PRIA Position Statement
Uniform Real Property Electronic Recording Act

Introduction

In early 2003, the Property Records Industry Association (PRIA) formed a workgroup (the PRIA URPERA Workgroup) as a vehicle to provide input to the National Conference of Commissioners on Uniform State Laws (NCCUSL). At that time, NCCUSL was beginning its drafting of the Uniform Real Property Electronic Recording Act (URPERA). Through six drafting sessions, PRIA, and its workgroup members, have supplied input, which has generally been well received by the NCCUSL drafting committee.

At NCCUSL's 2004 Annual Meeting in Portland, Oregon, the URPERA was approved and recommended for enactment in all the states. At that meeting, an amendment was made to the draft that altered Section 5(a) to allow for two alternatives for a statewide body to set electronic recording standards. The first alternative, Alternative "A," (which existed in the previous draft) establishes an Electronic Recording Commission, with a majority of the Commission's members being recorders. The second alternative, Alternative "B," vests the authority to adopt electronic recording standards in a pre-existing state body.

In October 2004, PRIA supplied comments to the URPERA drafting committee dealing specifically with the addition of the alternatives in Section 5(a). PRIA also supplied comments dealing with both Section 5's official comments and the act's prefatory notes. PRIA's comments on the prefatory notes centered on clarifying and harmonizing the notes with the Uniform Electronic Transactions Act (UETA) which has already been adopted in over 46 jurisdictions.

In November 2004, the final act including prefatory notes and comments was released. The majority of concerns that PRIA raised in October 2004 were addressed by the drafting committee in the final version of the act and its prefatory notes and comments. PRIA continues to believe, however, that Section 5(a)'s Alternative "A" is the preferable formulation for a statewide body to adopt electronic recording standards because it assures that the resulting administrative rules will accord with the practical aspects of the land recording process.

The American Bar Association (ABA) recommended (and NCCUSL has adopted) an additional element to be included in Section 5(b) which requires the standard-setting body as established in that state to consider "adequate security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering." PRIA understands that, with this language being incorporated into Section 5(b), the ABA has approved the URPERA.

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PRIA's Position

PRIA supports, approves, and recommends the adoption of the URPERA with the following recommendations:

1. The state enacting the URPERA implement Alternative A of Section 5(a);
2. The Electronic Recording Commission as defined in Alternative A of Section 5(a) utilize the letter and the spirit of the PRIA model rules in formulating its rules;
3. Any rules promulgated by the Electronic Recording Commission be final rules, not subject to being overturned or vetoed by any other state entity, except by a court of competent jurisdiction; and
4. The reference in Section 5(b) relating to security protection should be clearly understood to not create a mandate on recorders to implement any particular type of "security" nor to affect any aspect of non-electronic (i.e. "paper") recordings.

PRIA has reached its conclusion to conditionally support the URPERA based upon the following analyses.

URPERA Analysis

In General

PRIA believes that it is important to clarify the overall scope, purpose, and meaning of URPERA, as well as its relationship to the UETA.

It is PRIA's view that URPERA and its Prefatory Note should not be read to create any negative implication concerning the recordability of documents and signatures (whether such documents or signatures were initially generated in paper or electronic form) in any jurisdiction that has adopted UETA §§ 17, 18, and 19, but has not yet adopted URPERA. One of the clear benefits of E-SIGN and UETA is that they provide a clear basis for such recordations, even where URPERA is not adopted, and no implication to the contrary should be created.

Unfortunately, some states excluded land records from the scope of UETA (e.g., Connecticut, Kentucky and Minnesota) and others did not enact UETA §§17 and 18 which explicitly authorize governmental agencies to use and maintain records electronically. (PRIA believes that in at least some states these sections were deleted from UETA because of pre-existing legislation granting such authority to governmental agencies.) Others have expressed doubt or concern about whether UETA applies to land records. Such doubts, or non-uniform enactments of UETA, could be seized upon

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in an effort to stymie efforts by a recorder wishing to engage in electronic recordation or to call into question titles depending on electronically recorded documents. URPERA puts any such claims to rest once and for all.

The purpose of UETA and E-SIGN is to provide legal certainty when using electronic signatures and records (whether such records or signatures were initially generated in paper or electronic form) and to provide the authorizing vehicles to enable the recording of such electronic records in the various local land records offices to the extent that local recorders are willing to accept them. The URPERA was drafted to remove any doubt that – in the context of land records – county and other recording officials have the authority, based on UETA (and, where applicable, E-SIGN) to receive, record, and retrieve documents and information in electronic form.

Section 5

PRIA's position on Section 5 has been formulated in light of NCCUSL's amendment in August, 2004 which added the alternative formulation for the body charged with implementing the provisions of the URPERA. PRIA's concern is that the Alternative B formulation of allowing a (presumably pre-existing) state agency to promulgate regulations does not adequately address the implementation of electronic recording within a state.

PRIA understands that some NCCUSL commissioners felt the alternative formulation necessary because (1) they already had a state agency established that they felt could do the job; and (2) adding a new electronic recording commission could add a fiscal burden to the state. While PRIA understands all too well fiscal restraints on state and local government, it is PRIA's belief that any savings achieved by utilizing a pre-existing administrative infrastructure could be expended many times over again because of the lack of expertise in electronic recording and because recorders might not be given a sufficient voice in the administrative scheme.

Of the two alternatives, Alternative A is the preferred solution. A commission dedicated to the adoption and implementation of standards for electronic recording would most likely approach its task in a different manner than an existing state agency newly faced with one more task to complete with its already limited resources. Alternative A insures that those charged with the responsibility (and associated liability) of recording documents in the public land records have a voice in the standards adoption process, lest impractical or unworkable standards be promulgated. The goal of the URPERA is to integrate electronic recordings with the paper-based documents currently being recorded, so that a jurisdiction enacting the URPERA can have a unified public record as it pertains to real property ownership. In this regard, the present custodians of the records are in the best position to know how this can best be accomplished, especially given the limited resources available for the job.

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Accordingly, states adopting the URPERA should implement Alternative A. Should fiscal restraints be the deciding factor between Alternatives A and B, then, depending on the state, it may be possible that the funding necessary for Alternative A can come from technology funds already in place, provided the state concurrently amends any laws or rules regarding the use of those funds, if necessary.

Any savings realized from using an existing organizational structure as envisioned by Alternative B without recorder representation would be more than consumed by the body purely because the body lacks recorder representation. The process of issuing regulations by such a body could take longer not only because of the level-setting needs, but because it may not have any priority for the body to which it has been assigned. This lack of priority would result in delays in adoption of standards, which, in turn, would result in operating cost savings being deferred, i.e. higher ongoing costs of recording land records.

UETA Analysis

The URPERA has as its genesis the Uniform Electronic Transactions Act (UETA). Broadly speaking, the UETA was enacted to give electronic documents (called "electronic records" in the UETA) the same legal recognition afforded paper-based documents in a myriad of situations. The UETA accomplished this by "overlaying" existing state law and broadly validating electronic documents and electronic signatures in all areas except those specifically exempted under the NCCUSL published version of the UETA and any exemptions added to the NCCUSL version by a particular state when it adopted its version of the UETA.

As noted above, some states opted to add land records to the list of documents not within the scope of UETA; others did not enact Sections 17, 18, and 19 of the UETA. In states such as these, the following analysis does not apply.

It is the position of PRIA that Sections 17, 18, and 19 of the UETA permit the recordation of Scanned Documents in the land records, as Scanned Documents are electronic records under the UETA. While Sections 17, 18, and 19 of the UETA do not mandate that county recorders accept electronic records (which include Scanned Documents), these Sections of the UETA clearly provide county recorders with the authority to accept Scanned Documents for recordation if they choose to do so. And, once recorded, Scanned Documents meet the letter and overarching policy objective of the various recording laws: to provide notice to the world that a parcel of real property is affected by the transaction evidenced by the Scanned Document.

While it may be possible to argue that some states' recording statutes require the presentation of an "original" document, to the extent that an original presentation is required, the UETA would provide the statutory vehicle for meeting it. These positions are explained below.

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UETA Enables Electronic Transactions

The UETA has a broad goal of facilitating electronic transactions in the states adopting it. To date, over 46 jurisdictions have adopted the UETA. The UETA acts as an "overlay" statute that enables legislators to address, in a single statute, the myriad of state writing, signing and originality requirements under preexisting laws. This overlay approach is a powerful legislative vehicle which amends many laws through one enactment.

Using this overlay approach, the UETA establishes legal equivalence between traditional ink and paper writings and signatures and their electronic counterparts, thus authorizing the use of electronic records and signatures wherever paper and ink signature requirements were previously required.

UETA Recognizes Scanned Documents as Electronic Records, and Expressly Validates the Use of Scanned Documents to Meet Paper Original Requirements

The UETA recognizes Scanned Documents as electronic records, by defining such records as "records created, generated, sent, communicated, received, or stored by electronic means."

Moreover, the UETA's drafters also clearly stated that a fundamental premise of the law is to focus on the information in the record, not the medium in which it is presented, noting that "[t]he fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant." Additionally, the fact that the UETA expressly restricts the conversion of certain documents from paper to electronic form – i.e., paper notes – and not others, creates a strong implication that all other paper documents may be converted into electronic records (i.e., scanned), or created initially as electronic records, and utilized to meet state writing, signing, or original requirements.

The Interrelationship Between URPERA and UETA

PRIA is aware that some may believe that the URPERA may be required to create equivalence between Scanned Documents and their ink and paper counterparts. While PRIA conditionally supports the adoption of the URPERA, it is not inconsistent with the PRIA's position that the URPERA is not needed (1) to give effect to an electronic document; (2) for an electronic document to fulfill any purported requirement for the presentation of an original document; or (3) to provide county recorders with the authority to accept an electronic document (so long as the version of UETA enacted in that jurisdiction allows recorders to do so). Rather, the URPERA is intended to clarify earlier authority provided by UETA and address ancillary electronic recordation issues.

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