UNIFORM ELECTRONIC TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MARCH 19, 1999

UNIFORM ELECTRONIC TRANSACTIONS ACT

With Reporter’s Notes

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ON UNIFORM STATE LAWS

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PART 1
GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS.

In this [Act]:

(1) "Agreement" means the bargain of the parties in fact as found in their language or inferred from other circumstances, and rules, regulations, and procedures given the effect of agreements under rules of laws otherwise applicable to a particular transaction. [Whether an agreement has legal consequences is determined by this [Act], if applicable, or otherwise by other applicable rules of law.]

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

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

(4) “Consumer” means an individual involved in a transaction primarily for personal, family, or household purposes.

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

(6) "Contract" means the total legal obligation resulting from the parties'
agreement as affected by this [Act] and other applicable rules of law.

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

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

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

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

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

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

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

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

(13 45) "Person" means an individual, corporation, business trust, estate, trust,
partnership, limited liability company, association, joint venture, two or more persons having a
joint or common interest; governmental agency, or public corporation, or any other legal or
commercial entity.

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

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

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

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

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

(16 21) “Transaction” means an action or set of actions relating to the conduct of
business or governmental affairs and occurring between two or more persons relating to the
conduct of business or governmental affairs.

(17 25) "Transferable record" means an electronic record, other than a writing,
that (a) if the electronic record were in writing would be a note under [Article 3 of the Uniform
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Commercial Code], or chattel paper under [Article 9 of the Uniform Commercial Code], or a
document of title under [Article 1 of the Uniform Commercial Code] and (b) the obligor has
agreed expressly is subject to the provisions of this Act. , if the record were in writing.

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

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

Reporter’s Notes:

1. "Agreement"

Committee Votes:

1. To delete the concept of manifestation of assent from the definition - By consensus (no
formal vote) (Sept. 1997)

2. To delete course of performance, course of dealing and usage of trade: Committee 4 Yes -
2 No; Observers 6 Yes - 1 No. (Jan. 1998)

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

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

Reporter’s Notes:
At the September, 1997 Meeting the definition of agreement which included terms to which a
party manifested assent was rejected. The consensus of both the Committee and observers was
that there was no need to separate manifestations of assent from the language and circumstances
which comprise the bargain in fact of the parties as part of the definition of agreement. Rather
the Reporter was directed to return to the definition of agreement in the Uniform Commercial
Code. Accordingly, the definition in the November, 1997 Draft was taken from the most recent
revision to Article 1.

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

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

Whether the parties have reached an agreement is determined by their express language
and surrounding circumstances. The Restatement of Contracts §3 provides that
"An agreement is a manifestation of mutual assent on the part of two or more persons. A
bargain is an agreement to exchange promises or to exchange a promise for a
performance or to exchange performances."
The Uniform Commercial Code specifically includes in the circumstances from which an
agreement may be inferred "course of performance, course of dealing and usage of trade..." as
defined in the UCC.

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

2. "Automated Transaction."
Committee Vote: To delete references to governmental and commercial: Committee 4 Yes
(Chair broke tie) - 3 No; Observers 19 Yes - 1 No. (Jan. 1998)

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

Reporter’s Notes:
Article 2B has conformed its terminology with this Act by adopting "automated transaction" in
place of "electronic transaction." The definitions in each are conceptually the same. The
definition in this Act is broader, going beyond contract formation to performances under a
contract and other obligations accomplished by electronic means in a transaction, because of the
diversity of transactions to which this Act may apply.
As with electronic agents, this definition addresses the circumstance where electronic records may result in action or performance by a party although no human review of the electronic records is anticipated. Section 113 provides specific contract formation rules where one or both parties do not review the electronic records.

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

4. “Consumer.” NOTES TO THIS DRAFT: This definition has been deleted since all references to consumers have been deleted by the Committee.

5. “Consumer transaction.” NOTES TO THIS DRAFT: This definition has been deleted since all references to consumers have been deleted by the Committee.

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

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

Reporter’s Notes:

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

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

An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent by definition is capable, within the parameters of its programming,
of initiating, responding or interacting with other parties or their electronic agents once it has 
been activated by a party, without further attention of that party. This Act (Section 114) provides 
that a person is responsible for actions taken and accomplished through electronic agents in the 
absence of human intervention.

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

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

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

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

It is important to realize that this definition is intended to and does cover the standard 
webpage click through process, where the process includes identification of the person. For 
example, when a person orders goods or services through a vendor’s website, the person will be 
required to provide identifying information as part of a process which will result in receipt of the 
goods or services. When the customer ultimately gets to the last step and clicks “I agree,” the 
person has adopted the process which identifies the person, and has done so with the intent to
associate the person with the record of that process. The actual effect of the electronic signature will be determined from all the surrounding circumstances, however, the person adopted an identifying process which the circumstances indicate s/he intended to have the effect of getting the goods/services and being bound to pay for them.

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

**Reporter’s Notes:**

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

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

10. "Governmental agency."

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

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

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

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

13. “Person.” **NOTES TO THIS DRAFT:** This definition has been revised for clarity based on the suggestions of the Style Committee.
14. "Record." This is the standard Conference formulation for this definition.

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

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

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

17. Signature.

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

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

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

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

At the April 1998 meeting a good deal of discussion related to the propriety of delineating the specific functions of a signature. The Committee deleted from former Section 302 a provision establishing the specific effects of an electronic signature. The one critical aspect of a signature that was recognized was its purpose of identifying a person. Accordingly, the definition has been revised to reflect the principal function of a signature as an identifying mark. In addition, some volition must attach to application of a mark and this is noted by the requirement that the mark be "executed or adopted" by a person. This draft also requires that the mark, etc, be executed or adopted for the purpose of associating the person with the record, in order to distinguish a signature from a mere autograph.
At the Annual Meeting it was suggested that an unrecorded statement over the phone might qualify as a signature under this broadened definition. In order to address this concern the definition now indicates that the symbol or sound must be attached to or associated with the record. The effect of the signature is left to the underlying substantive law in light of the facts and circumstances. See Section 111. In short, the definition here reflects the bare minimum as to the function of a signature, with the substantive effect being treated in Section 111 and the substantive law underlying the transaction.

18. “Transaction.” NOTES TO THIS DRAFT: This definition has been revised for clarity based on the comments of the Style Committee. 

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

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

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

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

   B. In keeping with the general tenor of this Act, any provision should be as simple and straightforward as possible.

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

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

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

2. The definition has been revised to delete coverage of chattel paper and documents of title. As to chattel paper, revised Article 9 addresses the concept of electronic chattel paper. The concept of chattel paper is uniquely an Article 9 concept, and it is felt that treatment of chattel paper is best left to Article 9 in light of the current revision. Regarding documents of title, these records can be included with little difficulty. However, considering the limited scope and impact of state law in this area, the lack of any significant evidence of commercial demand that these records be covered in the UETA, and the activity of federal regulators (e.g., electronic cotton warehouse receipts), these records have also been eliminated from coverage. Accordingly, the scope of coverage in the UETA is limited to electronic records which would be promissory notes.
under Article 3 if they were in writing.

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

20. "Writing." This definition reflects the current UCC definition.

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

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

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

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

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

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

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

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

   (C) Article 4A Sections 4A-202(b and c); 4A-203(a)(1); 4A-207(c)(2); 4A-208(b)(2); 4A-305(c); and 4A-305(d)]
(4) [Revised Articles 2, 2A and 9 and new Article 2B, when enacted]

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

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

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

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

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

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

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

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

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

1. In former Section 103:
   a. To delete references to commercial and governmental transactions - Committee
   Yes Unanimous Observers 12 Yes - 0 No (Jan. 1998).
   b. To incorporate supplemental principles as part of Scope section - Committee
   Yes Unanimous Observers 12 Yes - 0 No (Jan. 1998).
   c. To delete reference to supplemental principles (April 1998)

2. In former Section 104
   a. To delete "repugnancy" language, and provide that Act will apply except for
   specific exclusions. Committee 4 Yes - 1 No Observers 14 Yes - 1 No (with a number of
   abstentions)(Jan. 1998)
   b. To delete former subsection (b)(6) and former section (c) (February 1999)

NOTES TO THIS DRAFT:

1. This act affects the medium in which information, records and signatures may be
   presented and retained under current legal requirements. While it covers all electronic records
   and signatures which are used between two people, the operative provisions of the act relate to
   requirements for writings and signatures under law. Accordingly, the exclusions in subsection (b)
   focus on those legal rules requiring certain writing and signature requirements which will not
   be affected by this act. Because an electronic record/signature may be used for purposes of more than one legal requirement, it is important to
   make clear, despite any apparent redundancy, in subsection (c) that an electronic record used for
   purposes of a law which is unaffected by this act under subsection (b) may nonetheless be used
   and validated for purposes of other laws not excluded by subsection (b). For example, this Act
   does not apply to an electronic record of a check when used in a transaction governed by Article
   4 of the UCC, i.e., the Act does not validate so-called electronic checks. However, for purposes
   of check retention statutes, the same electronic record of the check is covered by this Act, so that
   retention of an electronic image/record of a check will satisfy such retention statutes, so long as
   the requirements of Section 111 are fulfilled.

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

   Paragraph (1) excludes wills, codicils and testamentary trusts. Paragraph (2) excludes
   UCC Articles 5, 7 and 8. Articles 5 and 8 are excluded because they already provide significant
   media neutrality. Article 7 is excluded for the reasons noted in the notes to the definition of
   Transferable Record, notably the limited impact of state law on this area, and the lack of pressure
   for inclusion as part of this act. Paragraph (3) excludes Articles 3, 4 and 4A in toto, except for
   specific sections considered “ministerial” and so amenable to the use of electronic records and
   signatures. THESE SECTIONS HAVE BEEN NOTED IN BRACKETS FOR THE
COMMITTEE’S CONSIDERATION. If the Committee determines that inclusion of such sections creates more problems than it solves, then articles 3, 4 and 4A can be included in paragraph (2) and excluded totally from the operation of this act.

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

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

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

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

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

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

**Reporter’s Note:**

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

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

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

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

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

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

(b) The use of an electronic record or electronic signature in a transaction must be reasonable. Whether the use of an electronic record or electronic signature in a transaction is
reasonable must be determined from the circumstances and context in which it is used, including
the parties’ statements and agreement, if any, and other applicable law. The obligation of
reasonableness prescribed in this subsection may not be disclaimed by agreement.

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

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

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

NOTES TO THIS DRAFT:

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

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

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

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

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

Reporter’s Note:

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

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

SECTION 105. APPLICATION AND CONSTRUCTION. This [Act] must be construed and applied consistently with reasonable practices under the circumstances, and to facilitate electronic transactions, and to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.
NOTES TO THIS DRAFT: THE COMMITTEE ON STYLE CONTINUES TO INSIST THIS SECTION SHOULD BE DELETED. The additional language is from a standard provision usually included in Part 3 on Miscellaneous provisions.

**Reporter's Note:**

The purposes and policies of this Act are

- a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;
- b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;
- c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;
- d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;
- e) to promote uniformity of the law among the states (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;
- f) to promote public confidence in the validity, integrity and reliability of electronic commerce and governmental transactions; and
- g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

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

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

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

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

(d) If a rule of law requires a signature, or provides consequences in the absence of a signature, the rule of law is satisfied with respect to an electronic record if the electronic record includes an electronic signature.
[(e) In As part of a transaction, nothing in this [Act] precludes a person from establishing may establish reasonable requirements regarding the type of records or signatures acceptable to it.]

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

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

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

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

4. Section 107 is another example of additional requirements which may prevent the validity of an electronic record in a particular case. In section 107 the legal requirement addressed in the provision of information in writing. The section then sets forth the standards to be applied in determining whether the provision of information by an electronic record is the equivalent of the provision of information in writing. The requirements in section 107 are in addition to the bare validation that occurs in this section. Subsections (c and d) could be prefaced to make them subject to Section 104 and Section 107 if that is considered necessary.
5. Subsection (e) has been revised to reflect comments at the February 1999 meeting. It has been BRACKETED FOR RECONSIDERATION by the Committee in light of the revision to Section 104. IN THE ABSENCE OF DIRECTION FROM THE COMMITTEE, THE REPORTER WILL DELETE SUBSECTION (e) IN THE ANNUAL MEETING DRAFT.

Reporter’s Note:

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

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

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

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

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

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

4. Subsection (e) is a particularized application of Section 104, to make clear that parties retain control in determining the types of records to be used and accepted in any given transaction.
For example, in the Chrysler recall hypothetical referred to in Note 2 to Section 104, although Chrysler cannot unilaterally require recall notices to be effective under this Act, it may indicate the method of recall in a purchase agreement with a customer. If the customer objects, the customer would have the right to establish reasonable requirements for such notices.

SECTION 107. EFFECT OF SECURITY PROCEDURE.

ALTERNATIVE 1

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

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

(B) application of the security procedure verified

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

(ii) the integrity of the informational content of the electronic record;

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

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

ALTERNATIVE 2

(a) An agreement to be bound by the results of a security procedure is unenforceable [in a
consumer transaction].

END OF ALTERNATIVES

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

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

SECTION 107 108. PROVISION OF INFORMATION IN WRITING.

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

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

(2) capable of retention for subsequent reference by the person to which it is provided:

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

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

NOTES TO THIS DRAFT:

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

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

Reporter’s Notes: This section is included in response to suggestions made in the Report of the
Task Force on State Law Exclusions to protect parties entitled to receipt of notice in writing. The provision allows parties to provide information electronically so long as the recipient has the ability to retain or dispose of the information once received. The concern was prompted by the recognition that electronic information may be given to a person while the person lacks the ability to copy or download the information.

SECTION 108-109. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE TO PERSON.

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

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

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

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

NOTES TO THIS DRAFT:
1. This section now combines the substance of former section 109 and 111 regarding the attribution and effect of both electronic records and electronic signatures. The provisions for both attribution and effect are now the same regarding both records and signatures - a primary criticism of the prior draft.

2. Nothing in this section affects the use of a signature as an attribution device. Indeed, a signature is often the primary method for attributing a record to a person. However, it is not the only method for attribution, and there may be circumstances where attribution of an electronic signature is necessary, e.g., in the face of a claim of forgery or unauthorized signature. Accordingly, attributing electronic records and signatures are now subject to the same attribution in fact standard, provable by any means including evidence of the efficacy of security procedures. The inclusion of a specific reference to security procedures as a means of proving attribution is
salutary because of the unique importance of security procedures in the electronic environment. Indeed, in certain processes, a technical and technological security procedure may be the only way to convince a trier of fact that a particular electronic record or signature was that of a particular person. The reference to security procedures is not intended to suggest that other forms of proof of attribution should be accorded less persuasive effect, and the comment will so indicate.

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

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

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

SECTION 109

DETECTION OF EFFECT OF CHANGES AND ERRORS.

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

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

(b) In an automated transaction involving an individual, the individual may avoid is not responsible for the effect of an electronic record that resulted from an error by the individual made
in dealing with the electronic agent of another person only if the electronic agent did not provide
an opportunity for the prevention or correction of the error and, at the time the individual learns
of the error, the individual:

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

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

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

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

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

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

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

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

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

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

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

7. The most important limitation on the operation of subsection (b) relates to the ability of
the party acting through the electronic agent/machine, to build in safeguards which enable the
individual to prevent the sending of an erroneous record, or correct the error once sent. For
example, the electronic agent may be programmed to provide a “confirmation screen” to the
individual setting forth all the information the individual initially approved. This would provide
the individual with the ability to prevent the erroneous record from ever being sent. Similarly, the
electronic agent might receive the record sent by the individual and then send back a confirmation
which the individual must again accept before the transaction is completed. This would allow for
correction of the erroneous record. In either case, the electronic agent would “provide an
opportunity for prevention or correction of the error,” AND THE SUBSECTION WOULD NOT
APPLY.

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

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

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

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

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

SECTION 111. EFFECT OF ELECTRONIC SIGNATURES.

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

(b) A person bound by the operations of an electronic agent under Section 116 is deemed
to have signed an electronic record produced by the agent on its behalf, whether or not the
operations result in the attachment or application of an electronic signature to the electronic record.

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

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

SECTION 110 112. NOTARIZATION AND ACKNOWLEDGMENT. If a rule of law requires that a signature be notarized or acknowledged, or provides consequences in the absence of a notarization or acknowledgment, the rule of law is satisfied with respect to an electronic signature if a security procedure was applied to the electronic signature which establishes the identity of the person signing the electronic record [and that the electronic record has not been altered since it was electronically signed].

Source: New

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

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

SECTION 111 113. RETENTION OF ELECTRONIC RECORDS; ORIGINALS.

(a) If a rule of law requires that certain records be retained, that requirement is met by retaining an electronic record of the information in the record, if the electronic record is shown to reflect accurately the information set forth in the record after it was first generated in its final
form as an electronic record or otherwise, and the electronic record remains accessible for later reference.

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

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

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

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

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

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

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

[(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the front and back of the check in accordance with subsection (a).]
(f) A record retained as an electronic record in accordance with subsection (a) satisfies rules of laws requiring a person[, other than a governmental agency,] to retain records for evidentiary, audit, or like purposes, unless a law promulgated after the effective date of this [Act] until a governmental agency of this State adopts rules of law specifically prohibits the use of an electronic records for a specified purposes within the jurisdiction of the governmental agency.

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

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

NOTES TO THIS DRAFT:

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

2. THE BRACKETED LANGUAGE IN SUBSECTION (d) HAS BEEN RETAINED FOR THE COMMITTEE’S CONSIDERATION. BASED ON COMMENTS THAT IT IS INAPPROPRIATE TO OVERRIDE COMMERCIAL PRACTICE BY STATUTE, UNLESS THE COMMITTEE ADVISES OTHERWISE THE BRACKETED LANGUAGE WILL BE DELETED IN THE ANNUAL MEETING DRAFT.

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

4. The bracketed language in subsection (f) regarding an exclusion for governmental agencies is also RETAINED FOR THE COMMITTEE’S CONSIDERATION. IN THE ABSENCE OF OTHER INSTRUCTION THIS LANGUAGE ALSO WILL BE DELETED.
IN THE ANNUAL MEETING DRAFT. A governmental agency is able to exempt itself generally, and specifically under Part 2, and it is not necessary to provide an exclusion here.

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

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

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

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

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

If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."
This draft adopts as the appropriate standard that noted in the rules of evidence.

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

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

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

SECTION 112 114. ADMISSIBILITY IN EVIDENCE.

(a) In a legal proceeding, evidence of an electronic record or electronic signature may not be excluded because: (1) on the sole ground that it is an electronic record or electronic signature; 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 form.

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

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

NOTES TO THIS DRAFT: This section has been revised for clarity based on comments received from the Committee on Style. THE BRACKETED LANGUAGE IS PRESENTED FOR THE COMMITTEE’S CONSIDERATION AS TO THE PROPRIETY OF STATUTORILY DIRECTING A COURT ON THE MATTERS TO BE CONSIDERED IN DETERMINING THE PERSUASIVE EFFECT OF EVIDENCE.
**Reporter's Note:** Like section 106, subsection (a)(1) prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented. Subsection (a)(2) also precludes inadmissibility on the ground an electronic record is not an original.

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

**SECTION 113 ¶5. FORMATION OF CONTRACT.**

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

(1) when the acceptance is received; or

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

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

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

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

(c) The terms of a contract are determined by the substantive rules of law applicable to
the particular contract.

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

NOTES TO THIS DRAFT:

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

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

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

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

On the other hand it may be possible that my actions indicate agreement to a particular
term. For example, I go to a person’s site and am confronted by an initial screen which advises
me that the information at this site is proprietary, that I may use the information for my own
personal purposes, but that, by clicking below, I agree that any other use without the site owner’s
permission is prohibited. If I click “agree” and download the information and then use the
information for other, prohibited purposes, should I be bound by the click? It seems the answer
properly should be yes. If the owner can show that the only way I could have obtained the
information was from his website, and that the process to access the subject information required
that I must have clicked the I “agree” button after having the ability to see the conditions on use, I
have performed actions which I was free to refuse, which I knew would cause the site to grant me
access. The terms of the resulting contract would be determined under general contract principles,
but would include the limitation on my use of the information, as the *quid pro quo* for granting me
access to the information. There would NOT be an electronic signature, because the process
included no identification. If a “signed writing” were required this would be unenforceable.
However, it may be sufficient to establish that the electronic record showing this process is
attributable to me under section 108, and that may be done in any manner reasonable including
showing that, of necessity, I could only have gotten the information through the process at the
website - a very difficult proof, but available nonetheless.
SECTION 114 116. OPERATIONS OF ELECTRONIC AGENTS; AUTOMATED TRANSACTIONS.  (a) In this section, "inadvertent error" means an error by an individual made in dealing with an electronic agent of another person if the electronic agent of the other person did not allow for the prevention or correction of the error.

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

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

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

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

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

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

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

(3) has not used or received the benefit or value of the consideration, if any,

received from the other person.

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

NOTES TO THIS DRAFT:

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

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

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

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

(b) Unless otherwise agreed between the sender and the recipient, an electronic record is received when the electronic record enters an information processing system in a form capable of
being processed by that system that the recipient has designated or uses or has designated for the purpose of receiving electronic records or information of the type sent, in a form capable of being processed by that system, and from which the recipient is able to retrieve the electronic record. An electronic record is also received when the recipient learns of its content from a record.

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

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

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

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

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

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

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

NOTES TO THIS DRAFT:

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

2. Subsection (b) has been revised to clarify that the recipient retains control of the place of receipt by the requirement that the system be specified or used by the recipient, and that the
system be used or designated for the type of record being sent. The fact that many people have multiple e-mails for different purposes led to this clarification. The purpose is to assure that recipients can designate the e-mail address or system to be used in a particular transaction. For example, I would retain the ability to designate my home e-mail for personal matters, work for official business, or a separate organizational e-mail solely for the business purposes of that organization. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes and except to the extent that actual knowledge upon seeing it at home would qualify as receipt under the otherwise applicable substantive law.

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

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

Reporter’s Note:

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

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

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

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

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

Accordingly, where the place of sending or receipt is an issue, the relevant location should be the
location of the sender or recipient and not the location of the information processing system.

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

SECTION 116. CONTROL OF TRANSFERABLE RECORDS.

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

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

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

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

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

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

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

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

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

(2) if the person acquires control in a manner consistent with [Section 3-302(a) of
the Uniform Commercial Code], the person has the rights with respect to the record that a holder
in due course of a note would have if the record were a note; and

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

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

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

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

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

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

(d) Discharge of the obligation is effective against any person in control of the transferable
record if
(1) the discharge is made by or on behalf of the person in control of the transferable record at the time of the discharge; or

(2) the obligation would otherwise be discharged under the substantive law applicable to the transaction.

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

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

NOTES TO THIS DRAFT:

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

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

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

4. Subsection (b) provides rules for determining the rights of a party in control of a transferable record. The subsection makes clear that the rights are determined under this section, and not under other law. The provisions in paragraphs (2) and (3) regarding the manner of acquisition of control can be spelled out in these sections if the reference to Articles 3 and 9 are considered inappropriate. However, the formulation is sufficient to assure that those
considerations on acquisition are pulled into this statute. Paragraph (4) is intended to assure that requirements related to notions of possession are not incorporated into this statute.

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

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

PART 2

GOVERNMENTAL ELECTRONIC RECORDS

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

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

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

Reporter’s Notes: See Notes following Section 203.

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

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

(b) In a case governed by subsection (a), the [governmental agency] [designated state
officer], by appropriate regulation giving due consideration to security, shall specify:

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

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

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

and

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

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

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

Reporter’s Notes: See Notes following Section 203.

SECTION 203. INTEROPERABILITY. Regulations adopted by [a governmental agency] [designated state officer] of this State pursuant to Section 202 must be designed to encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other States and the federal government, and nongovernmental persons interacting with governmental agencies of this State. If appropriate,
those regulations must specify differing levels of standards from which governmental agencies of this State may choose in implementing the most appropriate standard for a particular application.

Source: Illinois Model Section 803.

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

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

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

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

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

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

PART 3

MISCELLANEOUS PROVISIONS

SECTION 301. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act], which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.
Source: Article 1 Draft Section 1-106.

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

Source:

SECTION 303. SAVINGS AND TRANSITIONAL PROVISIONS.

Source: