

The Florida Senate
PROFESSIONAL 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 2038

INTRODUCER: Judiciary Committee and Senator King

SUBJECT: Real Property Electronic Recording

DATE: April 4, 2007

REVISED: 04/12/07

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	Fav/CS
2.	Herrin	Yeatman	CA	Fav/2 amendments
3.			GO	
4.				
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

Current law provides for electronic records¹ and electronic signatures on documents,² 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, which starts the process toward electronic recording of real property documents with county recorders.

This CS provides county recorders the legal authority to prepare for electronic recording of real property instruments, and authorizes county recorders to begin accepting records in electronic form, storing electronic records, and setting up systems for searching for and retrieving these 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 Advisory Committee (committee), which the Department of State consults with when adopting standards to implement electronic recording. The committee shall consist of nine members: five members appointed by the Florida

¹ Section 668.50, F.S.

² Chapter 668, Part I, F.S.

Association of Court Clerks and Comptrollers, two members appointed by the Florida Land Title Association, one member appointed by 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 provides that the committee shall terminate on July 1, 2010.

The CS provides that the Florida Association of County Clerks and Comptrollers will provide administrative and technical support to the Department of State and the committee.

This CS creates section 695.27 of the Florida Statutes.

II. Present Situation:

Uniform Real Property Electronic Recording Act: Background³

As described on its website, the National Conference of Commissioners on Uniform State Laws (NCCUSL), now 115 years old, “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.”⁴ In 2004, the conference finalized and approved the Uniform Real Property Electronic Recording Act (URPERA). Currently, the act has been enacted in seven states and the District of Columbia, and is filed in the legislatures of 12 more, including Florida.⁵

There are certain barriers to using electronic communications to carry on real estate transactions. Currently, many states have enacted “statute of fraud” requirements that inhibit the use of electronic communications.⁶ Statute of 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.

Some cite URPERA as a possible starting point for the conversion of recording offices in the United States for implementation of an electronic recording system. The NCCUSL provided the following information regarding the proposed act:

The first step to remedy the problem took place in 1999 when the Uniform Law Commissioners promulgated the Uniform Electronic Transactions Act (UETA). This act adjusted statute of fraud provisions to include electronic “records” and “signatures” for the memorialization of all kinds

³ Significant portions of the present situation of this staff analysis are specifically derived from the Uniform Real Property Electronic Recording Act (URPERA), promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2004, as well as from materials on the website of NCCUSL.

⁴ National Conference of Commissioners on Uniform State Laws, *Uniform Law Commissioners*, at <http://www.nccusl.org/Update/> (last visited March 14, 2007).

⁵ 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 March 14, 2007).

⁶ For example, in Florida, s. 725.01, F.S., requires contracts for the sale of real property to be in writing. Additionally, ss. 689.01 and 689.05, F.S., require a writing for the conveyance of real estate or for a lease of greater than one year and that a declarations of trust be in writing.

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 the Electronic Signatures in Global and National Commerce Act (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 help.

...

The Uniform Real Property Electronic Recording Act (URPERA), promulgated by the Uniform Law Commissioners in 2004, is that essential start.⁷

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 concept 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 Recordors in Florida

Clerks of court and county recordors are required to maintain a variety of court and official records. Court clerks also serve as county recordors.⁸ Court records maintained by a clerk of court include:

⁷ National Conference of Commissioners on Uniform State Laws, *Summary, Uniform Real Property Electronic Recording Act*, at http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-urpera.asp (last visited March 14, 2007).

⁸ Section 28.222, F.S.

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 proceedings⁹

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.¹⁰

III. Effect of Proposed Changes:

This CS adopts the Uniform Real Property Electronic Recording Act (URPERA), with modifications specific to Florida. The purpose of URPERA is “to give county clerks and recorders the legal authority to prepare for electronic recording of real property instruments.”¹¹ 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 Official Records, as defined in s. 28.222, F.S., and maintained by a county 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 a county recorder in an electronic form.
- “Electronic signature” means an electronic sound, symbol, or process that is executed or adopted by a person with the intent to sign the document and is attached to or logically associated with a document such that, when recorded, it is 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, government or governmental subdivision, agency, 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.

The definition of “electronic signature” in this CS does not currently mirror the model URPERA. The model act provides that an “electronic signature” means “an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person

⁹ FLA. R. JUD. ADMIN. 2.420(b)(1)(A) (2007).

¹⁰ Section 28.222, F.S.

¹¹ National Conference of Commissioners on Uniform State Laws, *Uniform Real Property Electronic Recording Act*, at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=9> (follow “Final Acts and Legislation” hyperlink; then select “Florida”; then follow “Real Property Electronic Recording Act” hyperlink) (last visited March 15, 2007).

with the intent to sign the document.”¹² A representative from the Uniform Law Commission expressed concerns that the second part of the sentence in the definition provided in this CS¹³ narrows the scope of electronic signatures. According to the representative, the specific intent of the Uniform Law Commission was to pair the definition of “electronic signature” in URPERA to the definition in the Uniform Electronic Transactions Act to avoid confusion. Florida’s Uniform Electronic Transactions Act is codified in s. 668.50, F.S., and defines “electronic signature” in accordance with the model URPERA.

The 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 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 proposed s. 695.27, F.S. 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. 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. Rather, it permits the county recorder to accept electronic documents if they are presented electronically. The county recorder must continue to accept 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 CS directs the Department of State (department) to adopt, through the rulemaking process, standards to implement proposed s. 695.27, F.S. The Electronic Recording Advisory Committee (committee) created by this CS will consult with the department to develop standards to provide for the validity of electronic documents relating to real property and provide for the recording of electronic documents by the county recorders. The committee will consist of nine members:

- Five members appointed by the Florida Association of Court Clerks and Comptrollers;
- Two members appointed by the Florida Land Title Association;
- One member appointed by the Florida Bankers Association; and
- One attorney appointed by the Real Property, Probate and Trust Law Section of The Florida Bar.

The first meeting of the committee must be held within 60 days of the effective date of the act. Thereafter, the committee will meet at the call of the chair, but the members must meet at least

¹² *Id.*

¹³ Specifically, the part providing “such that, when recorded, it is assigned the same document number or a consecutive page number immediately following such document.”

annually. The members of the committee serve without compensation and cannot claim per diem or travel expenses from the Secretary of the State. Appointed members will serve a one-year term and the Committee shall terminate on July 1, 2010.

Among the purposes of the department and the Committee 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 department, in consultation with the committee, while 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");¹⁴
- The views of interested persons and governmental officials and entities;
- The needs of counties by varying size, population, and resources;
- Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering.

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 (E-Sign), 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 15 U.S.C. ss. 7001 *et seq.*,¹⁶ but adds that it does not modify, limit, or supersede s. 101(c) of E-Sign,¹⁷ 15 U.S.C. s. 7001(c),¹⁸ or authorize electronic delivery of any of the notices described in s. 103(b) of E-Sign, 15 U.S.C. s. 7003(b).¹⁹

¹⁴ The Property Records Industry Association's mission is "to serve the property records industry by facilitating recordation and access to public property records, by formulating and disseminating model standards, systems and procedures while preserving the integrity of those records." Property Records Industry Association, *What is PRIA's Mission?*, at <http://www.pria.us/> (last visited on March 15, 2007).

¹⁵ E-Sign specifically provides that a state statute may modify, limit, or supersede provisions of E-Sign as long as the state statute follows certain criteria enumerated in E-Sign. *See* 15 U.S.C. s. 7002.

¹⁶ 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 March 15, 2007).

¹⁷ "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. (E-Sign's Consumer Consent Provision) (last visited March 15, 2007).

¹⁸ 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

This CS takes 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.

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 CS specifies that the Florida Association of County Clerks and Comptrollers will provide administrative support and technical expertise to the Electronic Recording Advisory Committee and the Department of State, eliminating a fiscal impact.

The CS requires the Department of State to adopt rules to implement standards for electronic recording of documents.

VI. Technical Deficiencies:

On page 4, line 25, the word “Association” appears to be unnecessary in referring to The Florida Bar.

consumer’s rights, as well as a statement of the hardware and software requirements for access to and retention of the electronic records.

¹⁹ Section 103(b) of E-Sign and 15 U.S.C. s. 7003(b) exclude 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, 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.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

Barcode 243178 by Community Affairs:

The amendment provides that certain documents are subject to the same excise tax as paper documents. It also allows a return that states the actual consideration paid for an interest in real property to be filed electronically with the clerk of circuit court and the Department of Revenue.

Barcode 181080 by Community Affairs:

This is a technical amendment to correct a reference to the “Florida Association of Court Clerks and Comptrollers.”

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