

D R A F T  
FOR APPROVAL

# UNIFORM ELECTRONIC TRANSACTIONS ACT

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-EIGHTH YEAR  
DENVER, COLORADO  
JULY 23 – 30, 1999

# UNIFORM ELECTRONIC TRANSACTIONS ACT

*WITH PREFATORY NOTE AND REPORTER'S NOTES*

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON  
UNIFORM ELECTRONIC TRANSACTIONS ACT**

PATRICIA BRUMFIELD FRY, University of North Dakota, School of Law, P.O. Box 9003,  
Grand Forks, ND 58201, *Chair*  
STEPHEN Y. CHOW, 30th Floor, One Beacon Street, Boston, MA 02108  
KENNETH W. ELLIOTT, City Place Building, 22nd Floor, 204 N. Robinson Avenue, Oklahoma City,  
OK 73102  
HENRY DEEB GABRIEL, JR., Loyola University, School of Law, 526 Pine Street, New Orleans,  
LA 70118  
BION M. GREGORY, Office of Legislative Counsel, State Capitol, Suite 3021, Sacramento,  
CA 95814-4996  
JOSEPH P. MAZUREK, Office of the Attorney General, P.O. Box 201401, 215 N. Sanders, Helena,  
MT 59620  
PAMELA MEADE SARGENT, P.O. Box 846, Abingdon, VA 24212  
D. BENJAMIN BEARD, University of Idaho, School of Law, 6th and Rayburn Streets, Moscow,  
ID 83844-2321, *Reporter*

**EX OFFICIO**

GENE N. LEBRUN, P.O. Box 8250, 9th Floor, 909 St. Joseph Street, Rapid City, SD 57709, *President*  
HENRY M. KITTLESON, P.O. Box 32092, 92 Lake Wire Drive, Lakeland, FL 33802-2092,  
*Division Chair*

**AMERICAN BAR ASSOCIATION ADVISORS**

C. ROBERT BEATTIE, 150 S. 5th Street, Suite 3500, Minneapolis, MN 55402, *Business Law  
Section Advisor*  
AMELIA BOSS, Temple University, School of Law, 1719 N. Broad Street, Philadelphia, PA 19122,  
*Advisor*  
THOMAS J. SMEDINGHOFF, 500 W. Madison Street, 40th Floor, Chicago, IL 60661-2511, *Science  
and Technology Section Advisor*

**EXECUTIVE DIRECTOR**

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman,  
OK 73019, *Executive Director*  
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
211 E. Ontario Street, Suite 1300  
Chicago, Illinois 60611

312/915-0195

# UNIFORM ELECTRONIC TRANSACTIONS ACT

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# UNIFORM ELECTRONIC TRANSACTIONS ACT

## PREFATORY NOTE

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

### 1. History and Background

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

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

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

Pursuant to its instructions, the new Drafting Committee and reporter reviewed and discussed, both in draft form and in conference calls, a number of draft memoranda dealing with the scope of the proposed Act. They were assisted in these efforts by the Ad Hoc Task Force on Electronic Contracting, formed by the

1 American Bar Association and chaired by James E. Newell. (This Task Force was  
2 the precursor for the American Bar Association’s Ad Hoc Committee on Uniform  
3 State Law on Electronic Contracting, which has participated in the drafting process  
4 and is charged ultimately with making recommendations to the A.B.A. concerning  
5 the Act.) Ultimately the Drafting Committee submitted its memorandum dated  
6 January 3, 1997 to the Scope & Program Committee. That memorandum stated  
7 that the fundamental goal of the project was to draft “such revisions to general  
8 contract law as are necessary or desirable to support transaction processes utilizing  
9 existing and future electronic or computerized technologies.” It further concurred in  
10 the general principles stated in the Committee’s memorandum to guide decisions  
11 concerning both the content of the draft and expression of its provisions, including  
12 preservation of freedom of contract, technology-neutrality and  
13 technology-sensitivity, minimalism, and avoidance of regulation. The Committee  
14 was directed to make efforts to involve both technology and non-technology  
15 interests.

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

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

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

1 for electronic records and signatures which have been created and used in  
2 conformity with security procedures which demonstrate greater reliability.

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

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

17 **2. Resolution of Principal Issues in**  
18 **1998 Annual Meeting Draft During the Past Year**

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

29 **A. Scope of the Act and Procedural Approach.** The scope of this Act  
30 remained one of the most difficult areas to be resolved by the Drafting Committee  
31 over the past year. However, the Committee’s resolution of the issue of scope has  
32 resulted in a coverage which provides a clear framework for covered transactions,  
33 and also avoids unwarranted surprises for unsophisticated parties dealing in this  
34 relatively new media. These attributes have been accomplished while still providing  
35 a solid legal framework to allow for the continued development of innovative  
36 technology to facilitate electronic transactions.



1           With regard to the general scope of the Act, the Committee reversed its  
2 initial decision, at the January 1998 meeting, to eliminate references to commercial  
3 and governmental transactions. At its October, 1998 meeting the definition of  
4 transaction was limited to business and governmental affairs. The reference to  
5 commercial was added following the meeting in April, 1999, to make clearer the  
6 coverage intended. As a result of these decisions the Act no longer applies to *all*  
7 writings and signatures, but only to electronic records and signatures relating to a  
8 transaction, defined as limited to business, commercial and governmental affairs.

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

36           The exclusion of specific Articles of the Uniform Commercial Code is  
37 consistent with the charge to the Committee to be consistent with and not  
38 duplicative of the UCC. Perhaps more importantly, these exclusions reflect the  
39 Committee’s recognition that, particularly in the case of Article 5, 8 and revised  
40 Article 9, electronic transactions were addressed in the specific contexts of those  
41 revision processes. In the context of revised Articles 2 and 2A and, to a lesser

1 degree, UCITA, the extent of coverage in those Articles/Acts may make application  
2 of this Act as a gap-filling law desirable.

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

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

## 18 **B. Continued Refinement of Procedural Approach.**

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

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

35 The deference of the Act to other substantive law does not negate the  
36 importance of this Act in effectuating electronic transactions by setting forth rules  
37 and standards outlining the method for using electronic media. The Act expressly

1 validates electronic records, signatures and contracts. It provides for the use of  
2 electronic records and information for retention purposes, providing certainty in an  
3 area with great potential in cost savings and efficiency. The Act makes clear that  
4 the actions of machines (“electronic agents”) programmed and used by people will  
5 bind the user of the machine, regardless of whether human review of a particular  
6 transaction has occurred. It specifies the standards for sending and receipt of  
7 electronic records, and it allows for innovation in financial services through the  
8 implementation of transferable records. In these ways the Act permits electronic  
9 transactions to be accomplished with certainty under existing substantive rules of  
10 law.

### 11 **C. Evolution of the Concept and Effect of a Signature.**

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

- 15 • identification of a person
- 16 • verification of the party creating or sending the record
- 17 • verification of the informational integrity of the record
- 18 • acceptance or adoption of a term or record
- 19 • verification of a party’s authority
- 20 • acknowledgment of receipt.

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

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

31 With the deletion of specific provisions outlining the effect of a signature  
32 because they were considered too narrow, a reconsideration of the definition and  
33 effect of a signature was required. This draft reflects the Committee’s conclusion  
34 that the substantive law is sufficiently well developed to recognize what is required  
35 for a person to have an “intent to sign” sufficient to qualify as an electronic  
36 signature. The only requirement in this Act was considered to be noting that an  
37 electronic signature may take a different form, or indeed include the execution of a

1 process, so long as those forms and processes were adopted by a person with “intent  
2 to sign”. Indeed, the evolution of the function that a signature actually serves  
3 moved beyond a consideration that a signature, itself, must identify the signer. What  
4 is critical is the execution or adoption with the requisite intent to sign, i.e to  
5 accomplish a legally binding act, in such a way that the execution is attached or  
6 associated with the record signed.

7 **D. The Need for Some Intention to Conduct Transactions**  
8 **Electronically.**

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

17 **3. Citation and Style Notes**

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

19 1. “UCITA” – Uniform Computer Information Transactions Act (April,  
20 1999 Draft).

21 2. “Illinois Act” – Illinois Electronic Commerce Security Act (5 I.L.C.S  
22 175).

23 3. “Uncitral Model” – United Nations Model Law on Electronic Commerce,  
24 approved by the UN General Assembly November, 1996.

25 4. “Massachusetts Model” – Massachusetts Electronic Records and  
26 Signatures Act, (November 4, 1997 Draft).

27 5. “UCC Section” – Uniform Commercial Code, Official Text, 1990.

28 6. “Article 1 Draft” – Uniform Commercial Code Revised Article 1 –  
29 General Provisions (199\_\_) (September 1997 Draft).

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**UNIFORM ELECTRONIC TRANSACTIONS ACT**

**PART 1**

**NONGOVERNMENTAL ELECTRONIC  
RECORDS AND SIGNATURES**

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

**SECTION 102. DEFINITIONS.** In this [Act]:

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

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

(3) “Computer program” means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

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

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

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

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

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

14           (9) “ Governmental agency” means an executive, legislative, or judicial  
15 agency, department, board, commission, authority, institution, or instrumentality of  
16 the federal government or of a State or of any county, municipality, or other  
17 political subdivision of a State.

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

20           (11) “Information processing system” means an electronic system for  
21 creating, generating, sending, receiving, storing, displaying, or processing  
22 information.



1 Committee and observers was that there was no need to separate manifestations of  
2 assent from the language and circumstances which comprise the bargain in fact of  
3 the parties. Rather the Reporter was directed to return to the definition of  
4 agreement in the Uniform Commercial Code. Accordingly, the definition in the  
5 November, 1997 Draft was taken from the most recent revision to Article 1.

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

14 Although the definition of agreement does not specifically include usage of  
15 trade and other party conduct as informing the agreement, this definition is not  
16 intended to affect the construction of the parties' agreement under the substantive  
17 law applicable to a particular transaction where that law takes account of usage and  
18 conduct in informing the terms of the parties' agreement. Such conduct would be  
19 included in this definition under "other circumstances." The second clause in the  
20 definition is intended to assure that where the law applicable to a given transaction  
21 provides that system rules and the like qualify as part of the agreement of the  
22 parties, that such rules will be considered in determining the parties agreement under  
23 this Act. For example, Article 4 (Section 4-103(b)) provides that Federal Reserve  
24 regulations and operating circulars and clearinghouse rules have the effect of  
25 agreements. Such agreements by law are properly included in the definition in this  
26 Act.

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

35 Whether the parties have reached an agreement is determined by their  
36 express language and all surrounding circumstances. The Restatement of Contracts  
37 §3 provides that, "An agreement is a manifestation of mutual assent on the part of  
38 two or more persons." See also Restatement Section 2, Comment b. The Uniform  
39 Commercial Code specifically includes in the circumstances from which an



1 agreement may be inferred “course of performance, course of dealing and usage of  
2 trade . . .” as defined in the UCC. The context and circumstances indicating an  
3 agreement under this [Act] will be important in determining the applicability of this  
4 Act under Section 104.

5 **2. “Automated Transaction”**

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

8 This definition has been revised for clarity. A transaction is an action or set  
9 of actions between people. Actions are not formed, but rather are conducted or  
10 performed.

11 The Uniform Computer Information Transactions Act (UCITA) has  
12 conformed its terminology with this Act by adopting “automated transaction” in  
13 place of “electronic transaction.” The definitions in each Act are the same. The  
14 definition goes beyond contract formation to performances under a contract and  
15 other obligations accomplished by electronic means in a transaction, because of the  
16 diversity of transactions to which this Act may apply.

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

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

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

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

5           5. **“Electronic agent.”** The definition has been revised to clarify that the  
6 relevant time frame for lack of individual review is bounded by the temporal  
7 limitations of the transaction.

8           This Act used the term “electronic device” (rather than “electronic agent”  
9 used in UCITA) in order to avoid connotations of agency. However, in UCITA and  
10 in other contexts the term “electronic agent” has come to be recognized as a near  
11 term of art. Accordingly, the Chair and Reporter of UETA agreed in the  
12 coordination meeting with the Executive Director of the Conference and the Chair  
13 and Reporter for UCITA in January, 1999 to adopt “electronic agent” in order to be  
14 consistent with UCITA. Comments made at UETA Drafting Committee meetings  
15 from members of the Committee and observers highlight that the key aspect of this  
16 term is its function as a tool of a party. As the term “electronic agent” has come to  
17 be recognized, it is limited to the tool function.

18           The definition has been revised to reflect comments that, for purposes of the  
19 definition, it is irrelevant who employs the agent. Rather the definition establishes  
20 that an electronic agent is a machine. The effect on the party using the agent is  
21 addressed in the operative provisions of the Act (e.g., Section 113)

22           An electronic agent, such as a computer program or other automated means  
23 employed by a person, is a tool of that person. As a general rule, the employer of a  
24 tool is responsible for the results obtained by the use of that tool since the tool has  
25 no independent volition of its own. However, an electronic agent by definition is  
26 capable, within the parameters of its programming, of initiating, responding or  
27 interacting with other parties or their electronic agents once it has been activated by  
28 a party, without further attention of that party.

29           While this Act proceeds on the paradigm that an electronic agent is capable  
30 of performing only within the technical strictures of its preset programming, it is  
31 conceivable that, within the useful life of this Act, electronic agents may be created  
32 with the ability to act autonomously, and not just automatically. That is, through  
33 developments in artificial intelligence, a computer may be able to “learn through  
34 experience, modify the instructions in their own programs, and even devise new  
35 instructions.” Allen and Widdison, “Can Computers Make Contracts?” 9 *Harv.*  
36 *J.L. & Tech* 25 (Winter, 1996). If such developments occur, courts may construe the

1 definition of electronic agent accordingly, in order to recognize such new  
2 capabilities.

3 The examples involving Amazon.com and General Motors in the Comment  
4 to the definition of Automated Transaction are equally applicable here. Amazon  
5 acts through an electronic agent in processing my order for books. General Motors  
6 and the supplier each act through electronic agents in facilitating and effectuating  
7 the just-in-time inventory process through EDI.

8 6. **“Electronic record.”** An electronic record is a subset of the broader  
9 defined term “record.” Unlike the term “electronic message” used in UCITA, the  
10 definition is not limited to records intended for communication, but extends to any  
11 information contained or transferred in an electronic medium. It is also used in this  
12 Act as a limiting definition in those provisions in which it is used.

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

17 7. **“Electronic signature”**

18 This definition has been revised and broadened in light of the Committee’s  
19 deletion of the defined terms “signature” and “signed.” It now includes the idea of  
20 symbols, sounds and processes, which previously were supplied through the  
21 definition of signature. The definition also includes the requirement that the signer  
22 execute or adopt the symbol, etc., indicating an intention to make the symbol,  
23 process, etc. its own, i.e., with the intent to sign the record. Over the past year, the  
24 Committee came to realize that the idea of a signature was broad and not  
25 specifically defined. The act of applying a symbol or process to an electronic record  
26 could have differing meanings and effects. But applying a symbol or process with an  
27 intent to do a legally significant act seemed the fundamental attribute of a signature,  
28 and that intention was viewed as understood in the law as a part of the word “sign”,  
29 without the need for a definition.

30 In this Act it was considered important to establish, to the greatest extent  
31 possible, the equivalency of electronic signatures and manual signatures. The  
32 purpose is to overcome unwarranted biases against electronic methods of signing  
33 and authenticating records. Therefore the term “signature” has been used to  
34 connote and convey that equivalency. The term “authentication” used in Revised  
35 Articles 2, 2A and 9 and in UCITA, have narrower meanings and purposes than  
36 electronic signature as used in this Act. However, an authentication in any of those  
37 Articles, would be an electronic signature under this Act.

1           As currently drafted, the precise effect of the adopted electronic signature  
2 will be determined based on the surrounding circumstances under Section 108(b).

3           It is important to realize that this definition is intended to cover the standard  
4 webpage click through process. For example, when a person orders goods or  
5 services through a vendor’s website, the person will be required to provide  
6 information as part of a process which will result in receipt of the goods or services.  
7 When the customer ultimately gets to the last step and clicks “I agree,” the person  
8 has adopted the process and has done so with the intent to associate the person with  
9 the record of that process. The actual effect of the electronic signature will be  
10 determined from all the surrounding circumstances, however, the person adopted a  
11 process which the circumstances indicate s/he intended to have the effect of getting  
12 the goods/services and being bound to pay for them. The adoption of the process  
13 carried the intent to do a legally significant act, the hallmark of a signature.

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

23           A digital signature using public key encryption technology would qualify as  
24 an electronic signature, as would the mere appellation of one’s name at the end of an  
25 e-mail message – so long as in each case the signer executed or adopted the symbol  
26 with the intent to sign.

27           **8. “Governmental agency”**

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

30           This definition is important in the context of Part 2. The definition has also  
31 been expanded to be a generic description unrelated to any particular State. This  
32 was necessitated by the use of the term in Section 203 on Interoperability. Where  
33 governmental agencies of the enacting State are relevant this has been clarified in the  
34 operative provisions.

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

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

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

8           12. **“Security procedure.”**

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

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

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

## 25           **SECTION 103. SCOPE.**

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

28           (b) This [Act] does not apply to transactions subject to the following laws:

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

1 (2) [Article 1 of the Uniform Commercial Code, other than Sections  
2 1-107 and 1-206];

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

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

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

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

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

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

15 **Source:** UETA Sections 103 and 104 (1998 Annual Meeting Draft).

16 **Committee Votes:**

17 1. In former Section 103 – Scope:

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

20 b. To incorporate supplemental principles as part of Scope section – Committee  
21 Yes Unanimous Observers 12 Yes – 0 No (Jan. 1998).

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

23 2. In former Section 104 – Exclusions:

24 a. To delete “repugnancy” language, and provide that Act will apply except for  
25 specific exclusions. Committee 4 Yes – 1 No Observers 14 Yes – 1 No (with a  
26 number of abstentions) (Jan. 1998).

27 b. To delete former subsection (b)(6) and former subsection (c) (February  
28 1999) unanimous.

1 **Reporter's Notes**

2 1. This Act affects the medium in which information, records and signatures  
3 may be presented and retained under current legal requirements. While it covers all  
4 electronic records and signatures which are used between two people in a business,  
5 commercial or governmental transaction, the operative provisions of the Act relate  
6 to requirements for writings and signatures under law.

7 Accordingly, the exclusions in subsection (b) focus on those legal rules  
8 requiring certain writing and signature requirements which will *not* be affected by  
9 this Act. Because an electronic record/signature may be used for purposes of more  
10 than one legal requirement, or may be covered by more than one law, it is important  
11 to make clear, despite any apparent redundancy, in subsection (c) that an electronic  
12 record used for purposes of a law which is *not* affected by this Act under subsection  
13 (b) may nonetheless be used and validated for purposes of other laws not excluded  
14 by subsection (b). For example, this Act does not apply to an electronic record of a  
15 check when used for purposes of a transaction governed by Article 4 of the UCC,  
16 i.e., the Act does not validate so-called electronic checks. However, for purposes of  
17 check retention statutes, the same electronic record of the check is covered by this  
18 Act, so that retention of an electronic image/record of a check will satisfy such  
19 retention statutes, so long as the requirements of Section 111 are fulfilled.

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

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

38 Paragraph (1) excludes wills, codicils and testamentary trusts. This  
39 exclusion is largely salutary given the unlikely use of such records in a transaction as

1 defined in this Act (i.e., actions taken in context of business, commercial or  
2 governmental affairs). Paragraph (2) excludes all of Article 1 of the UCC, other  
3 than UCC Sections 1-107 and 1-206. Paragraph (3) excludes all of the UCC,  
4 whether revised or unrevised, except Articles 2 and 2A and UCITA.

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

14 The exclusion of Articles 3 and 4 will not affect the Act’s coverage of  
15 Transferable Records. The provisions in Section 116 operate as free standing rules,  
16 establishing the rights of parties using Transferable Records *under this Act*. The  
17 references in 116 to Sections 3-302, 7-501, and 9-308 of the UCC are designed to  
18 incorporate the substance of those provisions into this Act for the limited purposes  
19 noted in Section 116(c). Accordingly, an electronic record which is also a  
20 Transferable Record, would not be used for purposes of a transaction governed by  
21 Articles 3 and 4, but would be an electronic record used for purposes of a  
22 transaction governed by Section 116.

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

32 Paragraph 4 provides for exclusion from this Act of revised Articles 2, 2A  
33 and UCITA, except to the extent provided in those revised Articles. The legislative  
34 note will make clear that this Act will apply, *in toto*, to transactions under existing,  
35 unrevised Articles 2 and 2A. There is no reason not to validate electronic  
36 contracting in these situations. Sales and leases do not implicate the types of  
37 systems such as payment systems. Further they generally do not have a far reaching  
38 effect on the rights of parties beyond the contracting parties as exists in the secured  
39 transactions system. Finally, it is in the area of sales, licenses and leases that



1 electronic commerce is occurring to its greatest extent today. To exclude these  
2 transactions would largely gut the purpose of this Act.

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

10 Furthermore, exclusion of revised articles 2, and 2A, and proposed UCITA  
11 when enacted, except to the extent UETA is given effect in those Acts, is consistent  
12 with the approach that this Act should not affect legislation drafted in consideration  
13 of the use of electronic records, e.g., Articles 5, 8 and revised Article 9. The  
14 exclusions in paragraphs (2) through (5) were considered necessary to assure that  
15 when enacted this Act would have clear boundaries concerning the laws to be  
16 affected and those to be excluded. Provisions in prior drafts relating to a generic  
17 description of statutes which provided for the use of other than written records was  
18 considered unworkably vague and so was deleted by vote of the Committee.  
19 Similarly, the limited repugnancy clause found in prior drafts also was viewed as  
20 unworkably vague and deleted.

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

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

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

27 3. laws relating to real estate transactions;

28 4. trusts other than testamentary trusts;

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

31 However, the Legislative Note will also set forth the reasons that the Drafting  
32 Committee chose not to specifically exclude such transactions from the Scope of  
33 this Act. Those explanations will reflect the analysis contained in the Task Force  
34 Report (See Historical Notes 1 and 2 below.)

1                   3. Subsection (e) is a standard construction clause.

2                   **Historical Notes:**

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

10                  3. The Task Force Report dated September 21, 1998, was extensively  
11 discussed at the October, 1998 meeting. Subsection (b) reflects specific exclusions  
12 and limitations to the coverage of this Act based on the Task Force Report, and the  
13 Committee's discussions at the October 1998 meeting and subsequent meetings and  
14 comments with other interested parties.

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

17                  (a) This [Act] does not require that a record or signature be created,  
18 generated, sent, communicated, received, stored, or otherwise processed or used by  
19 electronic means or in electronic form.

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

24                  (c) If a party agrees to conduct a transaction electronically, this [Act] does  
25 not prohibit the party from refusing to conduct other transactions electronically.  
26 This subsection may not be varied by agreement.

1 (d) Except as otherwise provided in this [Act], the effect of any provision of  
2 this [Act] may be varied by agreement. The presence in certain provisions of this  
3 [Act] of the words “unless otherwise agreed”, or words of similar import, does not  
4 imply that the effect of other provisions may not be varied by agreement.

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

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

#### 10 **Reporter’s Notes**

11 1. This section makes clear that this Act is intended to facilitate the use of  
12 electronic means, but does not require the use of electronic records and signatures.  
13 First, subsection (a) removes any doubt that this is a voluntary statute and parties  
14 retain the right to refuse to use electronic records and signatures for any reason or  
15 no reason. For example, if Chrysler Corp. were to issue a recall of automobiles via  
16 its internet website, it would not be able to rely on this Act to validate that notice in  
17 the case of a person who never logged on to the website, or indeed, had no ability to  
18 do so. This result is strengthened by subsections (b) and (c), which require an  
19 intention to conduct transactions electronically and preserve the right of a party to  
20 refuse to use electronics in any subsequent transaction.

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

30 Subsection (b) provides that the Act applies to transactions in which the  
31 parties have agreed to conduct the transaction electronically. In this context it is  
32 essential that the requisite agreement be broadly construed. Accordingly, the Act  
33 expressly provides that the party’s agreement is to be found from all circumstances,

1 including the parties' conduct. The critical element is the intent of a party to  
2 conduct a transaction electronically. Once that intent is established, this Act applies.  
3 See Restatement of Contracts 2d, Sections 2, 3, and 19.

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

8 **Examples:**

9 A. If Joe gives out his business card with his business e-mail address, it is  
10 then reasonable for a recipient of the card to communicate electronically with  
11 Joe for business purposes using the e-mail address on the card, unless Joe  
12 affirmatively indicates to the contrary, or an unreasonable period of time has  
13 elapsed under the circumstances (See example D below). However, it would  
14 not necessarily be reasonable to infer Joe's agreement to communicate  
15 electronically for purposes outside the scope of the business indicated by use of  
16 the business card.

17 B. Sally may have several e-mail addresses – home, main office, office of a  
18 non-profit organization on whose board Sally sits. In each case, it would be  
19 reasonable to communicate via e-mail with Sally with respect to business related  
20 to the business/purpose associated with the respective e-mail addresses.  
21 However, depending on the circumstances, it likely would not be reasonable to  
22 communicate with Sally for purposes other than those related to the purpose for  
23 which she maintained the e-mail account. Similarly, if a person's e-mail address  
24 is listed in a directory for a particular organization, it would be reasonable to  
25 communicate with that person, for purposes related to that organization,  
26 through the e-mail listed in the directory.

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

34 D. In another context, if I give my business card, which contains my e-mail  
35 address, to Sarah at a business meeting, that act likely demonstrates my  
36 agreement to conduct business with Sarah electronically. However, until such  
37 time as electronic addresses gain the perceived permanency and traceability

1 associated with physical addresses, the duration of my agreement to conduct  
2 business using that address may be limited. If I work for IBM there may be a  
3 greater expectation of permanency or traceability than if I work for myself in a  
4 small business, or use a home e-mail address. In any event, the reasonableness  
5 of finding an agreement under such circumstances must be determined from all  
6 the surrounding circumstances.

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

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

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

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

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

21 (2) to be consistent with reasonable practices concerning electronic  
22 transactions and with the continued expansion of those practices; and

23 (3) to effectuate its general purpose to make uniform the law with respect to  
24 the subject of this [Act] among States enacting it.

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

27 **Reporter's Notes**

28 The purposes and policies of this Act are:

1 (a) to facilitate and promote commerce and governmental transactions by  
2 validating and authorizing the use of electronic records and electronic signatures;

3 (b) to eliminate barriers to electronic commerce and governmental  
4 transactions resulting from uncertainties relating to writing and signature  
5 requirements;

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

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

10 (e) to promote uniformity of the law among the States (and worldwide)  
11 relating to the use of electronic and similar technological means of effecting and  
12 performing commercial and governmental transactions;

13 (f) to promote public confidence in the validity, integrity and reliability of  
14 electronic commerce and governmental transactions; and

15 (g) to promote the development of the legal and business infrastructure  
16 necessary to implement electronic commerce and governmental transactions.

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

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

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

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

1 (d) If a law requires a signature, or provides consequences in the absence of  
2 a signature, the law is satisfied with respect to an electronic record if the electronic  
3 record includes an electronic signature.

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

6 **Reporter's Notes**

7 1. Under Restatement 2d Contracts Section 8, a contract may have legal  
8 effect and yet be unenforceable. Indeed, one circumstance where a record or  
9 contract may have effect but be unenforceable is in the context of the Statute of  
10 Frauds. The Statute of Frauds is one of the critical motivations for this entire  
11 project to validate electronic records. Though a contract may be unenforceable, the  
12 records may have collateral effects, as in the case of a Buyer that insures goods  
13 purchased under a contract unenforceable under the Statute of Frauds. The  
14 insurance company may not deny a claim on the ground that the Buyer is not the  
15 owner, though the Buyer may have no direct remedy against seller for failure to  
16 deliver. See Restatement 2d Contracts, Section 8, Illustration 4.

17 2. This section sets forth the fundamental premise of this Act: namely, that  
18 the medium in which a record, signature, or contract is created, presented or  
19 retained does not affect its legal significance. Subsections (a) and (b) are phrased in  
20 a manner to eliminate the single element of medium as a reason to deny effect or  
21 enforceability to a record, signature, or contract. It is phrased in the negative since it  
22 only eliminates a single ground for denying effect. To state affirmatively that  
23 electronic records and signatures shall be given effect and enforceability overstates  
24 the effect to be given, as there may be many other reasons to deny effect or  
25 enforceability to the record, signature or contract. Accordingly, subsections (a) and  
26 (b) should not be interpreted as establishing the legal effectiveness of any given  
27 record, signature or contract. For example, where a rule of law requires that the  
28 record contain minimum substantive content, the legal effect will depend on whether  
29 the record meets the substantive requirements. However, the fact that the  
30 information is set forth in an electronic, as opposed to paper record, is irrelevant.  
31 Section 107 expressly preserves a number of legal requirements in currently existing  
32 legislation regarding information and writings.

33 3. Subsections (c) and (d) do provide the positive assertion that electronic  
34 records and signatures do satisfy legal requirements for writings and signatures. The  
35 provisions are limited to requirements in laws that a record be in writing or be  
36 signed. If a law imposes requirements other than the medium in which a record or  
37 signature must be contained, this section does not address that requirement. See

1 Section 107. Similarly, Section 104 of this Act provides that whether the use of  
2 electronics between parties to a transaction is authorized in a particular transaction  
3 is to be determined from the agreement of the parties as determined from the  
4 circumstances. Accordingly, while this section would validate an electronic record  
5 for purpose of a statute of frauds, if an agreement to conduct the transaction  
6 electronically cannot reasonably be found, Section 104 would preclude enforcement  
7 of the electronic records as outside the scope of authorized use in the particular  
8 transaction.

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

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

21 **Illustration 2:** A sends the following e-mail to B: “I hereby offer to buy 100  
22 widgets for \$1000, delivery next Tuesday. /s/ A.” B responds with the following  
23 e-mail: “I accept your offer to purchase 100 widgets for \$1000, delivery next  
24 Tuesday. /s/ B.” In this case the analysis is the same as in Illustration 1 except  
25 that here the records otherwise satisfy the requirements of UCC Section  
26 2-201(1). The transaction may not be denied legal effect solely because there is  
27 not a pen and ink “writing” or “signature”.

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

32 4. Section 107 addresses additional requirements which may prevent the  
33 validity of an electronic record in a particular case. For example, in Section 107(a)  
34 the legal requirement addressed is *the provision of information* in writing. The  
35 section then sets forth the standards to be applied in determining whether the  
36 provision of information by an electronic record is the equivalent of the provision of  
37 information in writing. The requirements in Section 107 are in addition to the bare  
38 validation that occurs under this section.



1           5. Under different provisions of substantive law the legal effect of an  
2 electronic record may be separate from the issue of whether the record contains a  
3 signature. For example, where notice must be given as part of a contractual  
4 obligation, the effectiveness of the notice will turn on whether the party provided the  
5 notice regardless of whether the notice was signed (see Section 114). An electronic  
6 record attributed to a party under Section 108 and complying with the requirements  
7 of Section 114, would suffice in that case, notwithstanding that it may not contain  
8 an electronic signature.

9           **SECTION 107. PROVISION OF INFORMATION IN WRITING;**  
10 **PRESENTATION OF RECORDS.**

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

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

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

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

24           (3) The record must contain the information formatted in the manner  
25 specified in the other law.

1 (c) An electronic record may not be sent, communicated, or transmitted by  
2 an information processing system that inhibits the ability to print or download the  
3 information in the electronic record.

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

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

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

12 **Source:** New; Canadian Draft Uniform Electronic Commerce Act.

13 **Reporter's Notes**

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

18 2. Under subsection (a) the fundamental the consensus of the Committee  
19 was that to meet a requirement that information be provided in writing, the recipient  
20 of an electronic record of the information must be able to get to the electronic  
21 record and read it, and must have the ability to get back to the information in some  
22 way at a later date. Accordingly, the section now requires that the recipient have  
23 the ability to retain the information for later review.

24 3. As noted above, this section is independent of the prior section. Section  
25 106(c) refers to legal requirements for a writing. This section refers to legal  
26 requirements for the provision of information in writing or relating to the method or  
27 manner of presentation or delivery of information. The section addresses more  
28 specific legal requirements and provides the standards for satisfying these more  
29 particular legal requirements.

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

8           5. Subsections (b) and (c) expand on the exclusion contained in the Task  
9 Force Report which recommended that, apart from the medium in which information  
10 is conveyed, laws providing for the means of delivering or displaying that  
11 information should not be affected by the Act. For example, if a law requires delivery  
12 of notice by first class US mail, that means of delivery should not be affected by this  
13 Act. The information to be delivered may be provided on a disc, i.e., in electronic  
14 form, but the particular means of delivery must still be via the US postal service.  
15 The section was revised and expanded to clarify that display, delivery and formatting  
16 requirements are NOT intended to be displaced by this Act. Those requirements  
17 will continue to be applicable to electronic records and signatures. If those legal  
18 requirements can be satisfied in an electronic medium, this Act will validate the use  
19 of the medium, leaving to the other applicable law the question of whether the  
20 particular electronic record meets the other legal requirements. For example, if a  
21 law requires that particular records be delivered together, or attached to other  
22 records, this Act does not preclude the delivery of the records together in an  
23 electronic communication, so long as the records are connected or associated with  
24 each other in a way determined to satisfy the other law.

25           **SECTION 108. ATTRIBUTION AND EFFECT OF ELECTRONIC**  
26 **RECORD AND ELECTRONIC SIGNATURE.**

27           (a) An electronic record or electronic signature is attributable to a person if  
28 it was the act of the person. The act of the person may be proved in any manner,  
29 including a showing of the efficacy of any security procedure applied to determine  
30 the person to which the electronic record or electronic signature was attributable.

31           (b) The effect of an electronic record or electronic signature attributed to a  
32 person under subsection (a) is determined from the context and surrounding

1 circumstances at the time of its creation, execution, or adoption, including the  
2 parties' agreement, if any, and otherwise as provided by law.

3 **Source:** UETA Sections 202 and 302 (1998 Annual Meeting Draft).

4 **Reporter's Notes**

5 1. The draft retains a rule of attribution of electronic records and signatures  
6 to persons. Under subsection (a), so long as the electronic record or electronic  
7 signature resulted from a person's action it will be attributed to that person – the  
8 legal effect of that attribution is dealt with in subsection (b). The person's actions  
9 include actions taken by human agents of the person, as well as actions taken by an  
10 electronic agent, i.e., the tool, of the person. Although the rule may appear to state  
11 the obvious, it assures that the record or signature is not ascribed to a machine, as  
12 opposed to the person operating or programing the machine. The subsection also  
13 indicates that the use of a security procedure will be an important aspect in  
14 establishing attribution. However, it does not set forth any rule of attribution under  
15 particular circumstances.

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

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

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

27 2. Nothing in this section affects the use of a signature as an attribution  
28 device. Indeed, a signature is often the primary method for attributing a record to a  
29 person. In the foregoing examples, once the electronic signature is attributed to me,  
30 the electronic record would also be attributed to me, unless I established fraud or  
31 other invalidating cause. However, it is not the only method for attribution, and  
32 there may be circumstances where attribution of an electronic signature is necessary,  
33 e.g., in the face of a claim of forgery or unauthorized signature. Accordingly,  
34 attributing electronic records and signatures are now subject to the same attribution  
35 in fact standard, provable by any means including evidence of the efficacy of security  
36 procedures. The inclusion of a specific reference to security procedures as a means

1 of proving attribution is salutary because of the unique importance of security  
2 procedures in the electronic environment. Indeed, in certain processes, a technical  
3 and technological security procedure may be the only way to convince a trier of fact  
4 that a particular electronic record or signature was that of a particular person. In  
5 the above examples, the use of a security procedure to establish that the record, and  
6 related signature, came from my business might be necessary to avoid my claim that  
7 a hacker intervened. The reference to security procedures is not intended to suggest  
8 that other forms of proof of attribution should be accorded less persuasive effect.

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

14           4. This section does apply in determining the effect of a "click-through"  
15 transaction. A "click-through" transaction involves a process which, if executed  
16 with an intent to "sign," will be an electronic signature directly covered. See  
17 definition of Electronic Signature and related Notes. In the context of an  
18 anonymous "click-through" issues of proof will be paramount. This section will be  
19 relevant to establish that the resulting electronic record is attributable to a particular  
20 person upon the requisite proof, including security procedures which may track the  
21 source of the click-through.

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

25           (1) If the parties have agreed to use a security procedure to detect changes  
26 or errors and one party has conformed to the procedure, but the other party has not,  
27 and the nonconforming party would have detected the change or error had that party  
28 also conformed, the effect of the changed or erroneous electronic record is  
29 avoidable by the conforming party.

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

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

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

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

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

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

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

20 **Reporter’s Notes**

21           1. Substantively, the section is now limited to changes and errors occurring  
22 in transmissions between parties – whether person-person (paragraph 1) or in an  
23 automated transaction involving an individual and a machine (paragraphs 1 and 2).  
24 The section focuses on the effect of changes and errors occurring when records are  
25 exchanged between parties. In cases where changes and errors occur in contexts

1 other than transmission, the law of mistake is expressly made applicable to resolve  
2 the conflict.

3 2. Paragraph (1) deals with any transmission where the parties have agreed  
4 to use a security procedure to detect changes and errors. It operates against the  
5 non-conforming party, i.e., the party in the best position to have caught the change  
6 or error, regardless of whether that person is the sender or recipient. The source of  
7 the error/change is not indicated, and so in this context both human and machine  
8 errors/changes would be covered. It is limited to the situation where a security  
9 procedure would detect the error/change but one party fails to use the procedure  
10 and does not detect the error/change. In such a case, consistent with the law of  
11 mistake generally, the record is made avoidable at the instance of the party who did  
12 everything possible to avoid the mistake. See Restatement Sections 152-154. With  
13 respect to errors or changes that would not be caught by the security procedure  
14 even if applied, the parties are left to the general law of mistake to resolve the  
15 dispute.

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

24 4. Paragraph (2) has been moved from Section 204 of the 1998 Annual  
25 Meeting Draft. The move gathers in one place all the provisions dealing with  
26 mistake. The key in prior discussions has been the context of mistakes in  
27 transmission – whether between two people or an individual and a machine. The  
28 substance of the former definition of “inadvertent error” has simply been  
29 incorporated into the preamble. The substance of former Section 204 has not been  
30 changed. Under paragraph (2) an individual must satisfy all three requirements  
31 before avoiding the effect of the erroneous electronic record.

32 5. As with paragraph (1), paragraph (2), when applicable, allows the  
33 mistaken party to avoid the effect of the erroneous electronic record. However, the  
34 subsection is limited to human error on the part of an individual when dealing with  
35 the machine of the other party. This limitation is based on the consideration that  
36 security procedures may be developed to address system errors, and that in an  
37 individual to individual context there is a greater ability to correct the error before  
38 parties have acted on the error. Where a system error occurs, the issue of the effect

1 of that error would be resolved under paragraph (1) if applicable, otherwise under  
2 paragraph (3) and the general law of mistake.

3 6. The most important limitation on the operation of paragraph (2) relates to  
4 the ability of the party acting through the electronic agent/machine, to build in  
5 safeguards which enable the individual to prevent the sending of an erroneous  
6 record, or correct the error once sent. For example, the electronic agent may be  
7 programmed to provide a “confirmation screen” to the individual setting forth all the  
8 information the individual initially approved. This would provide the individual with  
9 the ability to prevent the erroneous record from ever being sent. Similarly, the  
10 electronic agent might receive the record sent by the individual and then send back a  
11 confirmation which the individual must again accept before the transaction is  
12 completed. This would allow for correction of the erroneous record. In either case,  
13 the electronic agent would “provide an opportunity for prevention or correction of  
14 the error,” *and the subsection would not apply.*

15 7. Paragraph (2) also places additional requirements on the mistaken  
16 individual before the paragraph may be invoked to avoid an erroneous electronic  
17 record. The individual must take prompt action to advise the other party of the  
18 error and the fact that the individual did not intend the electronic record. Whether  
19 the action is prompt must be determined from all the circumstances including the  
20 individual’s reason to know the manner of contacting the other party. The  
21 individual should advise the other party both of the error and of the lack of intention  
22 to be bound (i.e., avoidance) by the electronic record received. Since this provision  
23 allows avoidance by the mistaken party, that party should also be required to  
24 expressly note that it is seeking to avoid the electronic record, i.e., lacked the  
25 intention to be bound.

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

29 Finally, and most importantly in regard to transactions involving  
30 intermediaries which may be harmed because transactions cannot be unwound, the  
31 individual cannot have received any benefit from the transaction. Observers from  
32 the financial industry expressed concern that this section would allow for the  
33 unwinding of transactions after the delivery of value and consideration which could  
34 not be returned or destroyed. Under subparagraph (2)(C), in such a case, the  
35 individual would have received the benefit of the consideration and would NOT be  
36 able to avoid the erroneous electronic record.

37 8. In all cases not covered by paragraphs (1) or (2), where error or change  
38 to a record occur, the parties contract, or other law, specifically including mistake,



1 applies to resolve any dispute. If the error occurs in the context of record retention,  
2 Section 111 will apply. In that case the standard is one of accuracy and  
3 retrievability of the information.

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

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

17 **Source:** New.

18 **Reporter's Notes**

19 This provision was added in response to the Task Force Report. Essentially  
20 this section allows a notary public to act electronically, effectively removing the  
21 stamp/seal requirements. However, the section does not eliminate any of the other  
22 requirements of notarial laws, and consistent with the entire thrust of this Act,  
23 simply allows the signing and information to be accomplished in an electronic  
24 medium.

1           **SECTION 111. RETENTION OF ELECTRONIC RECORDS;**  
2           **ORIGINALS.**

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

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

7           (2) remains accessible for later reference.

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

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

13           (d) If a law requires a record to be presented or retained in its original form,  
14 or provides consequences if the record is not presented or retained in its original  
15 form, that law is satisfied by an electronic record retained in accordance with  
16 subsection (a).

17           (e) If a law requires retention of a check, that requirement is satisfied by  
18 retention of an electronic record of the information on the front and back of the  
19 check in accordance with subsection (a).

20           (f) A record retained as an electronic record in accordance with subsection  
21 (a) satisfies a law requiring a person to retain records for evidentiary, audit, or like

1 purposes, unless a law enacted after the effective date of this [Act] specifically  
2 prohibits the use of an electronic record for a specified purpose.

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

6 **Source:** UETA Sections 205 and 206 (1998 Annual Meeting Draft); Uncitral  
7 Model Articles 8 and 10.

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

9 1. Subsection (a) requires accuracy and the ability to access at a later time.  
10 The requirement of accuracy is derived from the Uniform and Federal Rules of  
11 Evidence. The requirement of continuing accessibility addresses the issue of  
12 technology obsolescence and the need to update and migrate information to  
13 developing systems. Other requirements in former drafts were deleted based on  
14 comments that they were unnecessary and did not advance the cause of accuracy.  
15 The subsection still refers to the information contained in an electronic record,  
16 rather than relying on the term electronic record, as a matter of clarity that the  
17 critical aspect in retention is the information itself.

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

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

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

28 3. Subsection (e) has been added to address particular concerns regarding  
29 check retention statutes identified by the Federal Reserve Bank of Boston.

30 4. Subsections (f) and (g) generally address record retention statutes. As  
31 always the government may require records in any medium, however, these

1 subsections require a governmental agency to specifically identify the types of  
2 records and requirements that will be imposed.

3 **Historical Notes:**

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

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

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

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



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

4 (2) A contract may be formed by the interaction of an electronic agent  
5 and an individual, acting on the individual's own behalf or for another person,  
6 including by an interaction in which the individual performs actions that the  
7 individual is free to refuse to perform and which the individual knows or has reason  
8 to know will cause the electronic agent to complete the transaction or performance.

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

11 **Source:** UETA Section 401 (1998 Annual Meeting Draft); Uncitral Model Article  
12 11.

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

14 1. Subsection (a) has been significantly simplified. It defers to other law on  
15 the formation of a contract except to provide that the effectiveness of an acceptance  
16 is upon receipt, rather than upon dispatch. In addition, the form of acceptance,  
17 whether an express return promise, performance or notice of initiation of  
18 performance, is irrelevant. Whatever the form of acceptance, it is effective on  
19 receipt. The purpose of the section is to make clear that the rules regarding contract  
20 formation are not to be altered in the electronic environment except that the time of  
21 formation occurs on receipt of acceptance or performance.

22 2. Inclusion of the automated transaction provisions in subsection (b)  
23 focuses the purpose of the provisions. The intent behind subsection (b) is to assure  
24 that contracts can be formed by machines. The concern raised relates to the  
25 perceived lack of human intent at the time of contract formation. When machines  
26 are involved, the requisite intention flows from the programming and use of the  
27 machine. As in other cases, these are salutary provisions consistent with the  
28 fundamental purpose of the Act to remove barriers to electronic transactions while  
29 leaving the substantive law, e.g., law of mistake, law of contract formation,  
30 unaffected to the greatest extent possible. The emphasis is on contract formation  
31 methods and not on the fact that machines are involved.

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

7           On the other hand it may be possible that my actions indicate agreement to a  
8 particular term. For example, I go to a person’s site and am confronted by an initial  
9 screen which advises me that the information at this site is proprietary, that I may  
10 use the information for my own personal purposes, but that, by clicking below, I  
11 agree that any other use without the site owner’s permission is prohibited. If I click  
12 “agree” and download the information and then use the information for other,  
13 prohibited purposes, should I be bound by the click? It seems the answer properly  
14 should be, and would be, yes. If the owner can show that the only way I could have  
15 obtained the information was from his website, and that the process to access the  
16 subject information required that I must have clicked the “I agree” button after  
17 having the ability to see the conditions on use, I have performed actions which I was  
18 free to refuse, which I knew would cause the site to grant me access, i.e., “complete  
19 the transaction.” The terms of the resulting contract would be determined under  
20 general contract principles, but would include the limitation on my use of the  
21 information, as condition precedent to granting me access to the information. There  
22 may be an electronic signature, because by clicking “I agree” I adopted a process  
23 with the intent to “sign,” i.e., bind myself to a legal obligation, the resulting record  
24 of the transaction. If a “signed writing” were required this would be enforceable. If  
25 a “signed writing” were not required, it may be sufficient to establish that the  
26 electronic record is attributable to me under Section 108, and that may be done in  
27 any manner reasonable including showing that, of necessity, I could only have gotten  
28 the information through the process at the website – a very difficult proof, but  
29 available nonetheless.

30           **SECTION 114. TIME AND PLACE OF SENDING AND RECEIPT.**

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

1       behalf of the sender or (ii) enters a region of an information processing system that  
2       is under the control of the recipient.

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

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

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

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

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

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

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



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

3 (f) Receipt of an electronic acknowledgment from an information processing  
4 system described in subsection (b) establishes that a record was received but, in  
5 itself, does not establish that the content sent corresponds to the content received.

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

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

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

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

22 2. Subsection (a) requires that information be properly addressed or  
23 otherwise directed to the recipient before it will be considered sent. The record will  
24 be considered sent once it leaves the control of the sender, or comes under the  
25 control of the recipient. The structure of many message delivery systems is such  
26 that electronic records may actually never leave the control of the sender. For  
27 example, at my university, e-mail sent within the system to another faculty member  
28 is technically not out of my control since it never leaves my server. Accordingly, to  
29 qualify as a sending, my e-mail must arrive at a point where the recipient has

1 control. The effect of an electronic record that is thereafter “pulled back,” e.g.,  
2 removed from a mailbox, is not addressed by this section. The parallel would be  
3 removing a letter from a person’s mailbox.

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

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

22 4. Subsections (c) and (d) provide default rules for determining where a  
23 record will be considered to have been sent or received. The focus is on the place of  
24 business of the recipient and not the physical location of the information processing  
25 system, which may bear absolutely no relation to the transaction between the parties.  
26 As noted in paragraph 100 of the commentary to the Uncitral Model Law

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

32 Accordingly, where the place of sending or receipt is an issue under other applicable  
33 law, e.g., conflict of laws issues, tax issues, the relevant location should be the  
34 location of the sender or recipient and not the location of the information processing  
35 system.

36 Subsection (d) assures individual flexibility in designating the place from  
37 which a record will be considered sent or at which a record will be considered

1 received. Under subsection (d) a person may designate the place of sending or  
2 receipt unilaterally in an electronic record. This ability, as with the ability to  
3 designate by agreement, would be limited by applicable law to places having a  
4 reasonable relationship to the transaction.

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

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

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

17 **SECTION 115. TRANSFERABLE RECORDS.**

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

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

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

24 (b) A person has control of a transferable record if a system employed for  
25 evidencing the transfer of interests in the transferable record reliably establishes that  
26 person as the person to whom the transferable record has been issued or transferred.

1 (c) A system satisfies subsection (a), and a person is deemed to have control  
2 of a transferable record, if the record or records are created, stored, and assigned in  
3 such a manner that:

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

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

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

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

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

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

18 (d) Except as otherwise agreed, a person having control of a transferable  
19 record is the holder, as defined in [Section 1-201(2) of the Uniform Commercial  
20 Code], of the transferable record and has the same rights and defenses as a holder of  
21 an equivalent record or writing under the [Uniform Commercial Code], including, if  
22 the applicable statutory requirements under [Section 3-302(a), 7-501, or 9-308 of

1 the Uniform Commercial Code] are satisfied, the rights and defenses of a holder in  
2 due course, a holder to which a negotiable document of title has been duly  
3 negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are  
4 not required to obtain or exercise any of the rights in this subsection.

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

8 (f) If requested by the person against which enforcement is sought, the  
9 person seeking to enforce the transferable record shall provide reasonable proof that  
10 the person is in control of the transferable record. This proof may include access to  
11 the authoritative copy of the transferable record and related business records  
12 sufficient to review the terms of the transferable record and establish the identity of  
13 the person in control of the transferable record.

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

15 **Reporter's Notes**

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

21 2. Committee discussions at its last two meetings made clear that any  
22 coverage of transferable records would be limited to the minimum necessary to  
23 facilitate the use of these types of records. The guiding principles informing this  
24 draft can be summarized as follows:

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

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

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

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

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

13           3. The definition of transferable record has been revised to delete coverage  
14 of chattel paper. Revised Article 9 addresses the concept of electronic chattel  
15 paper. The concept of chattel paper is uniquely an Article 9 concept, and it is felt  
16 that treatment of chattel paper is best left to Article 9 in light of the current revision.  
17 Regarding documents of title, an earlier draft had proposed deleting these records  
18 considering the limited scope and impact of state law in this area and the activity of  
19 federal regulators (e.g., electronic cotton warehouse receipts). However, at the  
20 Committee's last meeting evidence of wide support from industry for inclusion of  
21 these records was presented. Accordingly, the Act now covers electronic records  
22 which would be documents under Article 7 if in writing.

23           4. Further, the scope has been limited by requiring, as part of the definition  
24 of a transferable record, that the obligor expressly agree in the electronic record that  
25 the provisions of this Act, which would include Section 115 relating to transferable  
26 records, will apply. This limitation is intended to assure that an obligor on a paper  
27 note or paper document will not be confronted with the conversion of that note or  
28 document to electronic form without his/her express agreement. The requirement  
29 that the obligor expressly agree in the electronic record to the applicability of the  
30 UETA will not otherwise affect the characterization of a transferable record because  
31 it is a statutory condition.

32           5. Based on the comments at the last two meetings of the Drafting  
33 Committee and consistent with the exclusion of Articles 3, 4 and 7 from the scope  
34 of this Act, Section 115 is drafted as a stand-alone provision. Although references  
35 are made to specific provisions in Article 3 and Article 9, these provisions are  
36 "pulled" into this Act and made the applicable rules for purposes of this Act. The  
37 rights of parties to transferable records are established under subsections (d) and (e).

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

8           7. Subsection (d) provides rules for determining the rights of a party in  
9 control of a transferable record. The subsection makes clear that the rights are  
10 determined under this section, and not under other law, by incorporating the rules  
11 on the manner of acquisition into this statute. The last sentence of subsection (d) is  
12 intended to assure that requirements related to notions of possession are not  
13 incorporated into this statute.

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

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**PART 2**

**GOVERNMENTAL ELECTRONIC RECORDS AND SIGNATURES**

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

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

**Source:** UETA Section 501 (1998 Annual Meeting Draft); Massachusetts Electronic Records and Signatures Act Section 3 (Draft November 4, 1997).

**Reporter's Notes**

See Notes following Section 203.

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

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



1 (b) To the extent that a governmental agency uses electronic records and  
2 electronic signatures under subsection (a), the [governmental agency] [designated  
3 state officer], giving due consideration to security, may specify:

4 (1) the manner and format in which the electronic records must be  
5 created, generated, sent, communicated, received, and stored and the systems  
6 established for such purposes;

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

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

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

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

21 **Source:** UETA Section 502 (1998 Annual Meeting Draft); Illinois Act Section  
22 25-101; Florida Electronic Signature Act, Chapter 96-324, Section 7 (1996).

1 **Reporter’s Notes**

2 See Notes following Section 203.

3 **SECTION 203. INTEROPERABILITY.** Standards adopted by [a  
4 governmental agency] [designated officer] of this State pursuant to Section 202  
5 must encourage and promote consistency and interoperability with similar  
6 requirements adopted by other governmental agencies of this and other States and  
7 the federal government and nongovernmental persons interacting with governmental  
8 agencies of this State. If appropriate, those standards must specify differing levels  
9 of standards from which governmental agencies of this State may choose in  
10 implementing the most appropriate standard for a particular application.

11 **Source:** UETA Section 504 (1998 Annual Meeting Draft); Illinois Act Section  
12 25-115.

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

15 **Reporter’s Notes to Part 2**

16 This Part addresses the expanded scope of this Act.

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

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

7                   3. Section 203 requires governmental agencies or state officers to take  
8 account of consistency in applications and interoperability to the extent practicable  
9 when promulgating standards. This section is critical in addressing the concerns of  
10 many at our meetings that inconsistent applications may promote barriers greater  
11 than currently exist.

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**PART 3**  
**MISCELLANEOUS PROVISIONS**

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

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

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

**Source:**

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

**Source:**