

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Community Affairs Committee

BILL: CS/SB 2106

INTRODUCER: Judiciary Committee and Senator Bennett

SUBJECT: Electronic Filing of Documents/Land

DATE: April 21, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Thompson/Maclure</u>	<u>Maclure</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Herrin</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable</u>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Current law provides for electronic signatures and electronic notarization of documents, but does not clearly provide for electronic recording of documents that affect real property titles. This committee substitute (CS) adopts the Uniform Real Property Electronic Recording Act. The act starts the process toward electronic recording of real property documents with recorders.

This CS authorizes recorders to begin accepting records in electronic form, storing electronic records, and setting up systems for searching for and retrieving these land records. The CS equates electronic documents and electronic signatures to original paper documents and manual signatures, so that any requirement for originality (paper document or manual signature) is satisfied by an electronic document and signature.

This CS creates an Electronic Recording Council to adopt standards to implement electronic recording. The Department of State will prescribe standards to implement this section in consultation with the Electronic Recording Council. The council shall consist of nine members: five clerks of circuit court or county recorders, two persons working in the title insurance industry who are members of the Florida Land Title Association, one banker who is a member of the Florida Bankers Association, and one attorney who is a member of the Real Property, Probate and Trust Law Section of the Florida Bar.

The CS creates section 695.27 of the Florida Statutes.

II. Present Situation:

Uniform Real Property Electronic Recording Act: Background¹ - The National Conference of Commissioners on Uniform State Laws (NCCUSL) “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law. NCCUSL’s work supports the federal system and facilitates the movement of individuals and the business of organizations with rules that are consistent from state to state.”² In 2004, the conference finalized and approved the Uniform Real Property Electronic Recording Act (URPERA). Currently, the act has been enacted in five states and the District of Columbia, and is filed in the legislatures of nine more, including in Florida.³

As a result of the enactments of the Uniform Electronic Transactions Act ("UETA")⁴ in most states, and the Electronic Signatures in Global National Commerce Act ("E-Sign") at the federal level, it is now possible to have sale contracts, mortgage instruments, and promissory notes memorialized in electronic form with the electronic signatures of the parties involved in the transaction. However, real estate transactions require another step not addressed by UETA or E-sign. Real estate transaction documents must be recorded on public records in order to protect the current interest in the real estate and clarify who owns title to the property.

Real estate records establish a chain of title which is based upon the originality and authenticity of the paper documents presented for recording. There must be an orderly conversion of recording offices in the United States for implementation of an electronic recording system. The essential starting point for this process is the URPERA.

URPERA modernizes real property law for the 21st Century. It is designed to help state administrative agencies meet the demands of the public for quick identification of title ownership. It should also streamline the real estate transaction at a benefit to consumers and every facet of the real estate industry.

The NCCUSL provided the following information regarding the proposed act:⁵

The law of the states of the United States has many “statute of fraud” requirements that inhibit the use of electronic communications. Statute of

¹ Significant portions of the present situation of this staff analysis are specifically derived from “Uniform Real Property Electronic Recording Act” (white paper with notes and comments describing the act), promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2004, as well as from materials on the website of NCCUSL. The members of the Drafting Committee on the Uniform Real Property Electronic Recording Act were: David D. Biklen, Owen L. Anderson, Patrick C. Guillot, Carl H. Lisman, James J. White, W. Jackson Willoughby, Lee Yeakel, Arthur R. Gaudio, Fred H. Miller, Lani Liu Ewart (ex officio), Dale Whitman (American Bar Association Advisor), William H. Henning (Executive Director), and William J. Pierce (Executive Director Emeritus).

² National Conference of Commissioners on Uniform State Laws, *Uniform Law Commissioners*, at <http://www.nccusl.org/Update/> (last visited April 12, 2006).

³ National Conference of Commissioners on Uniform State Laws, *A Few Facts About The Uniform Real Property Electronic Recording Act*, at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp (last visited April 12, 2006).

⁴ Section 668.50, F.S.

⁵ *Summary, Uniform Real Property Electronic Recording Act*, at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-urpera.asp. (last visited April 12, 2006).

fraud requirements put total and express reliance upon paper documents and manual signatures to make transactions enforceable. ... These same requirements have also made it more difficult to develop electronic analogues to transactions in paper that are equally enforceable.

The first step to remedy the problem took place in 1999 when the Uniform Law Commissioners promulgated the [UETA]. This act adjusted statute of fraud provisions to include electronic “records” and “signatures” for the memorialization of all kinds of transactions, including basic transactions in real estate. It is possible to have sale contracts, mortgage instruments (in whatever form a jurisdiction uses) and promissory notes memorialized in electronic form with electronic signatures that will now be treated the equal of the same paper documents with manual signatures. This is the result of the wide-spread enactment of UETA and of the subsequent enactment of [E-Sign] by Congress.

Real estate transactions, however, require another step not addressed by either UETA or E-Sign. Real estate documents must be recorded on public records to be effective. Recording takes place in most states in a county office devoted to keeping these records. Recording protects current interests in real estate by clarifying who holds those interests. The chain of title leading to the current title-holder, meaning the historic record of documents relating to transactions for a specific piece of real estate, establishes the marketability of that piece of real estate by the current owner of interests in it. The real estate records establish this chain of title. State law governs these local recording offices, and there are requirements in the law of every state relating to the originality and authenticity of paper documents that are presented for recording. These are themselves “statute of fraud” provisions that must be specifically adjusted before electronic recording may take place. Neither UETA nor E-Sign [address this issue].

There must be an orderly conversion of every recording office in the United States for electronic recording to become accepted universally. That will be a complex process, but it needs a starting point in the law. The URPERA, promulgated by the Uniform Law Commissioners in 2004, is that essential start.

The URPERA establishes that any requirement for originality, for a paper document or for a writing manually signed before it may be recorded, is satisfied by an electronic document and signature. This is essentially an extension of the principles of UETA and E-Sign to the specific requirements for recording documents relating to real estate transactions in any state. Second, it establishes what standards a recording office must follow and what it must do to make electronic recording effective. Third, URPERA establishes the board that sets statewide standards and requires it to set uniform standards that must be implemented in every recording office.

Clerks of Court/County Recorders in Florida - Clerks of court and county recorders are required to maintain a variety of court and official records. Court clerks also serve as county recorders.⁶ Court records maintained by a clerk of court include:

the contents of the court file, including the progress docket and other similar records generated to document activity in a case, transcripts filed with the clerk, documentary exhibits in the custody of the clerk, and electronic records, videotapes, or stenographic tapes of depositions or other proceedings filed with the clerk, and electronic records, videotapes, or stenographic tapes of court proceedings⁷

Official records maintained by county recorders include recorded judgments, deeds, mortgages, claims of liens, death certificates, certificates of discharge from military service, maps, and other records.⁸

III. Effect of Proposed Changes:

Section 1 creates s. 695.27, F.S., to adopt the Uniform Real Property Electronic Recording Act (URPERA), with modifications specific to Florida. The CS defines the following terms:

- “Document” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and eligible to be recorded in the land records maintained by the recorder.
- “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- “Electronic document” means a document that is received by the recorder in an electronic form.
- “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.
- “Logically associated” means information recorded simultaneously with the document to which it pertains and assigned the same document number or a consecutive page number immediately following such document.
- “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, or government; governmental subdivision, agency, or instrumentality; or any other legal or commercial entity.
- “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

This CS authorizes a county recorder to accept and record electronic documents relating to real property. Therefore, if a law requires, as a condition for recording, that a document relating to

⁶ Section 28.222, F.S. In Orange County, however, the county comptroller serves as the county recorder.

⁷ Rule 2.051(b)(1)(A), Fla. R. Jud. Admin.

⁸ Sections 28.222, F.S.

land records be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying the requirements of this section. This CS further provides that, if a law requires, as a condition for recording, that a document be signed or notarized, that the requirement is satisfied by an electronic signature or electronic notarization. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

This CS does not require that persons engaging in real estate transactions use electronic documents in order to have their documents recorded. It merely permits the county recorder to accept electronic documents if they are presented electronically. The county recorder must continue to receive paper documents and include those documents in the same index with the electronic ones. The county recorder may also convert paper documents accepted for recording into electronic form, and may also convert into electronic form information that was recorded before the recorder began to record electronic documents. The county recorder may store those electronic documents, or the information contained in them, and create an index of the documents or information that can be accessed and also have a system in place for search and retrieval of these documents.

The Electronic Recording Council is created to adopt standards to implement this section in consultation with the Department of State (department). The department must make specific written findings if any of the council's recommendations are rejected. The Electronic Recording Council will consist of nine members appointed by the Secretary of State: five clerks of circuit court or county recorders, two persons working in the title insurance industry who are members of the Florida Land Title Association, one banker who is a member of the Florida Bankers Association, and one attorney who is a member of the Real Property, Probate and Trust Law Section of the Florida Bar. The first meeting of the Electronic Recording Council must be held on or before July 30, 2006. Thereafter, the council meets at the call of the chair. The members of the Electronic Recording Council serve without compensation, and cannot claim per diem and travel expenses from the Secretary of State.

Among the purposes of the council is to help keep the standards and practices of county recorders in this state in harmony with the standards and practices of other states' recording offices, and to help keep the technology used by recorders in this state compatible with technology used by other states' recording offices. To that end, the CS directs the Electronic Recording Council, in adopting, amending, and repealing standards, to consider:

- Standards and practices of other jurisdictions.
- The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association (PRIA).
- The views of interested persons and governmental officials and entities.
- The needs of counties of varying size, population, and resources.⁹
- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

⁹ Because most counties are quite diverse in the size, population and resources of their recording venues, an organization such as PRIA assists in formulating and disseminating model standards, systems and procedures while preserving the integrity of those records. *What is PRIA's Mission?* <http://www.pria.us/index.html>. Last visited April 12, 2006.

The CS specifies that, in applying and construing the new Florida law, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Responding to the specific language of the Electronic Signatures in Global and National Commerce Act (ESIGN), this CS is designed to avoid preemption of state law under that federal legislation. The CS specifies that it modifies, limits, and supersedes E-Sign, 15 U.S.C. ss. 7001 et seq.,¹⁰ but adds that it does not modify, limit, or supersede s. 101(c) of E-Sign, 15 U.S.C. s. 7001(c),^{11, 12} or authorize electronic delivery of any of the notices described in s. 103(b) of E-Sign, 15 U.S.C. s. 7003(b).¹³

Section 2 provides the act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁰ The federal Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. ss. 7001 et seq., was enacted on June 30, 2000. Congress enacted the act “to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically. Careful to preserve the underlying consumer protection laws governing consumers’ rights to receive certain information in writing, Congress imposed special requirements on businesses that want to use electronic records or signatures in consumer transactions.” Federal Trade Commission & Department of Commerce, *Electronic Signatures in Global and National Commerce Act: The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, available at <http://www.ftc.gov/os/2001/06/esign7.htm> (last visited April 18, 2006).

¹¹ “Section 101(c)(1) of [E-Sign] provides that information required by law to be in writing can be made available electronically to a consumer only if he or she affirmatively consents to receive the information electronically and the business clearly and conspicuously discloses specified information to the consumer before obtaining his or her consent.” *Id.* at section II.A (“ESIGN’s Consumer Consent Provision”) (last visited April 18, 2006).

¹² 15 U.S.C. s. 7001(c) states that a consumer’s consent to receive electronic records is valid only if the consumer has affirmatively consented and, prior to the consent, he or she was provided a clear and conspicuous statement outlining the consumer’s rights.

¹³ 15 U.S.C. s. 7003(b) excludes from the Electronic Signatures in Global and National Commerce Act: 1) “court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings”; 2) notices of: cancellation of utility services; defaults or foreclosures or other such proceedings on a primary residence; cancellation or termination of health or life insurance; or recall of a product because of health or safety issues; and 3) documents required to transport toxic or dangerous materials.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Electronic recording of documents may lower costs to the private sector, related to the filing of documents in real property transactions.

C. Government Sector Impact:

The Department of State estimates a \$2,000 non-recurring and a \$56,000 recurring expense beginning in the 2006-2007 fiscal year.¹⁴ The continuing fiscal expense of \$56,000 is for the suggested creation of one full-time employee entitled "Electronic Records Specialist."¹⁵

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁴ Department of State Fiscal Note for House Bill 7091, page 1.

¹⁵ *Id.*, page 2.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
