the electronic record is considered to be received under subsection (d).

7 (d) Unless otherwise expressly provided in the electronic record or agreed between the
8 sender and the recipient, an electronic record is deemed to be sent from the sender's place of
9 business and is deemed to be received at the recipient's place of business. For the purposes of this
10 subsection, the following rules apply:

11 (1) If the sender or recipient has more than one place of business, the place of
12 business of that person is that which has the closest relationship to the underlying transaction.

13 (2) If the sender or the recipient does not have a place of business, the place of
14 business is the sender's or recipient's residence, as the case may be.

15 (e) An electronic record is effective when received even if no individual is aware of its
16 receipt.

17 [(f) Receipt of an electronic acknowledgment establishes that a record was received but,
18 in itself, does not establish that the content sent corresponds to the content received.]

19 **Source:** UETA Sections 402 and 403(b) (Sept. 1998 Draft); Uncitral Model Article 15.

20 **NOTES TO THIS DRAFT:**

21 1. The revisions to this section address concerns that the question of receipt of electronic
22 records requires greater party control, generally to avoid unintended consequences from the
23 application of otherwise applicable default rules. Under subsection (a) the sender retains control
24 over the timing of a sending of a record because the sending is within that party's control.

25 2. Subsection (b) has been revised to clarify that the recipient retains control of the place
26 of receipt by the requirement that the system be specified or used by the recipient, and that the

1 system be used or designated for the type of record being sent. The fact that many people have
2 multiple e-mails for different purposes led to this clarification. The purpose is to assure that
3 recipients can designate the e-mail address or system to be used in a particular transaction. For
4 example, I would retain the ability to designate my home e-mail for personal matters, work for
5 official business, or a separate organizational e-mail solely for the business purposes of that
6 organization. If A sends B a notice at his home which relates to business, it may not be deemed
7 received if B designated his business address as the sole address for business purposes and except
8 to the extent that actual knowledge upon seeing it at home would qualify as receipt under the
9 otherwise applicable substantive law.

10 3. The revision to subsection (d) is related. The purpose again is to assure individual
11 flexibility in designating the place from which a record will be considered sent or at which a
12 record will be considered received. Under subsection (d) a person may designate the place of
13 sending or receipt unilaterally in an electronic record. This ability, as with the ability to designate
14 by agreement, would be limited by applicable law to places having a reasonable relationship to the
15 transaction.

16 4. Subsection (f) has been retained for the Committee's consideration. It is a remnant of
17 the former section on electronic acknowledgment of receipt. **THE ISSUE FOR THE**
18 **COMMITTEE IS WHETHER IT REMAINS NECESSARY. IN THE ABSENCE OF**
19 **DIRECTION FROM THE COMMITTEE, THE REPORTER WILL DELETE THE**
20 **LANGUAGE FROM THE ANNUAL MEETING DRAFT AS UNNECESSARY.**

21 **Reporter's Note:**

22 1. This section provides default rules regarding when an electronic record is sent and when
23 and where an electronic record is received. This section does not address the efficacy of the
24 record that is received. That is, whether a record is unintelligible or unusable by a recipient is a
25 separate issue from whether that record was received.

26 2. Subsection (a) requires that information be properly addressed or otherwise directed to
27 the recipient before it will be considered sent.

28 3. Subsection (b) provides simply that when a record enters the system which the recipient
29 has designated or uses and to which it has access, in a form capable of being processed by that
30 system, it is received. By keying receipt to a system which is accessible by the recipient, the
31 issue of leaving messages with a server or other service is removed. However, the issue of how
32 the sender proves the time of receipt is not resolved by this section.

33 4. Subsections (c) and (d) provide default rules for determining where a record will be
34 considered to have been received. The focus is on the place of business of the recipient and not
35 the physical location of the information processing system. As noted in paragraph 100 of the
36 commentary to the Uncitral Model Law

37
38 It is not uncommon for users of electronic commerce to communicate from one State to
39 another without knowing the location of information systems through which
40 communication is operated. In addition, the location of certain communication systems
41 may change without either of the parties being aware of the change.

42 Accordingly, where the place of sending or receipt is an issue, the relevant location should be the

1 location of the sender or recipient and not the location of the information processing system.

2 5. Subsection (e) rejects the mailbox rule and provides that electronic records are effective
3 on receipt. This approach is consistent with Article 4A and, as to electronic records, Article 2B.

4 **SECTION 116 ~~118~~. CONTROL OF TRANSFERABLE RECORDS.**

5 (a ~~c~~) A person has control of a transferable record [~~under subsection (b)~~] if the record or
6 records comprising the transferable record are created, stored, and assigned in such a manner that:

7 (1) a single authoritative copy of the record or records exists which is unique,
8 identifiable, and except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

9 (2) the authoritative copy identifies the person asserting control as the assignee of
10 the record or records:

11 (3) the authoritative copy is communicated to and maintained by the person
12 asserting control or its designated custodian;

13 (4) copies or revisions that add or change an identified assignee of the authoritative
14 copy can be made only with the consent of the person asserting control;

15 (5) each copy of the authoritative copy and any copy of a copy is readily
16 identifiable as a copy that is not the authoritative copy; and

17 (6) any revision of the authoritative copy is readily identifiable as an authorized or
18 unauthorized revision.

19 (b ~~a~~) Except as otherwise provided in subsection (d), the following rules apply in
20 determining the rights of a person in control of a transferable record:

21 (1) if a person acquires ~~having~~ control of a transferable record the person has the
22 rights with respect to the record that a holder of a note would have if the record were a note;

23 (2) if the person acquires control in a manner consistent with [Section 3-302(a) of

1 the Uniform Commercial Code], the person has the rights with respect to the record that a holder
2 in due course of a note would have if the record were a note; and

3 (3) if the person acquires control in a manner consistent with [Section 9-308 of the
4 Uniform Commercial Code], the person has the rights with respect to the record that a purchaser
5 in possession of a note would have if the record were an note.

6 (4) Nothing in paragraphs (1), (2) or (3) requires a person to receive delivery,
7 possession or indorsement of an electronic record in order to obtain the rights available under
8 those paragraphs.

9 ~~(b) A person has control of a transferable record if a method employed for recording,~~
10 ~~registering, or otherwise evidencing the transfer of interests in such records reliably establishes~~
11 ~~that person as the person with the right to enforce the transferable record.~~

12 (c) The following rules apply in determining the rights and defenses of a person who is an
13 obligor under a transferable record:

14 (1) the obligor has the rights and defenses with respect to the record that a maker of
15 a note would have if the record were a note; and

16 (2) the person obtaining payment under the transferable record and a prior
17 transferor of the transferable record warrant to the obligor making payment in good faith, that the
18 warrantor is or was at the time the warrantor transferred the record, the person entitled to payment
19 of the record or authorized to receive payment on behalf of a person entitled to payment of the
20 record.

21 (d) Discharge of the obligation is effective against any person in control of the transferable
22 record if

1 (1) the discharge is made by or on behalf of the person in control of the
2 transferable record at the time of the discharge; or
3 (2) the obligation would otherwise be discharged under the substantive law
4 applicable to the transaction.

5 (e) If requested by the obligor under a transferable record, the person seeking to enforce
6 the transferable record must provide reasonable proof that the person is in control of the
7 transferable record. Prior to payment or performance of the obligation, the obligor is entitled to
8 access to the authoritative copy of the transferable record and related business records sufficient to
9 review the terms of the transferable record and establish the identity of the person in control of the
10 transferable record.

11 **Source:** New; Subsection (a) from Revised Article 9, Section 9-105.

12 **NOTES TO THIS DRAFT:**

13 1. Based on the comments at the February, 1999 meeting and consistent with the
14 exclusion of Articles 3 and 4 from the scope of this Act, this Section 116 is drafted as a stand-
15 alone provision. Although references are made to specific provisions in Article 3 and Article 9,
16 these provisions are “pulled” into this act and made the applicable rules for purposes of this Act.
17 Subsections (b) and (c) make clear, the rights of parties to transferable records are determined
18 under this section.

19 2. The section is limited to electronic records which would be “notes” if in writing. The
20 deletion of chattel paper was done to avoid potential confusion with revised Article 9. The
21 deletion of documents of title was done because of the limited impact of state law, and the
22 predominant federal presence, in this area, the desire to streamline the section as much as
23 possible, and the lack of any strong constituency seeking inclusion. However, inclusion of
24 documents of title is possible and can be done if the Committee views that as appropriate.

25 3. The provisions regarding “control” are taken directly from Revised Article 9 - Section
26 9-105. Not only is consistency worthwhile in general, but this allows for consistent treatment of
27 “electronic notes” under this section with the treatment of electronic chattel paper under revised
28 Article 9. This provides a solution under revised Article 9 for the transaction where a lease is
29 structured as a note and security agreement, which would not qualify as electronic chattel paper.

30 4. Subsection (b) provides rules for determining the rights of a party in control of a
31 transferable record. The subsection makes clear that the rights are determined under this section,
32 and not under other law. The provisions in paragraphs (2) and (3) regarding the manner of
33 acquisition of control can be spelled out in these sections if the reference to Articles 3 and 9 are
34 considered inappropriate. However, the formulation is sufficient to assure that those

1 considerations on acquisition are pulled into this statute. Paragraph (4) is intended to assure that
2 requirements related to notions of possession are not incorporated into this statute.

3 5. Subsection (c) accords to the obligor of the transferable record rights equal to those of a
4 maker, and specifically restates the warranty on payment given to the obligor. Subsection (d) is
5 intended to make clear that once payment is made to a person in control, the obligation is
6 discharged completely. This is carried through in the exception in subsection (b) to the rights
7 acquired with respect to the transferable record.

8 6. Subsection (e) restates the obligor's right to have the transferable record made available
9 for purposes of assuring the correct person to pay.

10 **PART 2**

11 **GOVERNMENTAL ELECTRONIC RECORDS**

12 **SECTION 201. CREATION AND RETENTION OF ELECTRONIC RECORDS**
13 **AND CONVERSION OF WRITTEN RECORDS BY GOVERNMENTAL AGENCIES.**

14 [Each governmental agency] [The designated state officer] of this State shall determine if, and
15 the extent to which, it will create and retain electronic records and convert written records to
16 electronic records.

17 **Source:** Massachusetts Electronic Records and Signatures Act Section 3 (Draft November 4,
18 1997)

19 **Reporter's Notes:** See Notes following Section 203.

20 **SECTION 202. ACCEPTANCE AND DISTRIBUTION OF ELECTRONIC**
21 **RECORDS BY GOVERNMENTAL AGENCIES.**

22 (a) Except as otherwise provided in Section 111(e), [each governmental agency] [the
23 designated state officer] of this State shall determine whether, and the extent to which, it will
24 send and accept electronic records and electronic signatures to and from other persons, and
25 otherwise create, use, store, and rely upon electronic records and electronic signatures.

26 (b) In a case governed by subsection (a), the [governmental agency] [designated state

1 officer], by appropriate regulation giving due consideration to security, shall specify:

2 (1) the manner and format in which the electronic records must be created, sent,
3 received, and stored[, and the systems established for such purposes];

4 (2) if electronic records must be electronically signed, the type of electronic
5 signature required, the manner and format in which the electronic signature must be affixed to the
6 electronic record, and the identity of, or criteria that must be met by, any third party used by a
7 person filing a document to facilitate the process;

8 (3) control processes and procedures as appropriate to ensure adequate
9 preservation, disposition, integrity, security, confidentiality, and auditability of electronic records;
10 and

11 (4) any other required attributes for electronic records which are currently specified
12 for corresponding nonelectronic records, or reasonably necessary under the circumstances.

13 (c) Except as otherwise provided in Section 111(e), this [Act] does not require any
14 governmental agency of this State to use or permit the use of electronic records or electronic
15 signatures.

16 **Source:** Illinois Model Section 801; Florida Electronic Signature Act, Chapter 96-324, Section 7
17 (1996).

18 **Reporter's Notes:** See Notes following Section 203.

19 **SECTION 203. INTEROPERABILITY.** Regulations adopted by [a governmental
20 agency] [designated state officer] of this State pursuant to Section 202 must be designed to
21 encourage and promote consistency and interoperability with similar requirements adopted by
22 other governmental agencies of this and other States and the federal government, and
23 nongovernmental persons interacting with governmental agencies of this State. If appropriate,

1 those regulations must specify differing levels of standards from which governmental agencies of
2 this State may choose in implementing the most appropriate standard for a particular application.

3 **Source:** Illinois Model Section 803.

4 **Committee Votes:** To delete bracketed provisions in sections 201, 202 and to delete former
5 section 503. Yea - 3 Nay - 0 (October, 1998)

6 **NOTES TO THIS DRAFT:** The only change to the prior draft is the addition of a state option
7 for the appropriate authority within the state to determine the records and signatures which may be
8 done electronically. The states are now given the option to allow governmental agencies to
9 decide, or to assign the task to a central state officer.

10 **Reporter's Notes to Part 2.** This Part addresses the expanded scope of this Act.

11 1. Section 201 authorizes state agencies to use electronic records and electronic signatures
12 generally for intra-governmental purposes, and to convert written records and manual signatures
13 to electronic records and electronic signatures. By its terms the section gives enacting legislatures
14 the option to leave the decision to use electronic records or convert written records and signatures
15 to the governmental agency or assign that duty to a designated state officer. It also authorizes the
16 destruction of written records after conversion to electronic form. Bracketed language *requiring*
17 the appropriate state officer to issue regulations governing such conversions was deleted by the
18 Committee at the October, 1998 meeting. The Committee also deleted former section 503
19 because it was considered inappropriate to provide for a single mechanism for promulgation of
20 regulations in every state.

21 2. Section 202 has been revised along the model of the pending Illinois legislation and broadly
22 authorizes state agencies to send and receive electronic records and signatures in dealing with
23 non-governmental persons. Again, the provision is permissive and not obligatory (see subsection
24 (c)). However, it has been clarified to provide that with respect to electronic records used for
25 evidentiary purposes, Section 111 will apply unless a particular agency expressly opts out.

26 3. Section 203 requires regulating authorities to take account of consistency in applications and
27 interoperability to the extent practicable when promulgating regulation. This section is critical in
28 addressing the concerns of many at our meetings that inconsistent applications may promote
29 barriers greater than currently exist.

30 **PART 3**

31 **MISCELLANEOUS PROVISIONS**

32 **SECTION 301. SEVERABILITY CLAUSE.** If any provision of this [Act] or its
33 application to any person or circumstance is held invalid, the invalidity does not affect other
34 provisions or applications of this [Act], which can be given effect without the invalid provision or
35 application, and to this end the provisions of this [Act] are severable.

1 **Source:** Article 1 Draft Section 1-106.

2 **SECTION 302. EFFECTIVE DATE.** This [Act] takes effect....

3 **Source:**

4 **SECTION 303. SAVINGS AND TRANSITIONAL PROVISIONS.**

5 **Source:**