

DRAFT  
FOR DISCUSSION ONLY

# UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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*WITH PREFATORY AND REPORTER'S NOTES*

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ON UNIFORM STATE LAWS

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March 8, 2007

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**UNIFORM RULES RELATING TO THE DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION**

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# UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

## PREFATORY NOTE

With very few exceptions, when the state rules and statutes concerning discovery in civil cases were promulgated and adopted, information was contained in documents in paper form. Those documents were kept in file folders, filing cabinets, and in boxes placed in warehouses. When a person or business or governmental entity decided a document was no longer needed and could be destroyed, the document was burned or shredded and that was the end of the matter. There was rarely an argument about sifting through the ashes or shredded material to reconstruct a memo which had been sent.

In today's business and governmental world, paper is a thing long past. By some estimates, 93 percent or more of corporate information was being stored in some sort of digital or electronic format.<sup>1</sup> This difference in storage medium for information creates enormous problems for a discovery process created when there was only paper. Principal among differences is the sheer volume of information in electronic form, the virtually unlimited places where that information may appear, and the dynamic nature of electronic information. These differences are well documented in the lengthy quote which follows from the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). This report recommended adoption of new Federal Rules to accommodate the differences.

The *Manual for Complex Litigation* (4<sup>th</sup>) illustrates the problems that can arise with electronically stored information.

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Electronically stored information may exist in dynamic databases that do not correspond to hard copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers - including the simple act of turning a computer on and off or accessing a particular file - can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be

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<sup>1</sup> "How much information 2003?" at [www.sims.berkeley.edu/research/projects/how-much-info-2003](http://www.sims.berkeley.edu/research/projects/how-much-info-2003).

“deleted” yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery.<sup>2</sup>

The report from which this quote is taken is the work product of a six-year effort by the Civil Rules Advisory Committee. The effort began in 2000, when that Committee conducted a series of national conferences to determine whether the Federal Rules should be amended to accommodate the differences between information contained in paper documents and electronically stored information. The Civil Rules Advisory Committee ultimately promulgated a package of rules amendments for public comment in August of 2004. That package contained amendments to (1) provide early attention to electronic discovery issues, (2) provide better management of discovery into electronically stored information, (3) set out a procedure for assertions of privilege after production, (4) clarify the application of the rules relating to interrogatories and requests for production of documents to electronically stored information, and (5) clarify the application of the sanctions rules to electronically stored information.

The proposed Federal Rules amendments generated tremendous interest from the bench and bar. The Committee held public hearings on the proposed amendments in late 2004 and early 2005. Seventy-four witnesses testified, many of whom also submitted written comments. An additional 180 other written comments were submitted. The Committee used the information gained during the public comment period to further revise the rules. The revised rules package became effective on December 1, 2006.

The NCCUSL Drafting Committee held its initial meeting on April 21-22, 2006 in Detroit, Michigan. At that time, the Drafting Committee decided not to reinvent the wheel. It was the Drafting Committee’s judgment that the significant issues relating to the discovery of information in electronic form had been vetted during the Federal Rules amendment process. Accordingly, this draft mirrors the spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure. The Drafting Committee has freely adopted, often verbatim, language from both the Federal Rules and comments that it deemed valuable. The rules are modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information.

The draft originally took the form of a proposed statute entitled “Uniform Discovery of Electronic Records Act”. At the request of the Drafting Committee, on November 14, 2006, the NCCUSL Executive Committee authorized that the draft take the form of proposed judicial rules and be re-titled “Uniform Rules Relating to the Discovery of Electronically Stored Information”.

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<sup>2</sup> Report of the Civil Rules Advisory Committee dated May 17, 2004 and revised August 3, 2004.

1                   **UNIFORM RULES RELATING TO THE DISCOVERY OF**  
2                   **ELECTRONICALLY STORED INFORMATION**

3  
4           **RULE 1. DEFINITIONS.** In these rules:

5           (1) “Discovery” means the process of providing information in a civil proceeding in the  
6 courts of this state pursuant to [insert reference to state rules of civil procedure] or these rules.

7           (2) “Electronic” means relating to technology having electrical, digital, magnetic,  
8 wireless, optical, electromagnetic, or similar capabilities.

9           (3) “Electronically stored information” means information that is stored in an electronic  
10 medium and is retrievable in perceivable form.

11           (4) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
12 limited liability company, association, joint venture, public corporation, government or  
13 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

14                   **Reporter’s Notes**

15           The definition of “electronically stored information” is intended to encompass future  
16 developments in computer technology. The rules are intended to be broad enough to cover all  
17 types of computer-based information, and flexible enough to encompass future changes and  
18 development. The term “electronically stored information” is derived from the Federal Civil  
19 Rule Amendments effective December 1, 2006, and, like its NCCUSL equivalent terms  
20 “information” and “record”, is intended to be expansive and to encompass any type of  
21 information that is stored electronically.

22  
23           The term “electronically stored information” is not intended to include traditional  
24 “writings” (i.e., information stored solely on paper or another tangible, non-electronic, medium).  
25 Discovery of “writings” is the subject of existing rules of civil procedure.

26  
27                   **Judicial Note**

28           The term “civil proceeding” as used in the definition of “Discovery” may need to be  
29 modified in certain states to specify that it includes civil courts with differing or limited  
30 jurisdiction within the same state. As the term is used in subsection (1), it is intended to

encompass not only civil courts of general jurisdiction, but also courts of limited jurisdiction such as domestic relations and probate courts. The term is used in various rules, including Rules 3, 4 and 7.

**RULE 2. APPLICABILITY.** These rules supplement [insert reference to state rules of civil procedure].

### **Reporter's Notes**

These rules are not intended to apply to cases where discovery of electronically stored information is not likely. Existing rules of civil procedure govern discovery in such cases. These rules supplement existing rules of civil procedure, and are intended to be applied in a manner which is consistent with, and not in derogation of, existing discovery procedures in the applicable state.

### **RULE 3. CONFERENCE CONCERNING DISCOVERY OF ELECTRONICALLY STORED INFORMATION; REPORT TO THE COURT.**

(a) Not later than [21] days after each responding party first appears in a civil proceeding, the parties shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding. If discovery of electronically stored information is reasonably likely to be sought, the parties at the conference shall discuss:

- (1) any issues relating to preservation of discoverable information;
- (2) the forms in which the information will be produced;
- (3) the time within which the information will be produced;

(4) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials, including whether such claims may be asserted after production;

(5) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the civil proceeding;

(6) whether allocation among the parties of the expense of production is appropriate; and,

(7) any other issue relating to the discovery of electronically stored information.

(b) If discovery of electronically stored information is reasonably likely to be sought in the proceeding, the parties shall:

- (1) jointly arrange the conference required under subsection (a);
- (2) develop a proposed plan relating to discovery of the information; and
- (3) prepare a written report, which must be submitted to the court not later than [14] days after the conference, that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

#### **Reporter's Notes**

There is almost universal agreement that early attention to issues relating to the discovery of electronically stored information, including preservation issues, facilitates orderly discovery. This rule requires the parties to discuss issues relating to the discovery of electronically stored information at the outset of the case, and as each additional party appears in the proceeding. While the rule requires more than one conference and report when additional parties appear in the action, it may be preferable that the parties ultimately prepare a single, comprehensive report.

The parties are required to confer regarding the form or forms of production, which may include the extent to which metadata or types of embedded data, if present, are to be preserved and produced. The parties should also confer regarding the form or forms in which the information is to be maintained prior to final resolution, by the court or the parties, of issues relating to the form of production.

Some local Federal Rules require counsel, in advance of this sort of a conference, to review the potential production of electronically stored information with the client in order to understand how information is stored and how it can be retrieved. While this rule does not expressly impose such an obligation, counsel's meaningful participation in the conference and compliance with discovery obligations require that counsel promptly and diligently familiarize themselves with their clients' information systems to the extent they may be relevant to the issues in dispute. Information systems are complex, and exhibit emergent and self-organizing properties. Often no one person will have a complete understanding of any single information system.



1 The discussion contemplated by this rule would encompass all facets of the discovery of  
2 electronically stored information. This conference may be combined with any other conference  
3 related to discovery required by state rule or statute or by the court.  
4

5 The rule also requires the parties to discuss any issues relating to privilege or to  
6 protection as trial preparation materials that may arise during the course of discovery. Because  
7 of the sheer volume of electronically stored information that may be produced, pre-production  
8 review of the information is often time consuming and expensive. Counsel may wish to explore  
9 the possibility of entering into agreements that would allow production without waiver of  
10 privilege or protection as trial preparation materials.  
11

12 The rule requires the parties to file a report with the court concerning the discovery of  
13 electronically stored information. In states where such a discovery report is otherwise required,  
14 information required to be provided by this rule may simply be included in that report.  
15

16 Any issues about which the parties were unable to reach agreement may be resolved by  
17 the court pursuant to Rule 4.  
18

19 **RULE 4. ORDER RELATING TO DISCOVERY OF ELECTRONICALLY**  
20 **STORED INFORMATION.**

21 (a) The court may issue an order governing the discovery of electronically stored  
22 information pursuant to:

23 (1) a motion by a party seeking discovery of electronically stored information or  
24 by a party or person from which discovery of electronically stored information is sought;

25 (2) stipulation of the parties and, if the person from which discovery of  
26 electronically stored information is sought is not a party, that person; or

27 (3) the court's own motion, after reasonable notice to, and an opportunity to be  
28 heard from, the parties and any person not a party from which discovery of electronically stored  
29 information is sought.

30 (b) An order governing discovery of electronically stored information may address:

31 (1) whether discovery of electronically stored information is reasonably likely to

- 1 be sought in the proceeding;
- 2 (2) preservation of the information;
- 3 (3) the forms in which the information is to be produced;
- 4 (4) the time within which the information is to be produced;
- 5 (5) the permissible scope of discovery of the information;
- 6 (6) the methods for asserting or preserving claims of privilege or of protection of
- 7 the information as trial-preparation material after production;
- 8 (7) the method for asserting or preserving confidentiality and the proprietary
- 9 status of information relating to a party or a person not a party to the proceeding;
- 10 (8) allocation of the expense of production; and
- 11 (9) any other issue relating to the discovery of electronically stored information.

12 **Reporter's Notes**

13 Although this rule does not expressly require the court to issue an order relating to  
14 discovery of electronically stored information, courts are strongly encouraged to do so. Early  
15 intervention by the court may facilitate orderly discovery of such information and avoid  
16 difficulties later in the case.

17  
18 The rule permits the court to issue an order relating to discovery of electronically stored  
19 information pursuant to motion of a party, stipulation of the parties, or on the court's own motion  
20 but only after providing the parties notice and an opportunity to be heard.

21  
22 **RULE 5. LIMITATION ON SANCTIONS.** Absent exceptional circumstances, the  
23 court may not impose sanctions on a party under these rules for failure to provide electronically  
24 stored information lost as the result of the routine, good-faith operation of an electronic  
25 information system.

26 **Reporter's Notes**

27 This rule is identical to its Federal Rule equivalent, Federal Rule 37(f). As noted in the

1 comments to Federal Rule 37(f), the rule responds to a distinctive feature of electronic  
2 information systems, the routine modification, overwriting, and deletion of information that  
3 attends normal use. Under this rule, absent exceptional circumstances, sanctions cannot be  
4 imposed for loss of electronically stored information resulting from the routine operation of the  
5 party's electronic information system if that operation was in good faith.  
6

7 This rule applies to information lost due to the routine operation of an information system  
8 only if the system was operated in good faith. Good faith may require that a party intervene to  
9 modify or suspend features of the routine operation of a computer system to prevent loss of  
10 information if that information is subject to a preservation obligation. When a party is under a  
11 duty to preserve information because of pending or reasonably anticipated litigation, such  
12 intervention in the routine operation of an information system is one aspect of what is often  
13 called a "litigation hold". A party cannot exploit the routine operation of an information system  
14 to evade discovery obligations by failing to prevent the destruction of stored information it is  
15 required to preserve.  
16

17 The steps the party takes to design and implement an effective and appropriate litigation  
18 hold are important to determining whether the routine operation of the information system was in  
19 good faith. Similarly, agreements the parties reached, or orders the court entered, calling for  
20 preservation of specific electronically stored information bear on whether the routine operation  
21 of the electronic information system continued to be in good faith.  
22

23 This rule restricts the imposition of sanctions. It does not prevent a court from making  
24 the kinds of adjustments frequently used in managing discovery if a party is unable to provide  
25 relevant responsive information. For example, a court could order the responding party to  
26 produce an additional witness for deposition, respond to additional interrogatories, or make  
27 similar attempts to provide substitutes or alternatives for some or all of the lost information.  
28

## 29 **RULE 6. REQUEST FOR PRODUCTION.**

30 (a) In a civil proceeding, a party may serve on any other party a request for production of  
31 electronically stored information and for permission to inspect, copy, test, or sample the  
32 information.

33 (b) A party on which a request to produce electronically stored information has been  
34 served shall, in a timely manner, serve a response on the requesting party. The response shall  
35 state, with respect to each item or category in the request:

36 (1) that inspection, copying, testing, or sampling of the information will be

1 permitted as requested; or

2 (2) any objection to the request and the reasons for the objection.

3 **Reporter's Notes**

4 This rule is intended to establish that the discovery of information in electronic form  
5 stands on an equal footing with discovery of paper documents.  
6

7 **RULE 7. FORM OF PRODUCTION.**

8 (a) A party requesting production of electronically stored information may specify the  
9 forms in which each type of information is to be produced.

10 (b) If a party responding to a request for production of electronically stored information  
11 objects to a specified form for producing the information, or if no form is specified in the  
12 request, the responding party shall state in its response the form in which it intends to produce  
13 each type of the information.

14 (c) Unless the parties otherwise agree or the court otherwise orders:

15 (1) if a request for production does not specify a form for producing a type of  
16 electronically stored information, the responding party shall produce the information in a form in  
17 which it is ordinarily maintained or in a form that is reasonably usable; and

18 (2) a party need not produce the same electronically stored information in more  
19 than one form.

20 **Reporter's Notes**

21 The form of production is more important to the exchange of electronically stored  
22 information than it is to the exchange of paper documents. The rule recognizes that  
23 electronically stored information may exist in multiple forms, and that different forms of  
24 production may be appropriate for different types of electronically stored information. The rule  
25 allows the requesting party to specify the form or forms and allows the responding party to  
26 object, and creates a default rule for production if no form is specified.  
27

1           **RULE 8. LIMITATIONS ON DISCOVERY.**

2           (a) Absent a court order to the contrary pursuant to subsection (c), a party is not required  
3 to provide discovery of electronically stored information from sources that the party identifies as  
4 not reasonably accessible because of undue burden or expense. In its objection to the production  
5 of such information, the party shall identify the reason for such undue burden or expense.

6           (b) On motion to compel discovery or for a protective order relating to the discovery of  
7 electronically stored information, a party claiming that the information is from a source that is  
8 not reasonably accessible because of undue burden or expense bears the burden of so  
9 demonstrating.

10          (c) Even if the party from which discovery of electronically stored information is sought  
11 establishes that the information is from a source that is not reasonably accessible because of  
12 undue burden or expense, the court may order discovery if the requesting party shows good  
13 cause. In determining if good cause exists, the court shall consider whether the burden and cost  
14 is justified under the circumstances of the case.

15          (d) If the court finds good cause for production of electronically stored information from  
16 a source that is not reasonably accessible, it may set conditions for its discovery which may  
17 include allocation of the expense of production.

18          (e) The court shall limit the frequency or extent of production of any electronically  
19 stored information, even from a source that is reasonably accessible, if the court determines that:

20               (1) it is possible to obtain the information from some other source that is more  
21 convenient, less burdensome, or less expensive, or the discovery sought is unreasonably  
22 cumulative or duplicative;

23               (2) the party seeking discovery has had ample opportunity by discovery in the

1 action to obtain the information sought; or

2 (3) the likely benefit of the information outweighs the burden or expense of the  
3 proposed discovery, taking into account the needs of the case, the amount in controversy, the  
4 resources of the parties, the importance of the issues in the litigation, and the importance of the  
5 requested discovery in resolving the issues.

### 6 **Reporter's Notes**

7 This rule is designed to address the unique issues raised by the difficulties in locating,  
8 retrieving and providing discovery of electronically stored information. Information that is from  
9 sources that are reasonably accessible is subject to discovery without intervention of the court,  
10 subject to the limitations generally applicable to discovery under the state's existing discovery  
11 rules. Discovery of electronically stored information that is from sources that are reasonably  
12 accessible is also subject to the limitation imposed by this rule, which balances the likely benefit  
13 of the information against the burden of its production.

14  
15 Discovery of electronically stored information that is from sources that are not reasonably  
16 accessible is required, over objection, only upon a showing of good cause. In determining  
17 whether good cause for production exists, the court should consider the limitations of subsection  
18 (e) that balance the expense and potential benefits of discovery. The decision whether to require  
19 the responding party to search for and produce information that is from sources that are not  
20 reasonably accessible depends not only on the burden and expense of doing so but also on  
21 whether the burden and expense can be justified in the circumstances of one case. Appropriate  
22 considerations may include: (1) the specificity of the discovery request; (2) the quantity of  
23 information available from other and more easily accessed sources; (3) the failure to produce  
24 relevant information that seems likely to have existed but is no longer available from more easily  
25 accessed sources; (4) the likelihood of finding relevant responsive information that cannot be  
26 obtained from other, more easily accessed sources; (5) predictions as to the importance and  
27 usefulness of the further information; and (6) a party's willingness to voluntarily bear the cost of  
28 production. If the court finds good cause for production, the court may allocate to the requesting  
29 party the expense, in whole or in part, of production.

30  
31 Under this rule, a responding party should produce electronically stored information that  
32 is relevant, not privileged and reasonably accessible. The responding party must also identify,  
33 by category or type, the sources containing potentially responsive information that it is neither  
34 searching nor producing which it contends are not reasonably accessible. The identification  
35 should, to the extent possible, provide enough detail to enable the requesting party to evaluate  
36 the burden and expense of providing discovery and the likelihood of finding responsive  
37 information from the identified sources.

38  
39 A party's claim that electronically stored information is not reasonably accessible does

1 not relieve the party of its common-law or statutory duties to preserve evidence. Whether a  
2 responding party is required to preserve unsearched sources of information that it believes are  
3 not reasonably accessible depends on the circumstances of each case. It is often useful for the  
4 parties to discuss this issue early in discovery. One fact that bears on the preservation obligation  
5 is whether the responding party has a reasonable basis for believing that discoverable  
6 information is only available from sources that are not reasonably accessible and not from other  
7 reasonably accessible sources.  
8

9 **RULE 9. CLAIM OF PRIVILEGE OR PROTECTION AFTER PRODUCTION.**

10 (a) If electronically stored information produced in discovery is subject to a claim of  
11 privilege or of protection as trial-preparation material, the party making the claim may notify any  
12 party that received the information of the claim and the basis for the claim.

13 (b) After being notified of a claim of privilege or of protection under subsection (a), a  
14 party shall immediately return, sequester, or destroy the specified information and any copies it  
15 has and, subject to subsection (c), may not use or disclose the information until the claim is  
16 resolved. If the party that received the information disclosed it before being notified, the party  
17 shall take reasonable steps to retrieve the information.

18 (c) A party receiving a notice of claim of privilege or of protection under subsection (a)  
19 may present the information to the court under seal for a determination of the claim. The party  
20 shall preserve the information until the claim is resolved.

21 **Reporter's Notes**

22 The risk of privilege waiver and the work necessary to avoid it add to the costs and delay  
23 of discovery. When the review is of electronically stored information, the risk of waiver and the  
24 time and effort to avoid it can increase substantially because of the volume of electronically  
25 stored information and the difficulty of ensuring that all information to be produced has in fact  
26 been reviewed. This rule provides a procedure for a party to assert a claim of privilege or trial-  
27 preparation material protection after information is produced in discovery and, if the claim is  
28 contested, permits any party that received the information to present the matter to the court for  
29 resolution. The rule does not address whether the privilege or protection that is asserted after  
30 production was waived by the production or ethical implications of use of such data. These  
31 issues are left to resolution by other law or authority.

1                   **RULE 10. SUBPOENA FOR PRODUCTION.**

2                   (a) A subpoena in a civil proceeding may require that electronically stored information  
3 be produced and that the party serving the subpoena or person acting on the party's request be  
4 permitted to inspect, copy, test, or sample the information.

5                   (b) Subject to subsections (c) and (d), Rules 7, 8 and 9 apply to a person responding to a  
6 subpoena as if that person was a party.

7                   (c) A party serving a subpoena requiring production of electronically stored information  
8 shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the  
9 subpoena.

10                  (d) An order of the court requiring compliance with a subpoena issued under this Rule  
11 shall protect a person who is neither a party nor a party's officer from undue burden or expense  
12 resulting from compliance.

13   **Reporter's Notes**

14                  This rule is intended to make the process for responding to a discovery request involving  
15 electronically stored information and the process for responding to a subpoena congruent. This  
16 rule is not intended to supplant protections under the state's existing rules governing discovery  
17 afforded to a person responding to a subpoena. A person responding to a subpoena for  
18 electronically stored information and parties responding to a discovery request stand on the same  
19 footing and have the same rights and obligations. A party responsible for the issuance and  
20 service of a subpoena, however, is under a special duty to avoid imposing undue burden or  
21 expense on a person subject to the subpoena. The court shall enforce this duty whenever it is  
22 breached.

23  
24                  This rule protects a person responding to a subpoena for production of electronically  
25 stored information from undue burden or expense resulting from compliance with the subpoena.  
26 In determining whether there is undue burden or expense, the court may consider, among other  
27 factors, the existence of any relationship between such person and a party to the civil proceeding.  
28

29                   **RULE 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

30 applying and construing these rules, consideration must be given to the need to promote



1 uniformity of the law with respect to its subject matter among the states that adopt these rules.

2 **RULE 12. REPEALS.** The following rules are repealed:

3 . . . .

4 **RULE 13. EFFECTIVE DATE.** These rules take effect [insert effective date].