UNIFORM ELECTRONIC TRANSACTIONS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ELECTRONIC TRANSACTIONS ACT

WITH PREFATORY NOTE AND REPORTER’S NOTES

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ON UNIFORM STATE LAWS

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# UNIFORM ELECTRONIC TRANSACTIONS ACT

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UNIFORM ELECTRONIC TRANSACTIONS ACT

PREFATORY NOTE

The following draft of the Uniform Electronic Transactions Act is presented for final approval to the National Conference of Commissioners on Uniform State Laws convened in Denver, Colorado for its 108th Annual Meeting.

1. History and Background

In June 1996, Commissioner Patricia Brumfield Fry submitted two memoranda to the Scope & Program Committee of the National Conference of Commissioners on Uniform State Laws (NCCUSL). The first memorandum outlined then existing digital signature statutes (Utah, Florida and California primarily), briefly explained digital signature technology, and furnished illustrations of writing and signature requirements in completed Uniform Acts, along with an analysis of policies underlying those requirements.

The second memorandum contained proposals for several potential drafting projects relating to electronic transactions and communications. It outlined a variety of then pending international and domestic projects addressing electronic commerce, described completed and pending NCCUSL projects relating to electronic commerce, and proposed two projects.

These memoranda were reviewed by the Scope & Program and Executive Committees of NCCUSL at the August 1996 Annual Meeting. At the same time, the Conference had before it proposals from the Committee on the Law of Commerce in Cyberspace of the Business Law Section, American Bar Association, for projects dealing with electronic commerce, as well as reports on work under way in California, Oklahoma, Massachusetts and Illinois. As a result of its review of these materials, a Drafting Committee was approved “to draft an act consistent with but not duplicative of the Uniform Commercial Code, relating to the use of electronic communications and records in contractual transactions.” The Drafting Committee was instructed to report to the Scope & Program Committee, at its January 1997 meeting, with a detailed outline of the proposed Act. Commissioner Fry was designated chair of the Drafting Committee. Professor D. Benjamin Beard, University of Idaho College of Law, was named reporter for the project.

Pursuant to its instructions, the new Drafting Committee and reporter reviewed and discussed, both in draft form and in conference calls, a number of draft memoranda dealing with the scope of the proposed Act. They were assisted in these efforts by the Ad Hoc Task Force on Electronic Contracting, formed by the
American Bar Association and chaired by James E. Newell. (This Task Force was
the precursor for the American Bar Association’s Ad Hoc Committee on Uniform
State Law on Electronic Contracting, which has participated in the drafting process
and is charged ultimately with making recommendations to the A.B.A. concerning
the Act.) Ultimately the Drafting Committee submitted its memorandum dated
January 3, 1997 to the Scope & Program Committee. That memorandum stated
that the fundamental goal of the project was to draft “such revisions to general
contract law as are necessary or desirable to support transaction processes utilizing
existing and future electronic or computerized technologies.” It further concurred in
the general principles stated in the Committee’s memorandum to guide decisions
concerning both the content of the draft and expression of its provisions, including
preservation of freedom of contract, technology-neutrality and
technology-sensitivity, minimalism, and avoidance of regulation. The Committee
was directed to make efforts to involve both technology and non-technology
interests.

Based on these materials, the drafting project was authorized to proceed.
The Drafting Committee has met seven times. At the first meeting of the Drafting
Committee in May 1997, time was devoted to learning about existing technologies
and to assisting the reporter with a broad discussion of the nature and content of the
provisions which should be included in the proposed Act. The Committee reviewed
a set of provisions compiled by the reporter from other models.

At the August 1997 Annual Meeting proposals were considered by the
Scope & Program Committee relating to the use of electronic technologies by
governmental entities. Commissioner Fry was asked to participate in the discussion
of these proposals. Ultimately, the Scope & Program Committee and Executive
Committee asked the Drafting Committee to include in the project treatment of
public communications and transactions. In addition, the name of the project was
changed from The Uniform Electronic Records and Communications in Contractual
Transactions Act to the simpler Uniform Electronic Transactions Act.

The first draft was prepared for the second meeting of the Drafting
Committee, held in September 1997 in Alexandria, Virginia. Three primary issues
emerged from the Drafting Committee’s consideration of the first draft. First, it
became apparent that the scope of the Act would be a major issue. The first draft
limited the applicability of the Act to electronic records and signatures used in
commercial and governmental transactions, subject to a limited, and at that time, yet
to be determined, set of excluded transactions. Secondly, the Drafting Committee
began articulating the policy that this Act should be a procedural statute, affecting
the underlying substantive law of a given transaction only if absolutely necessary in
light of the differences in the media used. Finally, the Committee began to consider
the extent to which the Act should or should not provide heightened legal protection
for electronic records and signatures which have been created and used in
conformity with security procedures which demonstrate greater reliability.

In each of the two succeeding drafts, the Committee worked to clarify the
Scope provisions, eliminate unnecessary provisions considered to have a substantive
impact on the underlying transaction, and ultimately to remove any legal protection
for so-called “secure” electronic signatures and records. This latest development
raised a fourth issue relating to the fundamental purpose and effect of a signature.

Comments at last year’s Annual Meeting confirmed that the scope of the Act
would be the single biggest issue. However, comments regarding the procedural
approach and legal protection for secure electronic records and signatures were also
received and considered by the Committee. Over the course of the past year, the
Committee has addressed these issues as well as the question of the effect and
purpose of a signature. These issues have been vetted with a committed and
conscientious group of observers over the course of the three meetings in the past
year, resulting in the draft before the Conference this year which reflects the
Committee’s resolution of these issues.

2. Resolution of Principal Issues in
1998 Annual Meeting Draft During the Past Year

Three principal issues confronted the Committee after the 1998 Annual
Meeting: (1) the scope of the Act; (2) continued refinement of the procedural
approach of the Act and elimination of rules having an unwarranted substantive
effect; and (3) given the decision to eliminate any special protections for “secure”
electronic records and signatures, evolution of the concept and effect of a signature.
In addition, one other issue remained to be fully addressed by the Committee.
Although the concept of “manifestation of assent” had been generally disapproved
by the Committee, the question of whether the Act would apply in the absence of
some manifestation of an intent to conduct transactions electronically remained to be
determined.

A. Scope of the Act and Procedural Approach. The scope of this Act
remained one of the most difficult areas to be resolved by the Drafting Committee
over the past year. However, the Committee’s resolution of the issue of scope has
resulted in a coverage which provides a clear framework for covered transactions,
and also avoids unwarranted surprises for unsophisticated parties dealing in this
relatively new media. These attributes have been accomplished while still providing
a solid legal framework to allow for the continued development of innovative
technology to facilitate electronic transactions.
With regard to the general scope of the Act, the Committee reversed its initial decision, at the January 1998 meeting, to eliminate references to commercial and governmental transactions. At its October, 1998 meeting the definition of transaction was limited to business and governmental affairs. The reference to commercial was added following the meeting in April, 1999, to make clearer the coverage intended. As a result of these decisions the Act no longer applies to all writings and signatures, but only to electronic records and signatures relating to a transaction, defined as limited to business, commercial and governmental affairs.

Regarding the specific Scope of the Act, the Task Force on State Law Exclusions (the “Task Force”), formed at the Committee’s April, 1998 meeting to review sample state legislative compilations to determine which documents and records or transaction types should be excluded from the Act, issued its report dated September 21, 1998 (the “Task Force Report”). A full day was devoted to the conclusions and recommendations in the Task Force Report at the Committee’s October, 1998 meeting. Based upon the recommendations of the Task Force, the list of specific exclusions to this Act are narrower than initially contemplated. In general, the Task Force discovered that in most cases there were few writing or signature requirements imposed on many of the “standard” transactions that had been considered for exclusion. A good example relates to trusts, where no writing requirement is imposed to create a general trust. In light of that realization, the question was why such a trust could not, if needed in a business or commercial context, be accomplished electronically. The Task Force also concluded that where certain writing requirements were imposed, many times it was governmental filing issues that raised the concern. For example, real estate transactions are of concern because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should be eliminated. No sound reason was found. In addition, the filing requirements would fall within Part 2 on governmental records. If a State chose to convert to an electronic recording system, as many have for Article 9 financing statement filings, an exclusion of all real estate transactions would be unwarranted. A legislative note to Section 103 on Scope will accompany the Comments to this Act which will highlight areas such as those noted above that a State may wish to exclude. The Note will also explain the reason for the lack of exclusion in this Act.

The exclusion of specific Articles of the Uniform Commercial Code is consistent with the charge to the Committee to be consistent with and not duplicative of the UCC. Perhaps more importantly, these exclusions reflect the Committee’s recognition that, particularly in the case of Article 5, 8 and revised Article 9, electronic transactions were addressed in the specific contexts of those revision processes. In the context of revised Articles 2 and 2A and, to a lesser
degree, UCITA, the extent of coverage in those Articles/Acts may make application of this Act as a gap-filling law desirable.

The Committee also concluded that the Act required certainty in its scope. Accordingly, the idea of a general repugnancy provision was rejected. The Committee and Observers determined that the uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws was simply unacceptable if electronic transactions were to be facilitated.

Finally, over the course of the last two meetings the Committee came to the conclusion that, although the Act has never required anyone to conduct transactions electronically, it was necessary to affirmatively provide that some form of acquiescence or intent on the part of a person to conduct transactions electronically was necessary before the Act could be invoked. Accordingly, Section 104 now specifically provides that the Act only applies between parties that have agreed to conduct transactions electronically. As the notes indicate, the construction of the term agreement in this context must be broad in order to assure that the Act applies whenever the circumstances show the parties intention to transact electronically, regardless of whether the intent rises to the level of a formal agreement.

B. Continued Refinement of Procedural Approach.

The continued adherence to the fundamental premise of the Act as minimalist and procedural continued over the last year. The Act has gone from 31 sections in 6 parts last year, to 21 sections in 3 parts in this draft, as the Committee continued to recognize the general efficacy of existing law in the electronic context, so long as biases and barriers to the medium were removed. The deference to existing substantive law has increased with this recognition. Specific areas of deference to other law in this Act include: (1) the meaning and effect of “sign” under existing law; (2) the method and manner of displaying, transmitting and formatting information in Section 104; (3) rules of attribution in Section 108; (4) the law of mistake in Section 109; and (5) rules of contract formation in Section 113.

The Act’s treatment of records and signatures demonstrates best the minimalist approach that has been adopted. Whether a record is attributed to a person is left to the law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law. These provisions are salutary directives to assure that records and signatures will be treated in the same manner, under currently existing law, as written records and manual signatures.

The deference of the Act to other substantive law does not negate the importance of this Act in effectuating electronic transactions by setting forth rules and standards outlining the method for using electronic media. The Act expressly
validates electronic records, signatures and contracts. It provides for the use of electronic records and information for retention purposes, providing certainty in an area with great potential in cost savings and efficiency. The Act makes clear that the actions of machines (“electronic agents”) programmed and used by people will bind the user of the machine, regardless of whether human review of a particular transaction has occurred. It specifies the standards for sending and receipt of electronic records, and it allows for innovation in financial services through the implementation of transferable records. In these ways the Act permits electronic transactions to be accomplished with certainty under existing substantive rules of law.

C. Evolution of the Concept and Effect of a Signature.

Since last year’s Annual Meeting, the Committee has focused on the effect properly to be accorded to a signature under existing law. A written signature on paper may serve one or more of the following purposes, among others:

- identification of a person
- verification of the party creating or sending the record
- verification of the informational integrity of the record
- acceptance or adoption of a term or record
- verification of a party’s authority
- acknowledgment of receipt.

A recurring theme throughout the Committee’s deliberations has been the recognition that the actual effect to be accorded to a given signature requires a consideration of all the facts and circumstances, i.e., the context, surrounding the execution of the signature.

Early on the Committee determined to use the term signature, as opposed to the term “authenticate” used in the UCC and in UCITA. However, the Committee incorporated into early definitions of signature the attributes of identity, adoption and informational integrity appearing in UCITA definitions of authenticate. This was considered merely a “fleshing-out” of the term “authenticate” as used in the current definition of signature in the Uniform Commercial Code.

With the deletion of specific provisions outlining the effect of a signature because they were considered too narrow, a reconsideration of the definition and effect of a signature was required. This draft reflects the Committee’s conclusion that the substantive law is sufficiently well developed to recognize what is required for a person to have an “intent to sign” sufficient to qualify as an electronic signature. The only requirement in this Act was considered to be noting that an electronic signature may take a different form, or indeed include the execution of a
process, so long as those forms and processes were adopted by a person with “intent
to sign”. Indeed, the evolution of the function that a signature actually serves
moved beyond a consideration that a signature, itself, must identify the signer. What
is critical is the execution or adoption with the requisite intent to sign, i.e to
accomplish a legally binding act, in such a way that the execution is attached or
associated with the record signed.

D. The Need for Some Intention to Conduct Transactions
Electronically.

Although the specific provisions, derived from UCITA, relating to
manifestation of assent have been deleted, the Act does require some agreement to
be applicable. The agreement of parties is their “bargain in fact” regardless of the
enforceability of the bargain. The bargain may be discerned from the circumstances
surrounding its attainment. Particularly in the context of whether parties have
agreed to conduct transactions electronically, the circumstances and conduct of the
parties becomes critical. Accordingly, whether the parties have so “agreed” will
turn on a broad consideration of all the circumstances and conduct of the parties.

3. Citation and Style Notes

Unless otherwise noted, references in this draft are to the following sources:


UNIFORM ELECTRONIC TRANSACTIONS ACT

PART 1

NONGOVERNMENTAL ELECTRONIC RECORDS AND SIGNATURES

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 from rules, regulations, and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

(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 an 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.
(4) “Contract” means the total legal obligation resulting from the parties’
agreement as affected by this [Act] and other applicable law.

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

(6) “Electronic agent” means a computer program or an electronic or other
automated means used to initiate an action or respond to electronic records or
performances in whole or in part without review by an individual at the time of the
action or response.

(7) “Electronic record” means a record created, generated, sent,
communicated, received, or stored by electronic means.

(8) “Electronic signature” means an electronic sound, symbol, or process
attached to or logically associated with an electronic record and executed or
adopted by a person with the intent to sign the electronic record.

(9) “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) “Information” means data, text, images, sounds, codes, computer
programs, software, databases, or the like.

(11) “Information processing system” means an electronic system for
creating, generating, sending, receiving, storing, displaying, or processing
information.
(12) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) “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.

(14) “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 information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

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

Sources: Definitions in this Act have been derived from Uniform Commercial Code definitions, definitions in the proposed Uniform Computer Information Transactions Act, and the other models.

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).

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. 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.

Although the definition of agreement does not specifically include usage of trade and other party conduct as informing the agreement, this definition is not intended to affect the construction of the parties’ agreement under the substantive law applicable to a particular transaction where that law takes account of usage and 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. 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.

The need for a definition of agreement arises because Section 104(b) limits the applicability of this Act to transactions which parties have agreed to conduct electronically. Accordingly, a broad interpretation of the term agreement is necessary to assure that this Act has the widest possible application consistent with its purpose of removing barriers to electronic commerce. In addition, the parties agreement is relevant in determining whether the provisions of this Act have been varied by agreement, and to inform the construction of the parties use of electronic records and signatures, security procedures and similar aspects of the transaction.

Whether the parties have reached an agreement is determined by their express language and all 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.” See also Restatement Section 2, Comment b. 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 context and circumstances indicating an agreement under this [Act] will be important in determining the applicability of this Act under Section 104.

2. **“Automated Transaction”**

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

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.

The Uniform Computer Information Transactions Act (UCITA) has conformed its terminology with this Act by adopting “automated transaction” in place of “electronic transaction.” The definitions in each Act are the same. The definition goes 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.

The critical element in this definition is the lack of a human actor on one or both sides of a transaction. For example, if I order books from Amazon.com through Amazon’s website, the transaction would be an automated transaction because Amazon took and confirmed the order via its machine. Similarly, if General Motors and a supplier do business through Electronic Data Interchange, GM’s computer, upon receiving information within certain pre-programmed parameters, will send an electronic order to supplier’s computer. Supplier’s computer will confirm the order and process the shipment if the order is within pre-programmed parameters in supplier’s computer. This would be a fully automated transaction.

3. **“Computer program.”** This definition is derived from UCITA. The term is used principally with respect to the definition of “electronic agent” and “information.”
4. “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.

5. “Electronic agent.” 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.

This Act used the term “electronic device” (rather than “electronic agent” used in UCITA) in order to avoid connotations of agency. However, in UCITA and in other contexts the term “electronic agent” has come to be recognized as a near term of art. Accordingly, the Chair and Reporter of UETA agreed in the coordination meeting with the Executive Director of the Conference and the Chair and Reporter for UCITA in January, 1999 to adopt “electronic agent” in order to be consistent with UCITA. 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 113)

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.

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 devise new instructions.” Allen and Widdison, “Can Computers Make Contracts?” 9 Harv. J.L. & Tech 25 (Winter, 1996). If such developments occur, courts may construe the
The examples involving Amazon.com and General Motors in the Comment to the definition of Automated Transaction are equally applicable here. Amazon acts through an electronic agent in processing my order for books. General Motors and the supplier each act through electronic agents in facilitating and effectuating the just-in-time inventory process through EDI.

6. “Electronic record.” An electronic record is a subset of the broader defined term “record.” Unlike the term “electronic message” used in UCCIT A, 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.

7. “Electronic signature”

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, i.e., with the intent to sign the record. Over the past year, the Committee came to realize that the idea of a signature was broad and not specifically defined. The act of applying a symbol or process to an electronic record could have differing meanings and effects. But applying a symbol or process with an intent to do a legally significant act seemed the fundamental attribute of a signature, and that intention was viewed as understood in the law as a part of the word “sign”, without the need for a definition.

In this Act it was considered important to establish, to the greatest extent possible, the equivalency of electronic signatures and manual signatures. The purpose is to overcome unwarranted biases against electronic methods of signing and authenticating records. Therefore the term “signature” has been used to connote and convey that equivalency. The term “authentication” used in Revised Articles 2, 2A and 9 and in UCCITA, have narrower meanings and purposes than electronic signature as used in this Act. However, an authentication in any of those Articles, would be an electronic signature under this Act.
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 cover the standard webpage click through process. For example, when a person orders goods or services through a vendor’s website, the person will be required to provide 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 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 a 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 adoption of the process carried the intent to do a legally significant act, the hallmark of a signature.

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 with the intent to sign.

8. “Governmental agency”

Committee Votes: To include legislative and judicial agencies – 3 Yea - 0 Nay (October, 1998).

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.
9. “Information processing system.” This term is used in Section 114 regarding the time and place of receipt of an electronic record. It has been revised to conform with UCITA.

10. “Person.” This definition has been revised for clarity based on the suggestions of the Style Committee.

11. “Record.” This is the standard Conference formulation for this definition.

12. “Security procedure.”

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.

The definition is this Act is broad and is used to illustrate one way of establishing attribution or content integrity of an electronic record. The use of a security procedure is not accorded operative legal effect, through the use of presumptions or otherwise, by this Act. In this Act, the use of security procedures is simply one, expressly identified, method for proving the source or content of an electronic record or signature.

14. “Transaction.” The definition has been limited to actions between people taken in the context of business, commercial or governmental activities. As such it provides a structural limitation on the Scope of the Act as stated in the next section.

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 transactions subject to the following laws:

1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
(2) [Article 1 of the Uniform Commercial Code, other than Sections 1-107 and 1-206];

(3) [Articles 3, 4, 4A, 5, 6, 7, 8, or 9 of the Uniform Commercial Code];

(4) [Revised Article 2 or 2A of [the Uniform Commercial Code], or the Uniform Computer Information Transactions Act, except to the extent provided in Revised Article 2, 2A, or UCITA, respectively] [when enacted];

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

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

(c) This [Act] applies to an electronic record or electronic signature otherwise excluded from the application of this [Act] under subsection (b) when used for transactions subject to a law other than those specified in subsection (b).

(d) A transaction subject to this [Act] is also subject to other applicable substantive law.


Committee Votes:
1. In former Section 103 – Scope:
   a. To delete references to commercial and governmental transactions – Committee 4 Yes – 3 No (Chair broke tie) Observers 19 Yes – 1 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 – Exclusions:
   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 subsection (c) (February 1999) unanimous.
Reporters Notes

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 in a business, commercial or governmental transaction, 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, or may be covered by more than one law, 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 not affected 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 for purposes of 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.

In another context, subsection (c) would operate to allow this Act to apply to what would appear to be an excluded transaction under subsection (b). If a transaction, which would be subject to a law designated in subsection (b) and therefore excluded from this Act, is an excluded transaction under that other law, then this Act would apply. For example, Article 9 applies generally to any transaction that creates a security interest in personal property. However, Article 9 excludes landlord’s liens. Accordingly, although this Act excludes from its application transactions subject to Article 9, this Act would apply to the creation of a landlord lien if the law otherwise applicable to landlord’s liens did not provide otherwise, because the landlord’s lien transaction is excluded from Article 9.

2. The exclusions listed in subsection (b) reflect the discussions at the Drafting Committee meetings over the last year. 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 unaffected by this Act 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 create uncertainty or raise any doubt as to the applicability of this Act to a particular law.

Paragraph (1) excludes wills, codicils and testamentary trusts. This exclusion is largely salutary given the unlikely use of such records in a transaction as
defined in this Act (i.e., actions taken in context of business, commercial or
governmental affairs). Paragraph (2) excludes all of Article 1 of the UCC, other
than UCC Sections 1-107 and 1-206. Paragraph (3) excludes all of the UCC,
whether revised or unrevised, except Articles 2 and 2A and UCITA.

A legislative note will make clear that this Act does not apply to the
referenced excluded UCC articles in paragraph 3, whether in “current” or “revised”
form. Articles 3, 4 and 4A impact payment systems and have specifically been
removed from the charge to the Committee. Moreover, the systems affected go
well beyond the relationships between contracting parties and require broader
attention to systemic effects than could be brought to bear by this Committee.
However, the very limited application of this Act to Transferable Records does not
affect those systems, and is tailored to relate to the contracting parties through
express agreement.

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 Sections 3-302, 7-501, 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(c). Accordingly, an electronic record which is also a
Transferable Record, would not be used for purposes of a transaction governed by
Articles 3 and 4, but would be an electronic record used for purposes of a
transaction governed by Section 116.

Articles 5 and 8 have been excluded because the revision process included
significant consideration of electronic practices. To the extent unrevised versions of
these articles remain in some States, adoption of the revised versions seems the most
appropriate way to attain the benefits of electronic commerce in transactions
governed by those Articles. Similarly, revised Article 9 focuses on electronic
contracting issues in the context of secured transactions. Current Article 9 may be
an appropriate candidate for application of the UETA, but the Committee
considered that the better approach would be to leave the electronicization of
Article 9 to revised Article 9.

Paragraph 4 provides for exclusion from this Act of revised Articles 2, 2A
and UCITA, except to the extent provided in those revised Articles. The legislative
note will make clear that this Act will apply, in toto, to transactions under existing,
unrevised Articles 2 and 2A. There is no reason not to validate electronic
contracting in these situations. Sales and leases do not implicate the types of
systems such as payment systems. Further they generally do not have a far reaching
effect on the rights of parties beyond the contracting parties as exists in the secured
transactions system. Finally, it is in the area of sales, licenses and leases that
electronic commerce is occurring to its greatest extent today. To exclude these transactions would largely gut the purpose of this Act.

At the same time, Articles 2 and 2A and UCITA, in revised and new forms will be available for adoption. Once the revised versions are adopted, UETA should only apply to the extent provided in those Acts. Accordingly, this Act so provides. Revised Article 2 is not as broad in its treatment of electronic contracting as is UCITA. Therefore, it may be appropriate for Article 2 to allow UETA to apply in a broader fashion than UCITA. In any event, that is a decision for the Drafting Committees and States that promulgate and adopt those Articles.

Furthermore, exclusion of revised articles 2, and 2A, and proposed UCITA when enacted, except to the extent UETA is given effect in those Acts, 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, 8 and revised Article 9. The exclusions in paragraphs (2) through (5) were considered necessary to assure that when enacted this Act would have clear boundaries concerning the laws to be affected and those to be excluded. Provisions in prior drafts 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 found in prior drafts also was viewed as unworkably vague and deleted.

The types of laws which will be noted in a Legislative Note for consideration by States for exclusion under paragraph (5) include:

1. other, more recent statutes which address the use of electronic records and signatures;

2. powers of attorney of various kinds, e.g., durable powers of attorney, powers related to health care decisions, powers associated with living wills;

3. laws relating to real estate transactions;

4. trusts other than testamentary trusts;

5. certain consumer laws, such as those imposing a separate initialing, or signing requirement with regard to special types of contract.

However, the Legislative Note will also set forth the reasons that the Drafting Committee chose not to specifically exclude such transactions from the Scope of this Act. Those explanations will reflect the analysis contained in the Task Force Report (See Historical Notes 1 and 2 below.)
3. Subsection (e) is a standard construction clause.

Historical Notes:

1. 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.

3. The Task Force Report dated September 21, 1998, 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, and the Committee’s 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 a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This [Act] only applies to transactions between parties each of which has agreed to conduct transactions electronically. An agreement to conduct transactions electronically is determined from the context and surrounding circumstances, including the parties’ conduct.

(c) If a party agrees to conduct a transaction electronically, this [Act] does not prohibit the party from refusing to conduct other transactions electronically. This subsection may not be varied by agreement.
(d) Except as otherwise provided in this [Act], the effect of any provision 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.

(e) Whether an electronic record or electronic signature has legal consequences is determined by this [Act], if applicable, and otherwise by other applicable law.

Source: Subsections (a), (d), and (e) – UETA Section 105 (1998 Annual Meeting Draft); UCC Section 1-102(3); subsections (b) and (c) – New.

Reporter’s Notes

1. This section makes clear 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. 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. This result is strengthened by subsections (b) and (c), which require an intention to conduct transactions electronically and preserve the right of a party to refuse to use electronics in any subsequent transaction.

2. The paradigm of this Act is two willing parties doing transactions electronically. It is therefore appropriate that the Act is voluntary and preserves the greatest possible party autonomy to refuse electronic transactions. However, if the Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty would require that one obtain express agreement before relying on electronic transactions, such express agreement should not be necessary before one may feel safe in conducting electronic transactions. Indeed, such a requirement of express agreement would itself be an unreasonable barrier to electronic commerce.

Subsection (b) provides that the Act applies to transactions in which the parties have agreed to conduct the transaction electronically. In this context it is essential that the requisite agreement be broadly construed. Accordingly, the Act expressly provides that the party’s agreement is to be found from all circumstances,
including the parties’ conduct. The critical element is the intent of a party to conduct a transaction electronically. Once that intent is established, this Act applies. See Restatement of Contracts 2d, Sections 2, 3, and 19.

A number of scenarios were discussed by the Committee in its last two meetings which fell short of express agreement to use electronics, but on which there was consensus that the Act would apply to permit the justifiable use of electronic records.

**Examples:**

A. 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 Joe affirmatively indicates to the contrary, or an unreasonable period of time has elapsed under the circumstances (See example D below). However, it would not necessarily be reasonable to infer Joe’s agreement to communicate electronically for purposes outside the scope of the business indicated by use of the business card.

B. 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 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. However, depending on the circumstances, it likely would not be reasonable to communicate with Sally for purposes other than those related to the purpose for which she maintained the e-mail account. 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.

C. Among the circumstances to be considered in finding an agreement would be the time when the assent occurred relative to the timing of the use of electronic communications. If I order books from an on-line vendor, such as Amazon.com my agreement to conduct that transaction, and to receive any correspondence related to the transaction, electronically can be inferred from my conduct. Accordingly, as to information related to that transaction it is reasonable for Amazon to deal with me electronically.

D. In another context, if I give my business card, which contains my e-mail address, to Sarah at a business meeting, that act likely demonstrates my agreement to conduct business with Sarah electronically. However, until such time as electronic addresses gain the perceived permanency and traceability
associated with physical addresses, the duration of my agreement to conduct 
business using that address may be limited. If I work for IBM there may be a 
greater expectation of permanency or traceability than if I work for myself in a 
small business, or use a home e-mail address. In any event, the reasonableness 
of finding an agreement under such circumstances must be determined from all 
the surrounding circumstances.

3. Subsection (c) has been added to make clear the ability of a party to 
refuse to conduct a transaction electronically, even if the person has conducted 
transactions electronically in the past. The effectiveness of a party’s refusal to 
conduct a transaction electronically will be determined under other applicable law in 
light of all surrounding circumstances.

4. Subsection (d) has been revised for clarity based on the comments of the 
Committee on Style. Of course, the ability of parties to affect by their agreement 
the rights of third parties is limited by general contract principles.

5. Subsection (e) was formerly part of the definition of agreement. The 
focus of the provision now relates to the effect of an electronic record or electronic 
signature, which is the subject of this Act.

SECTION 105. APPLICATION AND CONSTRUCTION. This [Act] must 
be construed and applied:

   (1) to facilitate electronic transactions consistent with other applicable law;

   (2) to be consistent with reasonable practices concerning electronic

transactions and with the continued expansion of those practices; and

   (3) to effectuate its general purpose to make uniform the law with respect to

the subject of this [Act] among States enacting it.

Source: UETA Section 106 (1998 Annual Meeting Draft); Uniform Commercial 
Code Section 1-102.

Reporter’s Notes

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 law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies the law.
(d) If a law requires a signature, or provides consequences in the absence of a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature.

Source: UETA Sections 201, 301, and 401(a) (1998 Annual Meeting Draft); Uncitral Model Articles 5, 6, and 7.

Reporter's Notes

1. 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 it’s 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 affirmatively 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, signature or contract. Accordingly, 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. Section 107 expressly preserves a number of legal requirements in currently existing legislation regarding information and writings.

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 or be signed. If a law imposes requirements other than the medium in which a record or signature must be contained, this section does not address that requirement. See
Section 107. Similarly, Section 104 of this Act provides that whether the use of electronics between parties to a transaction is authorized in a particular transaction is to be determined from the agreement of the parties as determined from the circumstances. Accordingly, while this section would validate an electronic record for purpose of a statute of frauds, if an agreement to conduct the transaction electronically cannot reasonably be found, Section 104 would preclude enforcement of the electronic records as outside the scope of authorized use in the particular transaction.

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. Section 107 addresses additional requirements which may prevent the validity of an electronic record in a particular case. For example, in Section 107(a) the legal requirement addressed is 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 under this section.
5. 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 (see Section 114). An electronic record attributed to a party under Section 108 and complying with the requirements of Section 114, would suffice in that case, notwithstanding that it may not contain an electronic signature.

SECTION 107. PROVISION OF INFORMATION IN WRITING;
PRESENTATION OF RECORDS.

(a) If parties have agreed to conduct transactions electronically and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record and the information is capable of retention by the recipient at the time the information is received.

(b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.

(2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.

(3) The record must contain the information formatted in the manner specified in the other law.
(c) An electronic record may not be sent, communicated, or transmitted by an information processing system that inhibits the ability to print or download the information in the electronic record.

(d) This section may not be varied by agreement, but:

(1) a requirement under a law other than this [Act] to provide information in writing may be varied by agreement to the extent permitted by the other law; and

(2) a requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law.

Source: New; Canadian Draft Uniform Electronic Commerce Act.

Reporter’s Notes

1. This section is a savings provision, designed to assure that other aspects of a writing, required by other law, will not be overridden by this Act. The section should provide an answer to many concerns regarding disclosures and notice provisions in other laws.

2. Under subsection (a) the fundamental the consensus of the Committee was that to meet a requirement that information be provided in writing, the recipient of an electronic record of the information 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 retain the information for later review.

3. 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 or relating to the method or manner of presentation or delivery of information. The section addresses more specific legal requirements and provides the standards for satisfying these more particular legal requirements.
4. 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.

5. Subsections (b) and (c) expand on the exclusion contained in the Task Force Report which recommended that, apart from the medium in which information is conveyed, laws providing for the means of delivering or displaying that information should not be affected by the Act. For example, if a law requires delivery of notice by first class US mail, that means of delivery should not be 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 and expanded to clarify that display, delivery, and formatting requirements are NOT intended to be displaced by this Act. Those requirements will continue to be applicable to electronic records and signatures. If those legal requirements can be satisfied in an electronic medium, this Act will validate the use of the medium, leaving to the other applicable law the question of whether the particular electronic record meets the other legal requirements. 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 in a way determined to satisfy the other law.

SECTION 108. ATTRIBUTION AND EFFECT OF ELECTRONIC RECORD AND ELECTRONIC SIGNATURE.

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be proved in any manner, including 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) is 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.


Reporter’s Notes

1. The draft retains a rule of attribution of electronic records and signatures
to persons. Under subsection (a), so long as the electronic record or electronic
signature resulted from a person’s action it will be attributed to that person – the
legal effect of that attribution is dealt with in subsection (b). The person’s actions
include actions taken by human agents of the person, as well as actions taken by an
electronic agent, i.e., the tool, of the person. Although the rule may appear to state
the obvious, it assures that the record or signature is not ascribed to a machine, as
opposed to the person operating or programing the machine. The subsection 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.

In each of the following cases, both the electronic record and electronic
signature would be attributable to me under subsection (a):

A. I type my name at the bottom of an e-mail purchase order;
B. My employee, pursuant to authority, types my name at the bottom of an
e-mail purchase order;
C. My computer, programed to order goods upon receipt of inventory
   information within particular parameters, issues a purchase order which
   includes my name at the bottom of the order.

In each of the above cases, law other than this Act would ascribe both the signature
and the action to me if done in a paper medium. Subsection (a) expressly provides
that the same result will occur when an electronic medium is used.

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. In the foregoing examples, once the electronic signature is attributed to me,
the electronic record would also be attributed to me, unless I established fraud or
other invalidating cause. 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. In
the above examples, the use of a security procedure to establish that the record, and
related signature, came from my business might be necessary to avoid my claim that
a hacker intervened. The reference to security procedures is not intended to suggest
that other forms of proof of attribution should be accorded less persuasive effect.

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.
Also informing the effect of any attribution will be other 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. A “click-through” transaction involves a process which, if executed
with an intent to “sign,” will be an electronic signature directly covered. See
definition of Electronic Signature and related Notes. In the context of an
anonymous “click-through” issues of proof will be paramount. This section will be
relevant to establish that the resulting electronic record is attributable to a particular
person upon the requisite proof, including security procedures which may track the
source of the click-through.

SECTION 109. EFFECT OF CHANGES AND ERRORS. If a change or
error in an electronic record occurs in a transmission between parties to a
transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes
or errors and one party has conformed to the 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.
(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error by the individual made in dealing with the electronic agent of another person 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:

   (A) 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;

   (B) 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

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

(3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by law, including the law of mistake, and the parties’ contract, if any.

(4) Paragraphs (2) and (3) may not be varied by agreement.

Source: New; Derived from UETA Sections 203 and 204 (1998 Annual Meeting Draft); Restatement 2d, Contracts, Sections 152-155.

Reporter’s Notes

1. Substantively, the section is now limited to changes and errors occurring in transmissions between parties – whether person-person (paragraph 1) or in an automated transaction involving an individual and a machine (paragraphs 1 and 2). The section focuses on 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.

2. Paragraph (1) deals with any transmission where the parties have agreed
to use a security procedure to detect changes and errors. It operates against the
non-conforming party, i.e., the party in the best position to have caught the change
or error, regardless of whether that person is the sender or recipient. 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 Sections 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.

3. 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.

4. Paragraph (2) has been moved from Section 204 of the 1998 Annual
Meeting Draft. The move gathers 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 204 has not been
changed. Under paragraph (2) an individual must satisfy all three requirements
before avoiding the effect of the erroneous electronic record.

5. As with paragraph (1), paragraph (2), 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 paragraph (1) if applicable, otherwise under
paragraph (3) and the general law of mistake.

6. The most important limitation on the operation of paragraph (2) 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
programed 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.

7. Paragraph (2) also places additional requirements on the mistaken
individual before the paragraph 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. Since this provision
allows avoidance by the mistaken party, that party should also be required to
expressly note that it is seeking to avoid the electronic record, i.e., lacked the
intention to be bound.

Second, 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 any benefit from the transaction. Observers from
the financial industry 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 subparagraph (2)(C), 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.

8. In all cases not covered by paragraphs (1) or (2), where error or change
to a record occur, the parties contract, or other law, specifically including mistake,
applies to resolve any dispute. If the error occurs in the context of record retention, Section 111 will apply. In that case the standard is one of accuracy and retrievability of the information.

9. Paragraph (4) makes the error correction provision in paragraph (2) and the application of the law of mistake in paragraph (3) non-variable. This provision was added in response to consumer concerns. Paragraph (2) provides incentives for parties using electronic agents to establish safeguards for individuals dealing with them. It also avoids unjustified windfalls to the individual by erecting stringent requirements before the individual may exercise the right of avoidance under the paragraph. Therefore, there is no reason to permit parties to avoid the paragraph by agreement. Rather, parties should satisfy the paragraph’s requirements.

SECTION 110. NOTARIZATION. If a law requires that a signature be notarized, the requirement is satisfied with respect to an electronic signature if an electronic record includes, in addition to the electronic signature to be notarized, the electronic signature of a notary public together with all other information required to be included in a notarization by other applicable law.

Source: New.

Reporter’s Notes
This provision was added in response to the Task Force Report. Essentially this section allows a notary public to act electronically, effectively removing the stamp/seal requirements. However, the section does not eliminate any of the other requirements of notarial laws, and consistent with the entire thrust of this Act, simply allows the signing and information to be accomplished in an electronic medium.
SECTION 111. RETENTION OF ELECTRONIC RECORDS; ORIGINA L S.

(a) If a law requires that certain records be retained, that requirement is met by retaining an electronic record of the information in the record which:

(1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) remains accessible for later reference.

(b) 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, communicated, or received.

(c) A person satisfies subsection (a) by using the services of any other person if the requirements of subsection (a) are met.

(d) If a law 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 law 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 information on 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 a law requiring a person to retain records for evidentiary, audit, or like
purposes, unless a law enacted after the effective date of this [Act] specifically prohibits the use of an electronic record for a specified purpose.

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


Reporter’s Notes

1. 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. Other requirements in former drafts were 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.

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.

2. Subsections (b) and (c) simply make clear that certain ancillary information or the use of third parties, does not affect the serviceability of records and information retained electronically.

3. Subsection (d) continues the theme of the Act as validating electronic records as originals where the law requires retention of an original.

4. Subsections (f) and (g) generally address record retention statutes. As always the government may require records in any medium, however, these
subsections require a governmental agency to specifically identify the types of
records and requirements that will be imposed.

**Historical Notes:**

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 an earlier draft of the Illinois Act (derived largely from Uncitral
Model Law Summary Paragraph 62) identified 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.

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.

SECTION 112. ADMISSIBILITY IN EVIDENCE. In a legal proceeding, evidence of an electronic record or electronic signature may not be excluded because it is an electronic record or electronic signature or it is not an original or is not in its original form.

Source: UETA Section 404 (1998 Annual Meeting Draft); Uncitral Model Article 9.

Reporter’s Notes

Like Section 106, this section prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented.

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

SECTION 113. FORMATION OF CONTRACT.

(a) If an offer evokes an electronic record in response, a contract may be formed in the same manner and with the same effect as if the record was not electronic, but an acceptance of the offer is effective, if at all, when received.

(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 an electronic agent
and an individual, acting on the individual’s own behalf or for another person,
including by an interaction in which the individual performs actions that the
individual is free to refuse to perform and 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 law applicable
to the particular contract.

Source: UETA Section 401 (1998 Annual Meeting Draft); Uncitral Model Article

Reporter’s Notes

1. Subsection (a) has been significantly simplified. It defers to other law on
the formation of a contract except to provide that the effectiveness of an acceptance
is upon receipt, rather than upon dispatch. In addition, the form of acceptance,
whether an express return promise, performance or notice of initiation of
performance, is irrelevant. Whatever the form of acceptance, it is effective on
receipt. The purpose of the section is to make 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. Inclusion of the automated transaction provisions in subsection (b)
focuses the purpose of the provisions. The intent behind subsection (b) is to assure
that contracts can be formed by machines. The concern raised relates to the
perceived lack of human intent at the time of contract formation. When machines
are involved, the requisite intention flows from the programing and use of the
machine. As in other cases, these are salutary provisions consistent with the
fundamental purpose of the Act to remove barriers to electronic transactions while
leaving the substantive law, e.g., law of mistake, law of contract formation,
unaffected to the greatest extent possible. The emphasis is on contract formation
methods and not on the fact that machines are involved.
3. 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, or otherwise indicating agreement or assent to any limitation or obligation, 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, and would 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, i.e., “complete the transaction.” 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 condition precedent to granting me access to the information. There may be an electronic signature, because by clicking “I agree” I adopted a process with the intent to “sign,” i.e., bind myself to a legal obligation, the resulting record of the transaction. If a “signed writing” were required this would be enforceable. If a “signed writing” were not required, it may be sufficient to establish that the electronic record 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. 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 either (i) 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 or (ii) enters a region of an information processing system that
is under the control of the recipient.

(b) Unless otherwise agreed between the sender and the recipient, an
electronic record is received when:

(1) it enters an information processing system that the recipient has
designated or uses for the purpose of receiving electronic records or information of
the type sent from which the recipient is able to retrieve the electronic record; and

(2) the electronic record is in a form capable of being processed by that
system.

(c) Subsection (b) applies even if the place the information processing
system is located is different from the place the electronic record is deemed 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 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 from an information processing system described in subsection (b) establishes that a record was received but, in itself, does not establish that the content sent corresponds to the content received.

(g) If a law other than this [Act] requires that a record be sent or received, the requirement is satisfied by an electronic record only if it is sent in accordance with subsection (a) or received in accordance with subsection (b). If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, this subsection may not be varied by agreement.

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

Reporter’s Notes

1. This section provides default rules regarding when and from where 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 sent or received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was sent or received.

2. Subsection (a) requires that information be properly addressed or otherwise directed to the recipient before it will be considered sent. The record will be considered sent once it leaves the control of the sender, or comes under the control of the recipient. The structure of many message delivery systems is such that electronic records may actually never leave the control of the sender. For example, at my university, e-mail sent within the system to another faculty member is technically not out of my control since it never leaves my server. Accordingly, to qualify as a sending, my e-mail must arrive at a point where the recipient has
control. The effect of an electronic record that is thereafter “pulled back,” e.g., removed from a mailbox, is not addressed by this section. The parallel would be removing a letter from a person’s mailbox.

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 a recipient leaving messages with a server or other service to avoid receipt, is removed. However, the issue of how the sender proves the time of receipt is not resolved by this section.

Subsection (b) has been revised to assure that the recipient retains control of the place of receipt by the requiring 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 the need for 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, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail 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 unless actual knowledge upon seeing it at home would qualify as receipt under the otherwise applicable substantive law.

4. Subsections (c) and (d) provide default rules for determining where a record will be considered to have been sent or received. The focus is on the place of business of the recipient and not the physical location of the information processing system, which may bear absolutely no relation to the transaction between the parties. 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 under other applicable law, e.g., conflict of laws issues, tax issues, the relevant location should be the location of the sender or recipient and not the location of the information processing system.

Subsection (d) assures 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.

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, UCITA.

6. Subsection (f) provides legal certainty regarding the effect of an
electronic acknowledgment. It only addresses the fact of receipt, not the quality of
the content, nor whether the electronic record was read or “opened.”

7. Subsection (g) limits the parties’ ability to vary the method for sending
and receipt provided in subsections (a) and (b), when there is a legal requirement for
the sending or receipt. As in other circumstances where legal requirements derive
from other substantive law, to the extent that the other law permits variation by
agreement, this Act does not impose any additional requirements, and provisions of
this Act may be varied to the extent provided in the other law.

SECTION 115. TRANSFERABLE RECORDS.

(a) In this section, “transferable record” means an electronic record that:

(1) would be a note under [Article 3 of the Uniform Commercial Code]
or a document under [Article 7 of the Uniform Commercial Code] if the electronic
record were in writing; and

(2) the issuer of the electronic record expressly has agreed is subject to
this [Act].

(b) A person has control of a transferable record if a system employed for
evidencing the transfer of interests in the transferable record reliably establishes that
person as the person to whom the transferable record has been issued or transferred.
(c) A system satisfies subsection (a), and a person is deemed to have control of a transferable record, if the record or records 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.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in [Section 1-201(2) of the Uniform Commercial Code], of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under the [Uniform Commercial Code], including, if the applicable statutory requirements under [Section 3-302(a), 7-501, or 9-308 of...
the Uniform Commercial Code] are satisfied, the rights and defenses of a holder in
due course, a holder to which a negotiable document of title has been duly
negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are
not required to obtain or exercise any of the rights in this subsection.

(e) Except as otherwise agreed, obligors under a transferable record have
the same rights and defenses as equivalent obligors under equivalent records and
writings under the [Uniform Commercial Code].

(f) If requested by the person against which enforcement is sought, the
person seeking to enforce the transferable record shall provide reasonable proof that
the person is in control of the transferable record. This proof may include 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.

Reporter’s Notes

1. The Committee voted at its final meeting to include a provision covering
transferable records. This section reflects the provision adopted by the Committee
at its final meeting, as modified to reflect the needs of industry recognized by the
Committee. The section has been available to the Committee since early May and
was not changed in the conference call of the Committee held May 10.

2. Committee discussions at its last two meetings made clear that any
coverage of transferable records would be limited to the minimum necessary to
facilitate the use of these types of records. 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 and documents, as against the issuer, in order to provide the requisite legal certainty so that systems and processes, which involve significant expenditures of time and resources, will be developed.

3. The definition of transferable record has been revised to delete coverage of 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, an earlier draft had proposed deleting these records considering the limited scope and impact of state law in this area and the activity of federal regulators (e.g., electronic cotton warehouse receipts). However, at the Committee’s last meeting evidence of wide support from industry for inclusion of these records was presented. Accordingly, the Act now covers electronic records which would be documents under Article 7 if in writing.

4. 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 115 relating to transferable records, will apply. This limitation is intended to assure that an obligor on a paper note or paper document will not be confronted with the conversion of that note or document to electronic form without his/her express agreement. The requirement that the obligor expressly agree in the electronic record to the applicability of the UETA will not otherwise affect the characterization of a transferable record because it is a statutory condition.

5. Based on the comments at the last two meetings of the Drafting Committee and consistent with the exclusion of Articles 3, 4 and 7 from the scope of this Act, Section 115 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. The rights of parties to transferable records are established under subsections (d) and (e).
6. 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 note” equivalents and “electronic document” equivalents 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.

7. Subsection (d) 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, by incorporating the rules on the manner of acquisition into this statute. The last sentence of subsection (d) is intended to assure that requirements related to notions of possession are not incorporated into this statute.

8. Subsection (e) accords to the obligor of the transferable record rights equal to those of an obligor under an equivalent paper record. Subsection (f) grants the obligor the right to have the transferable record and other information made available for purposes of assuring the correct person to pay. This will allow the obligor to protect its interest and obtain the defense of discharge by payment or performance.
PART 2

GOVERNMENTAL ELECTRONIC RECORDS AND SIGNATURES

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 whether, and the extent to which, [it] [a governmental agency] will create and retain electronic records and convert written records to electronic records.


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(f), [each governmental agency] [the [designated state officer]] of this State shall determine whether, and the extent to which, [it] [a governmental agency] will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.
(b) To the extent that a governmental agency uses electronic records and
electronic signatures under subsection (a), the [governmental agency] [designated
state officer], giving due consideration to security, may specify:

(1) the manner and format in which the electronic records must be
created, generated, sent, communicated, 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
specified for corresponding nonelectronic records or reasonably necessary under the
circumstances.

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

Source: UETA Section 502 (1998 Annual Meeting Draft); Illinois Act Section
25-101; Florida Electronic Signature Act, Chapter 96-324, Section 7 (1996).
SECTION 203. INTEROPERABILITY. Standards adopted by [a governmental agency] [designated officer] of this State pursuant to Section 202 must 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 standards 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.


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

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 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 governmental agencies or state officers to take account of consistency in applications and interoperability to the extent practicable when promulgating standards. 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

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Source:

SECTION 303. SAVINGS AND TRANSITIONAL PROVISIONS. This [Act] applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after the effective date of this [Act].

Source: