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UNIFORM ELECTRONIC TRANSACTIONS ACT

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UNIFORM ELECTRONIC TRANSACTIONS ACT

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PART 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Agreement" means the bargain of the parties in fact as found in their language or records or terms in records to which a party has manifested assent, or by implication inferred from other circumstances, including course of performance, course of dealing and usage of trade as provided in this [Act]. Whether an agreement has legal consequences is determined by this [Act], if applicable, or, otherwise by other applicable rules of law.

Source: Article 1 Draft, Section 1-201(3) (Sept. 1997 Draft)

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

(2) "Authenticate" means to identify the authenticating party, adopt or accept a term or a record, or establish the informational integrity of a record.

Reporter's Note: Based on the comments and direction of the Drafting Committee at the September meeting, this section has been deleted and its substance incorporated into the definition of signature.
(2) “Automated transaction” means a commercial or governmental transaction formed or performed, in whole or in part, by electronic records in which the records of one or both parties will not be reviewed by an individual as an expected ordinary step in forming a contract or performing under an existing contract, or fulfilling any obligation required by the transaction.

Source: Article 2B Draft Section 2B-102(a)(18)

Reporter's Note: This is essentially the definition of "Electronic transaction" appearing in Article 2B. The term has been changed to "automated transaction" for clarity and to avoid confusion in light of the title of this Act as the "Electronic Transactions Act." It has also been expanded from the August Draft to include governmental transactions. As with electronic agents, this definition is relevant to those circumstances where electronic records may result in action or performance which will bind a party although no human review of the electronic records is anticipated or occurs. Section 401(c) provides specific contract formation rules where one or both parties do not review the electronic records.

(3) "Commercial transaction" means all matters arising in a commercial setting, whether contractual or not including, but not limited to, the following: any trade transaction for the supply or exchange of goods, information or services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation or organization; carriage of goods or passengers by air, sea, rail or road.

Source: Uncitral Model Law
Reporter's Note: This definition has been added to the text. For purposes of this draft it also remains as part of the commentary to Section 103 Scope. ISSUE FOR THE COMMITTEE: Should this definition be retained in text or continued solely as commentary to the Section on Scope?

(4) "Computer Program" means a set of statements or instructions to be used directly or indirectly to operate an information processing system in order to bring about a certain result. The term does not include any information created or communicated as a result of the operation of the system.

Source: Article 2B Draft Section 2B-102(a)(5).
Reporter's Note: This definition is from Article 2B. The term is used principally with respect to the definition of "electronic agent" and "information." Questions were raised at the May meeting, not resolved at the September meeting, regarding its necessity. ISSUE FOR THE COMMITTEE: Is this a necessary definition? Is it an accurate definition?

(5) "Conspicuous" means so displayed or presented that a reasonable individual against whom or whose principal it operates ought to have noticed it. A term is conspicuous if it is:

(A) a heading in all capitals (e.g., NON-NEGOTIABLE BILL OF LADING) equal or greater in size to the surrounding text;

(B) language in the body or text of a record or display in larger or other contrasting type or color than other language;

(C) a term prominently referenced in the body or text of an electronic record or display which can be readily accessed from the record or display;

(D) language so positioned in a record or display that a party cannot proceed without taking some additional action with respect to the term or the reference; or

(E) language readily distinguishable in another manner.

In the case of an electronic record intended to evoke a response without the need for review by an individual, a term is conspicuous if it is in a form that would enable a reasonably configured electronic agent to take it into account or react to it without review of the record by an individual.
Reporter's Note: This definition has been deleted at the suggestion of members of the Drafting Committee.

(6) "Consumer" means an individual who, at the time of entering into a transaction does so primarily for personal, family, or household purposes. [The term does not include a person that enters into a transaction primarily for profit making, professional, or commercial purposes, including agricultural, investments, research, and business and investment management, other than management of an ordinary person’s personal or family assets.]

Reporter's Note: This definition has been deleted as unnecessary. It is submitted, the definition of security procedure and the allocation of loss rules in Section 110 eliminate the need for any distinction based on the status of parties as consumer/merchant, sophisticated, unsophisticated, or the like. The presumptions established by this draft depend on the adoption or agreement of parties to a commercially reasonable security procedure. Where a security procedure is not used or is shown to not be commercially reasonable, the party relying on the security procedure will bear the loss. The relying party is in the best position to assure itself that the level of security is sufficient for the transaction contemplated, and to implement the level of security it deems appropriate, or suffer the consequences.

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

Source: UCC Section 1-201(11)

(8) "Electronic" means electrical, digital, magnetic, optical, electromagnetic, or any other form of technology that includes entails capabilities similar to these technologies.
Source: Article 2B Draft Section 2B-102(15).

Reporter's Note: 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. Query whether the definition is broad enough?

(9) "Electronic agent" means a computer program or other electronic or automated means used, selected, or programmed by a party person to initiate or respond to electronic records or performances in whole or in part without review by an individual.

Source: Article 2B Draft Section 2B-102(a)(16).

Reporter's Note: An electronic agent, as a computer program or other automated device 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 in the use of that tool since the tool has no independent volition of its own. However, an electronic agent by definition is capable, within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party. This draft contains provisions dealing with the efficacy of, and responsibility for, actions taken and accomplished by electronic agents in the absence of human intervention. While this Act proceeds on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming, it is conceivable that, within the useful life of this Act, electronic agents may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to "learn through experience, modify the instructions in their own programs, and even devise new instructions." Allen and Widdison, "Can Computers Make Contracts?" 9 Harv. J.L.&Tech 25 (Winter, 1996). At such time as this may occur, "Courts may ultimately conclude that an electronic agent is equivalent in all respects to a human agent..." Article 2B-102, Reporter's Note 10.

Section 303 and Section 401 make clear that the party that sets operations of an electronic agent in motion will be bound by the records and signatures resulting from such operations. A party would be bound by the actions of a computer program designed to act without human intervention,
as well as electronic and automated means such as telecopy and facsimile machines used by a party.

(¶ 8) "Electronic record" means a record created, stored, generated, received, or communicated by electronic means for use by, or storage in such as computer equipment and programs, an information system electronic data interchange, electronic or for transmission from one information system to another voice mail, facsimile, telex, telecopying, scanning, and similar technologies.

Source: Article 2B Draft Section 2B-102(a)(17)

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

(¶ 9) "Electronic signature" means [letters, characters, numbers, or other] symbols any signature in electronic form, attached to or logically associated with an electronic record, executed or adopted by a party with present person or its electronic agent with intent to authenticate sign the electronic record.

Source: UCC Section 1-201(39); Illinois Model Section 200(3).

Reporter's Note: As with electronic record, this definition is a subset of the broader defined term "signature." The purpose of the separate definition is principally one of clarity in extending the definition of signature to the electronic environment.

This definition has been simplified by using the defined term "signature" within this definition. The defined term "signature" has been expanded from the standard UCC definition to incorporate specifically the attributes normally attached to a written signature, and to track the concept of authentication as defined in Article 2B. The new definition of "signature" reflects the Committee's direction
to delete the term "authenticate" from the August Draft and
incorporate that definition into "signature."

The key aspect of this definition lies in the necessity
that the electronic signature be linked or logically
associated with the record. For example, in the pen and ink
context it is assumed that a 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 associated with, the electronic
record being authenticated. This linkage is consistent with
the regulations promulgated by the Food and Drug
Administration. 21 CFR Part 11 (March 20, 1997).

An electronic signature includes any symbol adopted by
a party, so long as the requisite intent to sign
(authenticate) the electronic record exists. The
requirement that there be "present intent" to sign has been
removed as a potential barrier to the efficacy of electronic
signatures. While a contemporaneous signature would reflect
a present intent to sign, the operations of an electronic
agent which result in the creation of an electronic
signature (See Section 303) may not be viewed by courts as
manifesting a "present" intent since the act of programming
the electronic agent may have occurred well before the
attachment of the electronic signature.

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 signature was
applied with the intention to authenticate the electronic
record with which it was associated. It is the adoption of
the symbol with intention to authenticate that is
controlling. See Parma Tile Mosaic & Marble Co. v. Estate
of Short, 87 NY2d 524 (1996) where it was held that the
automatic imprint of a firm name, programmed into a fax
machine, was not a sufficient signature because of the
absence of any intention to authenticate each document sent
over the fax.

(10) "Good faith" means honesty in fact and
the observance of reasonable commercial standards of fair
dealing.

Source: Article 1 Draft Section 1-201(22).

(11) "Governmental transaction" means all matters
arising in any governmental setting, including, but not
limited to, the following: all communications, filings, reports, commercial documentation, or other electronic records relating to interactions between any governmental entity and any individual outside the government; and all intragovernmental communications, documents or other records employed in the conduct of governmental functions between or within any branch or agency of government.

Source: New
Reporter's Note: Patterned after the definition of "Commercial transaction," this definition has been added to the text. ISSUE FOR THE DRAFTING COMMITTEE: Is the definition complete and accurate? Should this definition be part of the text, or only set forth in the commentary to the Scope section?

(12) "Information" means data, text, images, sounds, codes, computer programs, software, databases, and the like.

Source: Article 2B Draft Section 2B-102(a)(22); Illinois Model Section 200(4).

(13) "Information system" means a system for creating, generating, sending, receiving, storing or otherwise processing information, including electronic records.

Source: Uncitral Model Article 2(f).
Reporter's Note: This term is used in the definition of electronic record and in Section 402 regarding the time and place of receipt of an electronic record. ISSUE FOR THE COMMITTEE: Is this definition accurate and complete?

(15) "Manifest of Assent" means that a party or its electronic agent has signed or otherwise clearly indicated that a record or term in a record has been adopted or accepted by the party or its electronic agent. A party or
its electronic agent manifests assent by engaging in affirmative conduct or operations with actual knowledge of the terms or after having an opportunity to review the terms, and with the opportunity to decline to sign or engage in the conduct. A manifestation of assent to a record or term in a record does not result merely by retention of the record or term without objection by the party or its electronic agent. If assent to a particular term in addition to assent to a record is required, action taken by a party or its electronic agent does not manifest assent to that term unless there was an opportunity to review the term and the action taken relates specifically to that term.

Reporter's Note: The concept of Manifesting Assent has been moved to Section 108.

(16) "Merchant" means a person that is a professional in the business involved in the transaction, that by occupation purports to have knowledge or skill peculiar to the practices involved in the transaction, or to which knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that purports to have the knowledge or skill.

Reporter's Note: This definition has been deleted as unnecessary. See the Reporter's Note to the deletion of the definition of Consumer.

(17) "Notify" means to communicate, or make available, information to another person in a form and manner as appropriate or required under the circumstances.
Source: Illinois Model Section 103(22) (June 4 Interim Draft).

Reporter's Note: Consistent with the provisions on receipt in Section 402, a notice sent to a party must be in a proper format to permit the recipient to use and understand the information. For example, sending a message notice to a recipient in the United States in Chinese would not suffice to notify the recipient of the content of the message, in the absence of proof that the recipient understood Chinese. Similarly, sending a notice in WordPerfect 7.0 may not be appropriate when many people do not have the capability to convert from that format. In such a case, a more universal format such as ASCII would be required.

16 "Opportunity to Review" means that a record or a term of a record is made available in a manner designed to call it to the attention of the party and to permit review of its terms or to enable an electronic agent to react to the record or term.

Reporter's Note: The concept of Opportunity to Review has been moved to Section 109.

15 "Organization" means a person other than an individual.

Source: UCC Section 1-201(28).

Reporter's Note: This is the standard Conference formulation for this definition.

16 "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental subdivision, or agency or instrumentality, or any other legal or commercial entity.

Source: UCC Section 1-201(30).

Reporter's Note: This is the standard Conference formulation for this definition.
(17) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non-existence.

Source: UCC Section 1-201(31)
Reporter's Note: This definition becomes necessary to indicate the effect of the presumptions created by Sections 202, 203 and 302. While the decision whether a presumption should be created is generally one of policy relating to the substantive law, the effect to be given to a presumption once created is generally left to the rules of evidence.

ISSUE FOR THE COMMITTEE: Should this Act should establish the effect of a presumption created by this Act.

This definition adopts the so-called "bursting bubble" approach to presumptions. That is, it only shifts the burden of producing evidence, but not the ultimate burden of persuasion. Although the Reporter has not yet seen the draft of the Uniform Rules of Evidence, my understanding from Professor Whinery, the Reporter for the Rules of Evidence project, is that committee is inclined toward a treatment of presumptions which will shift the burden of persuasion.

(21) "Receive," with respect to an electronic record, means that the electronic record has entered an information system in a form capable of being processed by a system of that type and the recipient uses or has designated that system for the purpose of receiving such records or information.

Reporter's Note: This provision has been moved to Section 402(b).

(22 18) "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.

Source: Article 2B Draft Section 2B-102(a)(35).
Reporter's Note: This is the standard Conference formulation for this definition.

(23 19) "Rule of law" means a statute, regulation, ordinance, common-law rule, court decision, or other law relating to commercial or governmental transactions enacted, established, or promulgated by this State, or any agency, commission, department, court, other authority or political subdivision of this State.

Source: Oklahoma Model Section II.F; Illinois Model Section 200(7).

Reporter's Note: The definition is drafted broadly with the single limitation of laws relating to commercial and governmental transactions, consistent with the Scope of the Act.

(24 20) "Security procedure," with respect to either an electronic record or electronic signature, means a commercially reasonable procedure or methodology, established by law, by agreement, mutually or adopted by the parties, or otherwise established to be a commercially reasonable procedure, for the purpose of verifying (i) the identity of the sender, or source, of an electronic record, or (ii) the integrity of, or detecting errors in, the transmission or informational content of an electronic record. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback or other acknowledgment procedures, key escrow, or any other procedures that are reasonable under the circumstances.
Source: UCC Section 4A-201; Article 2B Draft Section 2B-115(a); Illinois Model Section 200(9); Oklahoma Model Section III.B.2.

Reporter's Note: This definition has been amended from the August draft to eliminate the possibility that a security procedure used, but not adopted, by the parties may subsequently be shown to be commercially reasonable and hence give rise to the presumptions provided in Section 202, 203, and 302. That provision was unworkably vague. By limiting security procedures to those which are both commercially reasonable and either agreed to or adopted by parties or established by law, much of the concern over the imposition of presumptions is eliminated. Section 110 sets forth loss allocation rules for situations where security procedures are shown to be commercially unreasonable or are not used at all. In such cases the party at risk is the party imposing the commercially unreasonable procedure, or the relying party where no procedure is used. In this way, the party with the greatest incentive to assess the risk of proceeding in a transaction with commercially unreasonable procedures, or indeed with no security procedure at all, will bear the loss.

The two key aspects of a security procedure are to identify the sender and assure the informational integrity of the 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.

(25 21) "Signature" includes means any symbol, sound, process, or encryption of a record in whole or in part, executed or adopted by a person or the person’s with a present electronic agent with intent to authenticate a record

(i) identify the party;

(ii) adopt or accept a term or a record; or

(iii) establish the informational integrity of a record or term that contains the signature or to which a record containing the signature refers.
"Sign" means the execution or adoption of a signature by a person or the person’s electronic agent.

Source: UCC Section 1-201(39); Article 2B Draft Section 2B-102(a)(3)

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

(26 22) "State agency" means any executive[, legislative or judicial] agency, department, board, commission, authority, institution, or instrumentality of this State or of any county, municipal or other political subdivision of this State.

Source: New.

Reporter's Note: This definition is required as a result of the expanded scope of the Act to cover governmental transactions. The reference to legislative and judicial agencies, etc. has been bracketed in light of comment from members of the Committee that these should not be included.

ISSUE FOR THE COMMITTEE: Should the legislative and judicial branches be excluded.

(23) "Term" means that portion of an agreement which relates to a particular matter.

Source: UCC Section 1-201(42)

Reporter's Note: This definition has been added because of the reference to terms of a record in the section on manifestation of assent and opportunity to review (Section 108 and 109).

(27 24) "Transferable record" means a record, other than a writing, that is an instrument or chattel paper
under Article 9 of the [Uniform Commercial Code] or a
document of title under Article 1 of the [Uniform Commercial
Code].

Source: Oklahoma Model Section II.H.
Reporter's Note: This definition is necessary in the event
the Drafting Committee decides to retain the applicability
of this Act to such records. See Section 405.

(§ 25) "Writing" includes printing, typewriting,
or any other intentional reduction to tangible form.
"Written" has a corresponding meaning.

Source: UCC Section 1-201(46).
Reporter's Note: This definition reflects the current UCC
definition.

SECTION 103. PURPOSES. The underlying purposes 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.

Committee Vote: The Committee voted 4-2 at the September Meeting to delete this section and place its substance in the commentary. The Observers present voted 18-4 to retain the section in the text.

Reporter's Note: The purposes have been moved to the commentary following Section 106 relating to Application and Construction. Although Section 106 smacks of a purposes clause, the Committee did not vote to delete that section.

SECTION 104 103. SCOPE. Except as otherwise provided in Section 105 or any regulation adopted pursuant to Part 5, this [Act] applies to electronic records and electronic signatures generated, stored, processed, communicated or used for any purpose in any commercial or governmental transaction.


Reporter's Note:
1. The scope of the Act has been clarified by limiting its applicability to electronic records and adding electronic signatures. Further it has been clarified by specifically providing that regulations adopted by state agencies pursuant to the authorization granted in Part 5 may indicate the extent to which this Act shall apply.

2. The Scope of this Act is perhaps the single most difficult aspect in the drafting of this Act. In light of
the purpose of this Act to validate and effectuate
electronic records and electronic signatures used in any
commercial or governmental transaction the question may be
asked whether any further limitations on its scope are
necessary.

At the May meeting the Drafting Committee expressed
strong reservations about applying this Act to all writings
and signatures, as is contemplated in the Illinois,
Massachusetts and other models. These same reservations
were again raised at the September Meeting. However, the
scope as currently drafted does not apply to all writings
and records, but only to those arising in the context of a
commercial or governmental transaction. Furthermore, as
currently drafted the provisions of this Act are all default
rules (except section 110 regarding certain allocations of
loss) which can be changed by the parties (as part of their
agreement) or governmental entities (pursuant to the
regulations contemplated by Part 5) to fit the needs of the
transaction.

3. Although the scope of the Act is limited to the context
of commercial and governmental transactions, the idea of a
commercial transaction is to be broadly understood. In a
footnote, the Uncitral Model Law provides that

The term "commercial" should be given a wide
interpretation so as to cover matters arising from all
relationships of a commercial nature, whether
contractual or not. Relationships of a commercial
nature include, but are not limited to, the following
transactions: any trade transaction for the supply or
exchange of goods or services; distribution agreement;
commercial representation or agency; factoring;
leasing; construction of works; consulting;
engineering; licensing; investment; financing; banking;
insurance; exploitation agreement or concession; joint
venture and other forms of industrial or business
cooperation; carriage of goods or passengers by air, sea, rail or road.

This draft adopts this position.

4. Consistent with the expanded scope of the Act approved
by the Scope and Program Committee this past summer, the
scope has been expanded to cover governmental transactions.
As in the case of commercial transaction, the idea of a
governmental transaction is to be broadly understood.

The term "governmental" should be broadly construed to
include all matters arising in any governmental
setting, including, but not limited to, the following:
all communications, filings, reports, commercial
documentation, or other electronic records relating to interactions between any governmental entity and any individual outside the government; and all intragovernmental communications, documents or other records employed in the conduct of governmental functions between or within any branch or agency of government.

Since the circumstances under which any given State may wish, or be able, to adopt electronic means of conducting its business (either with the private sector or intragovernmentally) will differ, this Act simply provides authority for state entities to adopt the means to go electronic. Part 5 authorizes state entities to adopt rules and regulations to implement electronic transactions consistent with the particular needs of the particular agency.

5. **ISSUE FOR THE DRAFTING COMMITTEE:** Is it sufficient to leave the scope of commercial transactions and governmental transactions to commentary, or should the Act set forth specific definitions for these terms?

6. Section 104 sets forth exclusions to the coverage of this Act. The specific subsections relating to writings and signatures which allowed specific exclusions from those provisions have been deleted. Exclusions from coverage should be set forth in a single section.

**SECTION 105. TRANSACTIONS SUBJECT TO OTHER LAW.**

(a) [Unless otherwise expressly agreed by the parties,] This [Act] does not apply to the extent that a transaction is governed by:

(1) rules of law relating to the creation or execution of a will;

(2) rules of law relating to the transfer, deposit or withdrawal of money or financial credit;

(3) rules of law relating to the creation, performance or enforcement of an indenture, declaration of trust or power of attorney;
(4) rules of law relating to the conveyancing of real property;

(5) [OTHER]

(b) A transaction subject to this [Act] is also subject to:

(1) any applicable rules of law relating to consumer protection;

(2) [OTHER].

(c) In the case of a conflict between this [Act] and a rule of law referenced in subsection (b), such rule of law governs.

SECTION 104. TRANSACTIONS SUBJECT TO OTHER LAW.

(a) This [Act] does not apply to the extent that its application would involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law, provided that the mere requirement that information be "in writing," "written," "printed," "signed," or any other word that specifies or requires the use of a particular medium of presentation, communication or storage, shall not, by itself, be sufficient to establish such intent.

(b) A transaction subject to this [Act] is also subject to:

(1) any applicable rules of law relating to consumer protection;
(2) the Uniform Commercial Code as enacted in this State; and

(3) [OTHER][such other rules of law as may be designated at the time of the enactment of this [Act]].

(c) The provisions of this [Act] and a rule of law referenced in subsection (a) or (b) must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable a rule of law referenced in subsection (a) or (b) governs.

Source: UETA Draft Section 105 (Aug. 15, 1997); Massachusetts Model Section 66(a)(i); Illinois Model Section 202(b)(1).

Reporter's Note:
1. This section has been revised based on the comments at the September meeting.

2. Subsection (a) sets forth a "repugnancy clause" similar to those appearing in the Mass. and Ill. Acts. This general exclusion is intended as a broad "catch-all" to assure that where a rule of law manifests a clear intent for a paper writing or an ink on paper signature it will not be overridden by this Act. In the commercial context, where the parties have not imposed such an ink on paper requirement, it is difficult to think of a law which would require ink on paper. For example the Statute of Frauds is the perfect example of a statute requiring a signed writing by its terms but with respect to which an electronic record or signature would not be repugnant to the purposes of creating a perceivable record, providing an evidentiary base for the transaction, permitting retention of a record of the transaction, or requiring application of a signature to indicate assent to the terms in the writing. All of these functions can be accomplished by electronic records and electronic signatures as defined in this Act. However, if such a rule of law existed, subsection (a) makes clear that this Act would have no application to the extent of the repugnancy.

3. Subsection (b) sets forth specific areas of law which implicate a commercial transaction and which will govern over this act to the extent inconsistent with this Act. The volume of consumer protection laws which apply to commercial transactions, as broadly defined in this Act, is varied and
vast. Consumer credit, leasing, sales and banking statutes exist which impose disclosure requirements on the commercial party when dealing with consumers. There would appear to be nothing manifestly repugnant to consumer disclosure laws if the disclosures were to be done electronically. Except for laws requiring a certain format (e.g., disclosures in 16 point type), so long as procedures exist to establish that the requisite information was available to the consumer, courts should be able to construe such laws consistently with the provisions of this Act.

At the suggestion of Fred Miller, the section now makes the Act expressly subject to the UCC. One question in this regard relates to the interplay between Section 405 on transferable records and Articles 3 and 4.

4. Subsection (b) also retains a placeholder for other areas of law to which this Act should be subject.

5. Subsection (c) requires consistent construction of the provisions of this Act with any rule of law which otherwise would be excluded.

6. The inherent limitation on the scope of this Act to commercial and governmental transactions, eliminates the need to specifically exclude laws relating to wills and personal trusts, as these will not likely arise in the context of a commercial or governmental transaction. Further, the provisions of Part 5, being entirely in the nature of an opt-in provision for governmental entities, eliminates laws relating to governmental licensing, recording, and the like. Since the Act will only apply to the extent a State agency adopts its provisions, the vast majority of writing and signature requirements relating to governmental business are automatically excluded.

7. Concern was raised at the September meeting that the use of the term "rules of law" created ambiguity in whether the Act would apply in a given scenario. However, in dealing with repugnancy under subsection (a) and construction for consistency under subsection (c), there would appear to be no other solution. For example, if a given provision of a consumer protection statute requires "written" disclosures, a court would have to deal with that particular rule to determine whether the disclosures, consistent with that rule, can be effectively made electronically. A total exclusion for all consumer writing requirements would be too broad.

SECTION 106 105. VARIATION BY AGREEMENT.
(a) As between parties involved in generating, storing, sending, receiving, or otherwise processing or using electronic records or electronic signatures, and except as otherwise provided, the provisions of this [Act] may be varied by agreement, except:

(1) the obligations of good faith, reasonableness, diligence and care prescribed by this [Act] may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable; and

(2) the rules in Section 110 regarding allocations of loss where no security procedure or commercially unreasonable security procedures are used in a transaction.

(b) 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 under subsection (a).

(c) This [Act] does not, nor shall it be construed to, require that information records or signatures be created generated, stored, transmitted sent, received or otherwise processed or used or communicated by electronic means or in electronic form.

Source: UCC Section 1-102(3); Illinois Model Section 103.
Reporter's Note: Given the principal purpose of this Act to validate and effectuate the use of electronic media in commercial and governmental transactions, it is important to preserve the ability of the parties to establish their own requirements concerning the method of generating, storing and communicating with each other. This Act affects substantive rules of contract law in only limited ways (See especially Part 4), by giving effect to actions done electronically. Even in those cases, the parties remain free to alter the timing and effect of their communications.

The only provisions of the Act which may not be disclaimed by agreement are the obligations of good faith, reasonableness, diligence and care imposed by the Act, and allocation of loss provisions where less than commercially reasonable security procedures are used. **ISSUE FOR THE COMMITTEE:** Are there other provisions of this Act which should be mandatory?

**SECTION 107. APPLICABLE LAW.**

— (a) An agreement by parties to a transaction governed in whole or in part by this [Act] that their rights and obligations with respect are to be determined by the law of this state or another state or country is effective, whether or not the transaction bears a reasonable relation to that state or country, unless:

-----------(1) the transaction is a consumer transaction and that state or country is neither
-----------(A) the state or country in which the consumer resides at the time the transaction becomes enforceable or will reside within 30 days thereafter, nor
-----------(B) the state or country in which, pursuant to the contract establishing the transaction, the goods, services, or other consideration flowing to the consumer are to be received by the consumer or a person designated by the consumer;
(2) the law of that state or country is contrary to a fundamental public policy of the state or country whose law would govern if the parties had not selected the governing law by agreement, or

(3) the agreement of the parties selects the law of a country other than the United States and the transaction does not bear a reasonable relationship to a country other than the United States.

SUBSECTION (B) ALTERNATIVE 1

(b) If subsection (a) does not apply or the agreement of the parties under subsection (a) is ineffective, this [Act] applies to transactions bearing an appropriate relation to this state.

SUBSECTION (B) ALTERNATIVE 2

(b) If subsection (a) does not apply or the agreement of the parties under subsection (a) is ineffective, the law determining the rights and obligations of parties with respect to any aspect of a transaction governed by this [Act] is the law that would ordinarily be selected by application of this state’s conflict of laws principles; provided, however, that if application of such principles to a transaction that is not a consumer transaction would result in the unenforceability of all or part of an agreement that is enforceable under the law of this state, the law governing those rights and obligations
is the law of this state unless the transaction does not
bear an appropriate relationship to this state].

Committee Vote: The Committee voted 4-3 to delete this
section. The observers polled 14-7 to retain the section.

SECTION 108. CHOICE OF FORUM. The parties may choose
an exclusive judicial forum. However, in a consumer contract
the choice is not enforceable if the chosen jurisdiction
would not otherwise have jurisdiction over the consumer, the
consumer did not have adequate notice of the choice of forum
term and the choice [is fundamentally unfair to] and
[unreasonably burdens] the consumer. A choice of forum in a
term of an agreement is not exclusive unless the agreement
expressly so provides.

Committee Vote: The Committee voted 4-3 to delete this
section. The observers polled 14-7 to retain the section.

SECTION 109. APPLICATION AND CONSTRUCTION. This
[Act] must be liberally construed and applied consistently
with commercially reasonable practices under the
circumstances and to promote its underlying purposes and
policies.

Source: UCC Section 1-102

Reporter’s Note: The following commentary, derived from the
Illinois Electronic Commerce Security Act Section 102, has
been moved from the text of former Section 103 in the August
Draft.

The underlying 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 110 107. COURSE OF PERFORMANCE, COURSE OF
DEALING, AND USAGE OF TRADE.

(a) A "course of performance" is a sequence of
conduct between the parties to a particular transaction that
which exists if:

(1) the agreement of the parties with
respect to the transaction involves repeated occasions for
performance by a party;

(2) that party performs on one or more
occasions; and

(3) the other party, with knowledge of the
nature of the performance and opportunity for objection to
it, accepts the performance or acquiesces to it without
objection.

(b) A "course of dealing" is a sequence of
previous conduct between the parties to a particular
transaction that which is fairly to be regarded as
establishing a common basis of understanding for
interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method
of dealing having such regularity of observance in a place,
vocation, or trade as to justify an expectation that it will
be observed with respect to the transaction in question.
The existence and scope of such a usage are to be proved
as facts. If it is established that such a usage is
embodied in a trade code or similar record, the
interpretation of the record is a question of law.

(d) A course of performance or course of dealing
between the parties or usage of trade in the vocation or
trade in which they are engaged or of which they are or
should be aware is relevant in ascertaining the meaning of
the parties’ agreement, may give particular meaning to
specific terms of the agreement, and may supplement or
qualify the terms of the agreement. A usage of trade
applicable where only part of the performance under the
agreement is to occur may be so utilized as to that part of
the performance.

(e) The express terms of an agreement [including
terms with respect to which a party has manifested assent],
and any applicable course of performance, course of dealing,
or usage of trade shall must be construed wherever
reasonable as consistent with each other. If such a
construction is unreasonable:
(1) express terms prevail over terms with respect to which either party has manifested assent, course of performance, course of dealing, and usage of trade;

(2) terms with respect to which either party has manifested assent prevail over course of performance, course of dealing, and usage of trade; course of performance prevails over course of dealing and usage of trade; and

(3) course of performance prevails over course of dealing and usage of trade; and

(4) course of dealing prevails over usage of trade.

(f) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter other party.

Source: Article 1 Draft Section 1-304.

Reporter's Note: This section follows the existing priority of construction found in UCC Sections 1-205 and 2-208. The priority to be given terms with respect to which either party has manifested assent, which appeared in the August Draft has been removed in light of the consensus of the Committee and observers that the distinction between terms expressly agreed to and those with respect to which a manifestation of assent has occurred was unnecessary and unwise. The bracketed language is proposed, however, to make clear that terms to which parties have manifested assent are express terms. Whether the committee adopts the bracketed language or not, the commentary will make clear that terms expressly agreed to and terms with respect to which a party manifests assent are both to be considered express terms and in case of conflict the issue is one of construing the express terms of the agreement.

SECTION 108. MANIFESTING ASSENT.
(a) A person or electronic agent manifests assent to a record or term in a record if, with knowledge of the terms or after having an opportunity to review the record or term under Section 109, it:

(1) signs the record or term, or engages in other affirmative conduct or operations that the record clearly provides or the circumstances, including the terms of the record, clearly indicate will constitute acceptance of the record or term; and

(2) had an opportunity to decline to sign the record or term or engage in the conduct.

(b) The mere retention of information or a record without objection is not a manifestation of assent.

(c) If assent to a particular term in addition to assent to a record is required, a person's conduct does not manifest assent to that term unless there was an opportunity to review the term and the signature or conduct relates specifically to the term.

(d) A manifestation of assent may be proved in any manner, including by showing that a procedure existed by which a person or an electronic agent must have engaged in conduct or operations that manifests assent to the record or term in order to proceed further in the transaction.

Source: Article 2B Draft Section 2B-112.

Reporter's Note: Derived from Article 2B, this section, together with the following section on "opportunity to review," is critical in determining what constitutes the agreement of parties when that agreement is formed electronically. Because of the nature of electronic media,
it may well be the case that a party does not deal with a human being on the other side of a transaction.

In an electronic environment where computers are often pre-programmed and operate without human review of the operations in any particular, discreet transaction, it is not always the case that two humans have reached a "bargain in fact," i.e., a "meeting of the minds." Rather, the agreement is often the result of one party or its electronic agent manifesting assent to terms or records presented to it on a "take it or leave it (i.e., exit)" basis, similar to the presentation of a standard form document in the paper environment.

The situations where parties participate in detailed negotiations leading to the formation of an integrated contract setting forth all the terms to which both parties have agreed are largely limited to transactions involving large amounts. Even outside the electronic environment, the use of pre-printed standard forms has supplanted detailed negotiations in many small amount transactions. Accordingly the concept of manifestation of assent to a record or terms of a record has supplemented the notion of actual agreement in determining that to which the parties have agreed to be bound (See Restatement (Second) Contracts Section 211, UCC Section 2-207).

Even in an electronic environment it remains possible to negotiate to agreement. In such a case, if parties engage in e-mail correspondence which results in a classic offer and acceptance of the terms (and only the terms) set forth in the correspondence, the electronic signatures appended to the e-mail messages serve to authenticate the records and result in contract formation. This is the case since an electronic signature, by definition, is made with intent to sign the record.

Contrasted with such a negotiated electronic contract is the situation where one calls up a provider on the Internet. The person determines to purchase the goods or services offered and is walked through a series of displayed buttons requesting the purchaser to agree to certain terms and conditions in order to obtain the goods and services. With each click on screen, the purchaser is indicating assent to that term in order to obtain the desired results. So long as the action of clicking in each case relates to a discreet term, or follows the full presentation of all terms, the actions of the purchaser can be said to clearly indicate assent to the terms available for review. As with the exchange of standard paper forms, there is no requirement that the terms be read before the on screen click occurs, so long as they were available to be read. Indeed, in such a scenario the problem of additional and conflicting terms which have so confused courts in the battle of the forms is not present.
A provision dealing with manifesting assent is particularly necessary in the electronic environment where the real possibility of a contract being formed by two machines exists. Sections 302 and 401 rely on the concept in determining when a signature occurs and what the terms of an agreement are when contracts or signatures result from the operations of electronic agents, either between electronic agents or when interacting with a human actor.

**SECTION 109. OPPORTUNITY TO REVIEW.** A person or electronic agent has an opportunity to review a record or term if it is made available in a manner which calls it to the attention of the person and permits review of its terms or enables the electronic agent to react to it.

*Source:* Article 2B Draft Section 2B-113(a).
*Reporter's Note:* See Reporter's Note to Section 108, Manifesting Assent, supra.

**SECTION 110. DETERMINATION OF COMMERCIALLY REASONABLE SECURITY PROCEDURE; COMMERCIALLY UNREASONABLE SECURITY PROCEDURE; NO SECURITY PROCEDURE.**

(a) The commercial reasonableness of a security procedure is determined by the court in light of the purposes of the procedure and the circumstances at the time the parties agreed to or adopted the procedure including the nature of the transaction, sophistication of the parties, volume of similar transactions engaged in by either or both of the parties, availability of alternatives offered to but rejected by a party, cost of alternative procedures, and procedures in general use for similar transactions. A security procedure established by law shall be determined to be commercially reasonable for the purposes for which it was established.
(b) If a loss occurs because a person complies with a security procedure that was not commercially reasonable, the person that required use of the commercially unreasonable security procedure bears the loss unless it disclosed the nature of the risk to the other person and offered commercially reasonable alternatives that the person rejected. The liability of the person that required use of the commercially unreasonable security procedure is limited to losses that could not have been prevented by the exercise of reasonable care by the other person.

(c) Except as otherwise provided in subsection (b), Section 202, Section 203, or Section 302, if a loss occurs because no security procedure was used, the person relying on an electronic record or electronic signature as between the two parties, the party who relied bears the loss.

Source: Article 2B Draft Section 2B-115(c and d)
Reporter's Note: Coupled with the definition of security procedure (now limited to commercially reasonable party agreement or adoption or establishment by law), this provision sets forth key allocation of loss rules. Where parties have agreed to or adopted commercially reasonable security procedures, the creation of presumptions about the identity of the source, and informational integrity, of an electronic record or the validity of an electronic signature should not pose the problems of unfair surprise and lack of sophistication which have been noted in the discussions of the propriety of the creation of presumptions. Even in the consumer transaction where a vendor "imposes" a security procedure, in order to continue in the transaction the consumer would manifest assent to the procedure, thereby adopting it. The burden would be on the vendor to establish the commercial reasonableness of the procedure, and if that were established, the limited presumption would attach. Where a person "imposes" a security procedure which cannot be shown to be commercially reasonable, any liability or loss will be borne by that person under subsection (b)
unless the person explained the problems with the chosen procedure or offered alternatives. In the event that a transaction is accomplished without any security procedure, the party (usually a vendor) relying on the electronic record or signature will bear the liability for any loss. By imposing the responsibility to invoke commercially reasonable procedures on the relying party, the vast majority of transactions will result in the more sophisticated party bearing the risk of loss. The need for distinctions based on the parties status as consumers/merchants, sophisticated/unsophisticated become unnecessary. Those persons wishing to use electronic commerce will bear the burdens, costs and risks of assuring themselves that the level of security is sufficient for their needs, given the significance of the transaction. The exceptions in subsection (c) are noted for clarity. Sections 202, 203 and 302 deal with methods of attributing records, assuring the informational integrity of electronic records and establishing the efficacy of electronic signatures. While these sections address the use of security procedures, other means of proof and attribution are authorized. For example, if a person can establish that an electronic record is attributed to a person because it was the act of that person (Section 202(a)(1)), then the loss would not be placed on that person under subsection (c), even though no security procedure was used.

SECTION 111. OBLIGATION OF GOOD FAITH. There is an obligation to act in good faith in the formation, performance, and enforcement of every transaction and duty within the scope of this [Act].

Source: Article 1 Draft Section 1-305.

Reporter's Note: This section has been added in response to comments at the September Meeting.

SECTION 112. GENERAL PRINCIPLES OF LAW APPLICABLE. Unless displaced by the particular provisions of this [Act], the principles of law and equity, including the law merchant and the law relating to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating and invalidating cause shall supplement its provisions.
Source: UCC Section 1-103

Reporter's Note: This section has been added based on comments at the September Meeting. It is particularly important in light of the essentially procedural nature of this Act. This Act has only limited effect on substantive provisions of commercial law. Rather its principal effect is to validate electronic transactions so that the procedural hurdle of the media in which records and signatures must be presented can be overcome and the substance of the transaction can be considered. Accordingly, this section has been added to make clear that the substantive law underlying the transactions governed by the Act continue to be fully applicable.

The Revised draft of Article 1 has streamlined existing Section 103. An adaptation of the revision follows for the Committee's consideration:

Principles of law and equity may be used to supplement this [Act], except to the extent that those principles are inconsistent with the terms[, or underlying purposes and policies,] of a particular provision of this [Act].

ISSUE FOR THE COMMITTEE: Is the streamlined revision (with or without the bracketed language) preferable?

PART 2

ELECTRONIC RECORDS AND SIGNATURES GENERALLY

SECTION 201. LEGAL RECOGNITION OF ELECTRONIC RECORDS.

(a) A record may not be denied legal effect, validity or enforceability solely because it is in the form of an electronic record.

SECTION 202. WRITINGS.

(a) Except as provided in subsection

(b) This section does not apply to: 

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

(c) A person may establish reasonable
requirements regarding the type of records which will be
acceptable to it.

Source: UETA Draft Sections 201 and 202 (August 15, 1997);
Uncitral Model Articles 5 and 6; Illinois Model Sections 201
and 202.

Reporter's Note:
1. Parts 2, 3 and 4 reflect a fundamental reorganization
of this Act. Part 2 now deals with those provisions
relating to the validity, effect, and use of electronic
records, Part 3 contains those sections dealing with the
validity and effect of electronic signatures, and Part 4
reflects general contract provisions, and provisions dealing
with the effect of both electronic records and electronic
signatures. Under different provisions of substantive law
the legal effect and enforceability of an electronic record
may be separate from the issue of whether the record
contains a signature. For example, where notice must be
given as part of a contractual obligation, the effectiveness
of the notice will turn on whether the party provided the
notice regardless of whether the notice was signed. An
electronic record attributed to a party under Section 202
would suffice in that case, notwithstanding that it may not
contain a signature.

2. This section reflects a merger of former Sections 201
and 202 from the August Draft.

3. Subsection (a) establishes the fundamental premise of
this Act: That the form in which a record is generated,
presented, communicated or stored may not be the only reason
to deny the record legal recognition. On the other hand,
subsection (a) should not be interpreted as establishing the
legal effectiveness, validity or enforceability of any given
record. Where a rule of law requires that the record
contain minimum substantive content, the legal effect,
validity or enforceability 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.

4. Subsection (b) is a particularized application of
Subsection (a). Its purpose is to validate and effectuate
electronic records 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 evidentiary 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 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 "signed writing."

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

5. Subsection (c) is a particularized application of Section 105, to make clear that parties retain control in determining the types of records to be used and accepted in any given transaction.

6. Former Section 202(b) has been deleted as unnecessary because of the policy reflected in this draft to set forth all exclusions in Section 104.

SECTION 403(a-b) 202. ATTRIBUTION; TRANSMISSION ERRORS OF ELECTRONIC RECORD TO A PARTY.

(a) As between the parties, an electronic record received by a party is attributable to a party indicated as the sender if:
(1) it was sent by in fact the action of that party, its agent, or its electronic agent;

(2) the receiving other party, in good faith and in compliance with a security procedure for identifying the party concluded that it was sent by it was the action of the other party, its agent, or its electronic agent; or

(3) subject to subsection (b), the electronic record:

(A) resulted from acts of a person that obtained access to a security procedure, access numbers, codes, computer programs, or the like from a source under the control of the alleged sender party creating the appearance that the electronic record came from the alleged sender that party;

(B) the access occurred under circumstances constituting a failure to exercise reasonable care by the alleged sender party; and

(C) the receiving other party reasonably relied to its detriment on the apparent source of the electronic record.

(b) In a case governed by subsection (a)(3), the following rules apply:

(1) The receiving relying party has the burden of proving reasonable reliance, and the alleged sender party to
which the electronic record is to be attributed has the burden of proving reasonable care.

(2) Reliance on an electronic record that does not comply with an agreed security procedure is not reasonable unless authorized by an individual representing the alleged sender party to which the electronic record is to be attributed.

(c) Attribution of an electronic record to a party under subsection (a)(2) creates a presumption that the electronic record was that of the party to which it is attributed.

Source: Article 2B Draft Section 2B-116.

Reporter's Note: This section follows Article 2B and sets forth risk allocation rules in the context of record attribution. The section sets forth rules establishing the circumstances under which a party will be bound by (be attributable for) an electronic record sent to another party.

Subsection (a)(1) relies on general agency law, including the new concept of electronic agency, to bind the sender. Subsections (a)(2) and (3) deal with allocations of risk where security procedures are involved. Under subsection (a)(2) an electronic record will be attributed to the sender if the recipient complied, in good faith, with a security procedure which confirmed the source of the electronic record. Subsection (a)(3) binds the purported sender of an electronic record where the sender's negligence in maintaining security procedures or the like has permitted the record to be sent and the recipient reasonably relied on the record to its detriment. Subsection (b) provides rules for the allocation of the burden of proof where negligence and reasonable reliance issues are present.

Subsection (c) is new and provides a rebuttable presumption of attribution where a security procedure is used. This presumption is appropriate because of the definition of security procedure which is now limited to procedures adopted by the parties or established by law which are also commercially reasonable. As Section 110 makes clear, where a security procedure is shown to be commercially unreasonable, or where no security procedure is
used, the presumption will not apply and the loss generally will fall on the relying party.

SECTION 203. DETECTION OF CHANGES AND ERRORS.

(a) If through a security procedure to detect changes in informational content, the informational content of an electronic record can be shown to be unaltered since a specified point in time, the informational content shall be presumed to have been unaltered since that time.

(b) If an electronic record is created or sent in accordance with a security procedure for the detection of error, the information in the electronic record is presumed to be as intended by the person creating or sending it as to portions of the information to which the security procedure applies. If the electronic record was transmitted pursuant to a security procedure for the detection of error and the record nevertheless contained an error but the error was not discovered, the following rules apply:

(1) If the sender complied with the security procedure and the error would have been detected had the receiving party also complied with the security procedure, the sender is not bound.

(2) If the sender, pursuant to a security procedure, receives a notice of the content of the record as received, the sender has a duty to required by the security procedure that describes the content of the record as received, the sender shall review the notice and report any
error detected by it in a commercially reasonable manner. Failure to so review and report any error shall bind the sender to the content of the record as received.

(d) Except as otherwise provided in subsection (a)(1) and (c), if a loss occurs because a party complies with a security procedure that was not commercially reasonable, the party that required use of the commercially unreasonable security procedure bears the loss unless it disclosed the nature of the risk to the other party or offered commercially reasonable alternatives that the party rejected. The party’s liability under this section is limited to losses that could not have been prevented by the exercise of reasonable care by the other party.

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

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

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

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

(d) In subsection (c), the burden of proving intent and lack of error is on the other party, and the individual has the burden of proving compliance with subsections (c)(1), (2), and (3).

(e) In this section, "inadvertent error" means an error by an individual made in dealing with an electronic agent of the other party when the electronic agent of the other party did not allow for the correction of the error.]

**Source:** Article 2B draft Section 2B-117

**Reporter's Note:**
1. Like Section 202, this section allocates the risk of errors in transmission to the party that could have best detected the error through the use of a security procedure. Again, since the parties will have agreed or adopted the security procedure, the creation of the presumption of accuracy, and allocation to the party that should have discovered the error, should not pose undue hardship or unfair surprise on the party bearing the loss.

2. Section 2B-117(c) of the November 1, 1997 draft of Article 2B sets forth a new, rather elaborate defense for consumers when errors occur. As currently drafted the defense is limited to errors occurring because of system failures and not human error (as in the single stroke error of concern to a number of observers at the September Meeting). Because the allocation of losses under this draft turns on the use of security procedures and their commercial reasonableness and places the loss on the party choosing to rely on electronic records and electronic signatures, the distinction between consumers and merchants, and sophisticated and unsophisticated parties has been eliminated. Rather the burden is placed on the person consciously desiring the benefits of electronic media to assure that the level of security necessary exists.

However, the bracketed language attempts to address the issue of human error in the context of an automated
transaction. The reason for attempting to address this issue is that inadvertent errors occurring as the result of a single keystroke error do occur, and are difficult, if not impossible to retrieve, given the speed of electronic communications. However, the definition of "inadvertent error" would allow a vendor to provide an opportunity for the individual to confirm the information to be sent, in order to avoid the operation of this provision. By providing an opportunity to an individual to review and confirm the information initially sent, the other party can eliminate the possibility of the individual defending on the grounds of inadvertent error since the electronic agent, through confirmation, allowed for correction of the error.

**ISSUE FOR THE DRAFTING COMMITTEE:** Is the bracketed language appropriate and should it be retained.

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**SECTION 205–204. ORIGINALS: – INFORMATION ACCURACY.**

(a) If a rule of law [or a commercial practice]
requires a record to be presented or retained in its original form, or provides consequences for the record not being presented or retained in its original form, that requirement is met by an electronic record if [the electronic record is shown to reflect accurately] [there exists a reliable assurance as to the integrity of] the information set forth in the electronic record from the time when it was first generated in its final form, as an electronic record or otherwise.

(b) The criteria for assessing the integrity and accuracy of the information in an electronic record shall be determined by whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display. The standard of reliability required shall must be assessed in the light
of the purpose for which the information was generated and
in the light of all the relevant circumstances.

(c) The provisions of this article do not apply to the
following:

Source: UETA Draft Section 205 (August 15, 1997); Uncitral
Model Article 8; Illinois Model Section 204.

Reporter's Note:
1. This section deals with the serviceability of
electronic records as originals. As was noted at the May
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." Given the recognition of this
problem, the title of the section has been expanded to
reflect the concern regarding the informational integrity of
an electronic record; integrity which is assumed to exist in
the case of an original writing.

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

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

Since requirements for "originals" are often the result of commercial practice and not an actual rule of law, the section includes the bracketed language regarding requirements derived from commercial practice. As a policy matter it is not at all clear that legislation should override established commercial practice. **ISSUE FOR THE DRAFTING COMMITTEE:** Should the bracketed language be retained or deleted?

3. 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."

At the May meeting concern was expressed that the "reasonable assurance" standard was too vague. The first alternative tracks the language in the rules of evidence and focuses on the accuracy of the information presented. The second alternative is the language appearing in Section 204 of the Illinois Model. **ISSUE FOR THE COMMITTEE:** Which alternative provision should be adopted?

4. 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 and signatures in evidence is addressed in Section 404 and its notes.

**SECTION 207 205. RETENTION OF ELECTRONIC RECORDS.**

(a) If a rule of law requires that certain documents, records, or information be retained, that requirement is met
by retaining electronic records, if: provided that the following conditions are satisfied:

(1) the information contained in the electronic record remains accessible so as to be usable for subsequent reference; and

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

(3) such the information, if any, is retained as enables the identification of the source of origin and destination of an electronic record and the date and time it was sent or received.

(b) A requirement to retain documents, records, or information in accordance with subsection (a) does not extend to any information the sole purpose of which is to enable the record to be sent or received.

(c) A person may satisfy the requirement referred to in subsection (a) by using the services of any other person, provided that if the conditions set forth in paragraphs (1), (2), and (3) of subsection (a) are met.

(d) The provisions of this section do not apply to documents, records, or information excluded from the provisions of Section 202 (Writings) or Section 203 (Signatures).
(e) (d) Nothing in this section shall preclude any
federal or state agency from specifying additional
requirements for the retention of records, either written or
electronic, that are subject to the jurisdiction of such
agency's jurisdiction.

Source: Uncitral Model Article 10; Illinois Model Section 206.
Reporter's Note: At the May meeting concern was expressed
that retained records may become unavailable because the
storage technology becomes obsolete and incapable of
reproducing the information on the electronic record.
Subsection (a)(1) addresses this concern by requiring that
the information in the electronic record "remain"
accessible, and subsection (a)(2) addresses the need to
assure the integrity of the information when the format is
updated or changed.

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

PART 3
SECURE ELECTRONIC RECORDS AND SIGNATURES

SECTION 301. SECURE ELECTRONIC RECORDS. If, through
the application of a security procedure, it can be verified
that an electronic record has remained unaltered since a
specified time, the record is a secure electronic record
from that time forward.

SECTION 302. SECURE ELECTRONIC SIGNATURES. If,
through the application of a security procedure, it can be
verified that an electronic signature was, at the time it was made, unique to the person using it, capable of verification, under the sole control of the person using it, and linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated, the signature is a secure electronic signature.

**SECTION 303. PRESUMPTIONS.**

(a) With respect to a secure electronic record, there is a rebuttable presumption that the electronic record has not been altered since the specific time to which the secure status relates.

(b) With respect to a secure electronic signature there is a rebuttable presumption that,

(1) the secure electronic signature is the signature of the party to whom it relates, and

(2) the secure electronic signature was affixed by that party with the intention of signing the record.

(c) In the absence of a secure electronic record or a secure electronic signature, this [Act] does not create any presumption regarding the authenticity and integrity of an electronic record or an electronic signature.

**Reporter's Note:** The concept of secure electronic records and signatures has been deleted in this draft. Rather, this draft addresses the limited presumptions available through the use of a security procedure on a more discreet basis. Instead of creating a broad category of secure electronic records and signatures, where a security procedure is used, certain presumptions regarding attribution, or integrity of a record or existence of an electronic signature, are
provided in those sections addressing the effect of an electronic record or electronic signature.

This more discrete treatment is consistent with the overall reorganization in this draft. The purpose of the reorganization is to treat electronic records and electronic signatures separately because the issues relating to records and signatures under substantive rules of law are often distinct. If the current organization is approved by the Drafting Committee, it would seem to make more sense to treat the effect of the use of a security procedure in the general provisions regarding electronic records and electronic signatures.

The distinction is largely one of style. As noted in the August Draft, the separate creation of presumptions for secure electronic records and signatures in Part 3 was, in large part, alternative to the attribution rules for electronic records and the methods of proving electronic signatures. This draft reflects a decision to take the latter approach to the issue of presumptions. In addition, the approach taken is more consistent with the approach taken in Article 2B.

It is to be noted that the presumption attaching to an electronic signature executed in accordance with a security procedure is more limited under this draft than in the deleted section 303(b). The effect now is a simple presumption that an electronic record is signed by the signing party. There is no longer a presumption regarding the intention of the signer, although such a presumption may follow based on the definition of signature.

ISSUE FOR THE DRAFTING COMMITTEE: Is the approach and organizational structure of the current draft preferable?

ELECTRONIC SIGNATURES GENERALLY

SECTION 203 301. LEGAL RECOGNITION OF ELECTRONIC SIGNATURES.

(a) A signature may not be denied legal effect, validity, or enforceability solely because it is in the form of an electronic signature.

(b) If a rule of law requires a signature, or provides consequences in the absence of a signature, that
the rule of law is satisfied with respect to an electronic
record if the electronic record includes an electronic
signature.

(b) (c) A party may establish reasonable requirements
regarding the method and type of signatures which will be
acceptable to it.

(c) The provisions of this article do not apply to:

Source: Uncitral Model Article 7; Illinois Model Section
203(a); Oklahoma Model Section IV.

Reporter's Note:
1. This section reflects a merger of former Sections 201
(expanded to cover signatures) and 203 from the August
Draft.

2. Subsection (a) establishes the fundamental premise of
this Act: That the form in which a signature is generated,
presented, communicated or stored may not be the only reason
to deny the signature legal recognition. On the other hand,
subsection (a) should not be interpreted as establishing the
legal effectiveness, validity or enforceability of any given
signature. Where a rule of law requires that a record be
signed with minimum substantive requirements (as with a
notarization), the legal effect, validity or enforceability
will depend on whether the signature meets the substantive
requirements. However, the fact that a signature appears in
an electronic, as opposed to paper record, is irrelevant.

3. Subsection (b) is a particularized application of
Subsection (a). Its purpose is to validate and effectuate
electronic signatures as the equivalent of pen and ink
signatures, subject to all of the rules applicable to the
efficacy and formality of a signature, except as such other
rules are modified by the more specific provisions of this
Act.

4. This section, consistent with the existing UCC
definition of a signature as "any symbol executed or adopted
by a party with present intention to authenticate a
writing," merely reiterates for clarity the rule that an
electronic record containing an electronic signature
satisfies legal requirements. The critical issue in either
the signature or electronic signature context is what the
signer intended by the execution, attachment or
incorporation of the signature into the record.
5. This section is technology neutral - it neither adopts nor prohibits any particular form of electronic signature. However, it only validates electronic signatures for purposes of applicable legal signing requirements and does not address the legal sufficiency, reliability or authenticity of any particular signature. As in the paper world, questions of the signer's intention and authority, as well as questions of fraud, are left to other law. The effect and proof of electronic signatures is addressed in the next Section.

6. Subsection (c) preserves the right of a party to establish reasonable requirements for the method and type of signatures which will be acceptable. Accordingly, and consistent with Section 105, a party may refuse to accept any electronic signature and of course establish the method and type of electronic signature which is acceptable.

7. Finally, former subsection 203(c) has been deleted. Exclusions from the coverage of this Act are set forth in Section 104.

SECTION 204 302. ELECTRONIC SIGNATURES: EFFECT AND PROOF; SIGNATURES BY ELECTRONIC AGENTS.

(a) Unless the circumstances otherwise indicate that a party intends less than all of the effect, an electronic signature is intended to establish the signing party's identity, its adoption and acceptance of a record or a term, and the authenticity of the record or term.

(1) the signing party's identity,

(2) its adoption and acceptance of a record or a term, and

(3) the informational integrity of the record or term to which the electronic signature is attached or with which it is logically associated.
(b) Operations of an electronic agent constitute the electronic signature of a party if the party designed, programed, or selected the electronic agent for the purpose of achieving results of that type.

(c) An electronic record is signed as a matter of law if the party complied with a security procedure. Otherwise, an electronic signature may be proved in any manner sufficient to demonstrate

(b) If the signing party executed or adopted the electronic signature in accordance with a security procedure, the electronic record to which the electronic signature is attached or with which it is logically associated is presumed to be signed by the signing party. Otherwise, an electronic signature may be proven in any manner, including by showing that

(1) the signer's intention to authenticate the electronic record, or term thereof, to which the electronic signature is attached or relates, including by showing that a procedure existed by which a party must of necessity have signed, executed a symbol, or manifested assent to, a record or term, in order to proceed further in the processing of the transaction, or

(2) that the party is bound by virtue of the operations of its electronic agent.

(d) The authenticity of, and authority to make, an electronic signature is admitted unless specifically denied
in the pleadings. If the validity of an electronic signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity.

[(e) If a rule of law requires that a signature be notarized or acknowledged for the electronic record to be enforceable or filed of record, that requirement shall be deemed satisfied with respect to an electronic record which has not been notarized if (i) the electronic record includes a secure electronic signature, or (ii) the creation, transmission and storage of the electronic record itself, or the symbol or methodology adopted for signing such electronic record, provide substantial evidence of the identity of the person signing the electronic record. Whether the substantial evidence standard has been met is for decision by the court.]

Source: Article 2B Draft Section 2B-118(a and c); UCC Section 3-308; Illinois Model Section 203.

Reporter's Note:
1. An electronic signature is any symbol or methodology adopted with intent to sign a writing. This Act includes in the definition of signature the attributes normally associated with a pen and ink signature in order to make clear what a signer intends by signing a document, i.e., to identify oneself, adopt the terms of the signed record, and verify the integrity of the informational content of the record which is signed. By identifying the multi-purpose effect of a signature, this Act clarifies the assumption as to the intent of one signing any record. Subsection (a) simply applies this assumption to the electronic signature. As with a signature on paper, the signing party remains free to prove that the signing was intended to accomplish only 1 or 2 of the normal purposes associated with a signing.

2. Subsection (b) has been changed to delete the idea that an electronic record is signed as a matter of law when a security procedure is used. Instead, the section creates a presumption that a signature executed or adopted pursuant to
a security procedure is the signature of the signing party. The purpose of the change is to make clearer the effect of an electronic signature and to make the operation of security procedures in the signature context parallel to the operation of security procedures in the record context, i.e., the creation of a presumption. The presumption is limited to the factual issue of whether the electronic record is signed. The issue of the legal effect, validity or authenticity of the signature is left to other law.

    Subsection (b) otherwise provides that an electronic signature may be proven in any manner including procedures necessitating the adoption of a term or record, or that the party is bound by the operations of its electronic agent (Section 303). By allowing proof of an electronic signature by showing that a process existed which had to be followed to obtain the results achieved, the section addresses the increasingly common "point and click" processes in on-line and on-screen programs.

    Subsection (c) borrows from Article 3 in raising the procedural requirements for denying the validity of a signature (as distinct from the question of whether the electronic record is signed). Unless the validity of an electronic signature is specifically denied in the pleadings, the authenticity of and authority to make the signature are admitted. However, if the validity of the signature is put in issue by an express denial, the party asserting validity must carry the burden of so establishing.

Based on concerns raised by the Drafting Committee regarding the propriety of addressing notarial requirements in this Act, subsection (e) of former Section 204 has been deleted. The role of a trusted third party, i.e., the notary public, in assuring the identity of the signer of a notarized document is not covered by this Act as currently drafted.

SECTION 303. [SIGNATURES BY] [OPERATIONS OF] ELECTRONIC AGENTS.

    (a) A party that designs, programs or selects an electronic agent is bound by operations of its electronic agent.

    (b) An electronic record resulting from the operations of an electronic agent shall be deemed signed by a party designing, programming or selecting the electronic agent.
regardless of whether the operations result in the
attachment or application of an electronic signature to the
electronic record.

Source: UETA Draft Section 204(b) (August 15, 1997)
Reporter's Note:
1. This section has been revised to make clear that a
person using an electronic agent is responsible for the
results obtained by setting the electronic agent in motion, and will be deemed to have signed any such record.

2. This section extends signing to the electronic agent, automated context. Its purpose is to establish that by programming an electronic agent, a party assumes responsibility for electronic records and operations "executed" by the program. While the electronic agent may or may not execute a symbol representing an electronic signature (i.e., with human intent to authenticate the electronic record), the party programming the electronic agent has indicated its adoption of records and operations produced by the electronic agent within the parameters set by the programming. Accordingly, the party should be bound and deemed to have signed the records of the electronic agent.

PART 4

ELECTRONIC CONTRACTS AND COMMUNICATIONS

SECTION 401. EFFECTIVENESS BETWEEN PARTIES.

(a) Except as otherwise provided in subsection (b), as between the sender and the recipient of an electronic record, a communication or other statement may not be denied legal effect, validity, or enforceability solely on the grounds that it is in the form of an electronic record.

(b) This section does not apply to [...].

SECTION 402 401. FORMATION AND VALIDITY.
(a) Unless otherwise agreed, an offer and the acceptance of an offer may be expressed by means of electronic records. If an electronic record is used in the formation of a contract, the contract may not be denied legal effect, validity or enforceability on the sole ground that an electronic record was used for that purpose.

(b) Subject to subsection (c), operations of one or more electronic agents which confirm the existence of a contract or signify agreement may be effective to form a contract even if no individual representing either party was aware of or reviewed the action or its results operations.

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

(1) A contract is formed by the interaction of two electronic agents. A contract is formed if the interaction results in each both electronic agents engaging in operations that signify agreement, such as by engaging in performing the contract, ordering or instructing performance, accepting performance, or making a record of the existence of a contract.

(2) A contract may be formed by the interaction of an electronic agent and an individual. A contract is formed by such interaction if the individual has reason to know (i) that the individual is dealing with an electronic agent and performs actions the person should know will cause (ii) the electronic agent to perform or
limitations on the ability of the electronic agent to permit further use, or that are clearly indicated as constituting acceptance regardless of other contemporaneous expressions by the individual to which the electronic agent cannot react to contemporaneous expressions by the individual and (B) the individual performs actions that the individual should know will cause the electronic agent to complete the transaction, perform or permit further use, or that are clearly indicated as constituting acceptance.

(3) The terms of a contract resulting from an automated transaction include terms of the parties' agreement (including terms with respect to which either party has manifested assent), terms which that the electronic agent could take into account, and, to the extent not covered by the foregoing, terms provided by law.

(d) If an electronic record initiated by a party or an electronic agent evokes an electronic record in response and the records reflect an intent to be bound, a contract exists when:

(1) the response signifying acceptance is received; or

(2) if the response consists of electronically performing the requested consideration in whole or in part, when the requested consideration, to be performed electronically, is received, unless the originating record prohibited that form of response.
Source: Article 2B Draft Sections 2B-203(e & f) and 2B-204(a); Uncitral Model Article 11.

Reporter's Note:
1. Former UETA Section 401 has been deleted as redundant of the general efficacy provisions in Section 201(a) and 301(a).

2. The first sentence in Subsection (a) has been deleted as unnecessary and confusing. Subsection (a) makes clear that the use of electronic records, e.g., offer and acceptance, in the context of contract formation may not be the sole ground for denying validity to the contract. It is another particularized application of the general rules stated in Sections 201(a) and 301(a).

3. Subsections (b) and (c) are taken from Article 2B's provisions regarding contract formation in electronic transactions, i.e. those transactions not involving human review by one or both parties. Subsection (b) provides a rule to expressly validate contract formation by use of electronic agents in a fully automated transaction. Subsection (c) sets forth the circumstances which demonstrate the formation of a contract under a fully automated transaction and under an automated transaction where one party is an individual. Subsection (c) has been redrafted to make clear that an individual dealing with an electronic agent must know both that it is dealing with an electronic agent and the limitations on the agent's ability to respond to the individual. Concerns were raised that individuals may not know what contemporaneous statements made by the individual would be given effect because of the potential for contemporaneous or subsequent human review. The burden would be on the party using an electronic agent to make clear the parameters of the agents ability to respond. If the party using the electronic agent provides such information, the individual's act of proceeding on the basis of contemporaneous expressions not within the parameters of the agent would be unreasonable and such expressions would not be included as terms of any resulting agreement.

4. Finally, subsection (d) deals with timing in the formation of a contract by electronic means. Subsection (d)(2) makes clear that acceptance by performance, either in whole or in part, when the performance is electronic, occurs on receipt. When acceptance of an offer by performance occurs other than electronically (e.g. by the shipment of product), acceptance is governed by other rules of law such as the UCC and common law. As to timing of receipt see section 402.
SECTION 404. TIME AND PLACE OF SENDING AND RECEIPT.

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it enters an information system outside the control of the sender or of a person who sent the electronic record on behalf of the sender.

(b) Unless otherwise agreed between the sender and the recipient, the time of receipt of an electronic record is determined as follows:

(1) if the recipient has designated a specific information system for the purpose of receiving electronic records, receipt occurs:

(A) at the time when the electronic record enters the designated information system, or

(B) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the recipient;

(2) if the recipient has not designated a specific information system, receipt occurs when the electronic record enters an information system of the recipient.

an electronic record is received when the electronic record enters an information system from which the recipient is able to retrieve electronic records, in a form capable of
being processed by that system, and the recipient uses or
has designated that system for the purpose of receiving such
records or information. In addition, an electronic record
is received when it comes to the attention of the recipient.

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

(d) Unless otherwise agreed between the sender and the
recipient, an electronic record is considered deemed to be
sent from the place where the sender has its place of
business; and is considered deemed to be received at the
place where the recipient has its place of business. For
the purposes of this subsection:

(1) if the sender or the recipient has more than
one place of business, the place of business is that which
has the closest relationship to the underlying transaction
or, if there is no underlying transaction, the principal
place of business; and

(2) if the sender or the recipient does not have
a place of business, reference the place of business is to
be made to its the recipient's habitual residence.

(e) Subject to section 405 403, an electronic record is
effective when received, even if no individual is aware of
its receipt.
(f) The provisions of this section do not apply to the following: [. . .].

Source: Article 2B Draft Section 2B-102(a)(34), and 2B-119(b); Uncitral Model Article 15.

Reporter's Note:
1. This section provides default rules regarding when an electronic record is sent and when and where an electronic record is received. As with acknowledgments of receipt under section 403, this section does not address the efficacy of the record that is received. That is, whether a record is unintelligible or unusable by a recipient is a separate issue from whether that record was received.

2. Subsection (b) is from the former definition of received in the August draft. It provides simply that when a record enters a system which the recipient has designated or uses and to which the recipient has access, in a form capable of being processed by that system it is received. Unless the parties have agreed otherwise, entry into any system to which the recipient has access will suffice. By keying receipt to a system which is accessible by the recipient, the issue of leaving messages with a server or other service is removed. However, the issue of how the sender proves the time of receipt is not resolved by this section. The last sentence provides the ultimate fallback by providing that in all events a record is received when it comes to the attention of the recipient.

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

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

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

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

5. Subsection (f) has been deleted since all exclusions are intended to be included in Section 104.

SECTION 405 403. ELECTRONIC ACKNOWLEDGMENT OF RECEIPT.

(a) If the sender of a record requests or agrees with the recipient of the record that receipt of the record must be acknowledged electronically, the following rules apply:

(1) If the sender indicates in the record or otherwise that the record is conditional on receipt of an electronic acknowledgment, the record does not bind the sender until acknowledgment is received and if acknowledgment is not received in a reasonable time after the record was sent.

(2) If the sender requests electronic acknowledgment but does not state that the record is conditional on electronic acknowledgment; and does not specify a time for receipt, and electronic acknowledgment is not received within a reasonable time after the record is sent, on notice to the other party, the sender, on notice to the other party, may either revoke the record as having expired or specify a further reasonable time within which electronic acknowledgment must be received or the message will be treated as not having binding effect. If electronic acknowledgment is not received within that additional time, the sender may treat the record as not having binding effect.
(3) If the sender requests electronic acknowledgment and specifies a time for receipt, if receipt does not occur within that time, the sender may treat the record as not having binding effect, exercise the options in subsection (2) expired.

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

Source: Article 2B Draft Section 2B-120; Uncitral Model Article 14.

Reporter's Note: This section deals with functional acknowledgments as described in the ABA Model Trading Partner Agreement. The purpose of such functional acknowledgments is to confirm receipt, and not necessarily to result in legal consequences flowing from the acknowledgment.

Subsection (a) permits the sender of a record to be the master of its communication by requesting or requiring acknowledgment of receipt. The subsection then sets out default rules for the effect of the original message under different circumstances. Article 2B Section 120(a)(3) permits the sender of a record who has requested acknowledgment by a specified time, if the acknowledgment is not timely received, to either revoke the record or specify a further period for acknowledgment, upon notice to the recipient under subsection (2). This draft permits the sender to treat the record as lapsing without further action.

As noted in subsection (b) the only effect of a functional acknowledgment is to establish receipt. The acknowledgment alone does not affect questions regarding the binding effect of the acknowledgment nor the content, accuracy, time of receipt or other issues regarding the legal efficacy of the record or acknowledgment.

QUESTION FOR THE COMMITTEE: At the September Meeting a few comments suggested that acknowledgement of receipt/confirmation should be a condition to enforceability. Is this appropriate/desirable?

SECTION 404. ADMISSIBILITY INTO EVIDENCE.
(a) In any legal proceeding, nothing in the application of the rules of evidence shall apply so as not to be applied to deny the admissibility in evidence of an electronic record or electronic signature into evidence:

(1) on the sole ground that it is an electronic record or electronic signature; or

(2) on the grounds that it is not in its original form or is not an original.

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

Source: UETA Draft Section 206 (August 15, 1997); Uncitral Model Article 9; Illinois Model Section 205.

Reporter's Note: Like sections 201(a) and 301(a), subsection (a)(1) prevents the nonrecognition of electronic records and signatures solely on the ground of the media in which information is presented. Subsection (a)(2) also precludes inadmissibility on the ground an electronic record is not an original.

The first sentence of former Section 206(b) was deleted based on comments from members of the Drafting Committee as an inappropriate direction in the statute.

Nothing in this section relieves a party from establishing the necessary foundation for the admission of an electronic record. Subsection (b) gives guidance to the trier of fact in according weight to otherwise admissible electronic evidence.
SECTION 405. TRANSFERABLE RECORDS. If the identity of the rightful holder of a transferable record can be reliably determined from the record itself or from a method employed for recording, registering, or otherwise evidencing the transfer of interests in such records, the rightful holder of the record is considered to be in possession of the record, and any indorsements required by applicable rules of law to effect transfer to the rightful holder are considered to have been given.

Source: Oklahoma Model Section III.B.2.

Reporter's Note: This section has been retained for discussion by the Drafting Committee on whether such documents should be covered by this Act. The last clause has been deleted as unnecessary. Determination of the rightful holder would include showing all endorsements, or legal substitutes as in UCC Section 4-205. The key to this section is to create a means by which a "holder" may be considered to be in possession of an intangible electronic record. If technological advances result in an ability to identify a single "rightful holder" of a negotiable instrument electronic equivalent, the last hurdle to holder in due course status would be possession, which this section would provide.

PART 5

PUBLIC GOVERNMENTAL ELECTRONIC RECORDS

Section 501. USE OF ELECTRONIC RECORDS BY STATE AGENCIES.

(a) [Except where expressly prohibited by statute,] Every state agency, through the adoption of appropriate regulations, may create and retain electronic records in
lieu place of written records and may also convert written records to electronic records. [Rules governing the disposition of written records after conversion to electronic records shall be established by the secretary of state.] [The [designated state officer] shall issue rules governing the disposition of written records after conversion to electronic records.]

(b) Any state agency that accepts the filing of records, or requires that records be created or retained by any person, may authorize, through the adoption of appropriate regulations, the filing, creation, or retention of records in the form of electronic records [except where expressly prohibited by statute].

(c) In any case governed by subsection (a) or (b), the state agency, by appropriate regulation giving due consideration to security, [may] [shall] specify:

(1) the manner and format in which the electronic records must be filed, created, or retained;

(2) where if electronic records must be electronically signed, the type of electronic signature required (including, if applicable, requiring the use of a secure electronic signature), and the manner and format in which the electronic signature must be affixed to the electronic record;
(3) control processes and procedures as appropriate to ensure adequate integrity, security, confidentiality, and auditability of electronic records; and

(4) any other required attributes for electronic records that which are currently specified for corresponding non-electronic records.

(d) In establishing regulations under subsection (c) state agencies shall give due regard to regulations implemented by other state agencies, other states and the federal government for conflicting regulations which would impede commerce and the implementation of electronic transactions.

(d) (e) Nothing in this [Act] shall may be construed to require any state agency to use or permit the use of electronic records or signatures.

Source: Illinois Model Section 902; Massachusetts Model Section 3; Florida Electronic Signature Act, Chapter 96-324, Section 7 (1996).

Reporter's Note: This section addresses the expanded scope of this Act.

Subsection (a) authorizes state agencies to use electronic records generally for intra-governmental purposes. It is permissive and not obligatory (see Subsection (e)). It also authorizes the destruction of written records after conversion to electronic form. In this regard, the bracketed language requires the appropriate state officer to issue regulations governing such conversions.

Subsection (b) authorizes state agencies to accept filings and permit the creation and retention of electronic records in lieu of written records for statutory and regulatory purposes related to private persons. Again, the provision is permissive and not obligatory (see subsection (e)).

Subsection (c) authorizes state agencies to establish regulations governing the quality of the electronic records and signatures which will be acceptable. The question here
is whether the state agencies should be required, or merely permitted, to promulgate such regulations before accepting electronic records? Should the task of promulgating regulations be left with the secretary of state or other central authority?

Based on comments at the September Drafting Meeting, subsection (d) exhorts the regulation making authority to give due consideration to other regulations adopted both within the state and by other states and federal government. Finally, subsection (e) makes clear that nothing in this Act requires any state agency to accept or use electronic records.

PART 6

MISCELLANEOUS PROVISIONS

SECTION 601. SEVERABILITY CLAUSE. If a provision of this [Act], or an application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the [Act] that 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 602. EFFECTIVE DATE.

Source:

SECTION 603. SAVINGS AND TRANSITIONAL PROVISIONS.

Source: