

Legislative Analysis



UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

Senate Bill 791 (Substitute H-1)

Sponsor: Sen. Gerald Van Woerkom

House Committee: Intergovernmental and Regional Affairs Committee

Senate Committee: Local, Urban, and State Affairs

First Analysis (5-19-10)

BRIEF SUMMARY: The bill would provide for the recording of electronic documents by a county register of deeds. More specifically, the bill would:

- Provide that an electronic document would satisfy any requirement that a document be an original for the purpose of recording.
- Provide that an electronic signature would satisfy a requirement that a document be signed for the purpose of recording.
- Effective January 1, 2011, create an Electronic Recording Commission and require it to adopt standards to implement the proposed new act, keeping the standards in harmony with those of other jurisdictions that enacted it.
- Require a county register of deeds who implemented functions related to the recording of electronic documents to do so in compliance with the standards established by the commission.
- Require a county register of deeds who accepted electronic documents to also continue to accept paper documents, and to place entries for both types of documents in the same index.

FISCAL IMPACT: As written, the bill would have no state fiscal impact, but might generate additional costs for local governments in order to comply with the requirement to accept and/or convert documents to an electronic form. These costs cannot be accurately determined, but they are likely to be relatively small.

THE APPARENT PROBLEM:

In 2000, changes to state and federal law provided a legal framework for conducting transactions electronically. Those changes established the validity and enforceability of electronic documents and electronic signatures.

The federal Electronic Signatures in Global and National Commerce (E-Sign) Act requires that electronic signatures, contracts, and other records not be denied legal effect or enforceability solely because they are electronic. In addition, the Michigan Uniform Electronic Transactions Act (UETA) gives legal effect to electronic records and signatures.

Neither of these laws specifically mentions real estate transactions or authorizes Registers of Deeds to accept electronic records as public records of property sales or conveyances.

Although some Registers of Deeds have begun accepting electronic records of real estate transactions, most have not, and they are uncertain whether there is adequate legal authority to do so.

To address concerns of this nature, the Uniform Law Commission based in Chicago, (an organization that promulgates uniform laws for adoption by the states) has designed model legislation that provides for the use of electronic documents and electronic signatures in records of real estate transactions. Legislation has been proposed to implement a version of that model legislation in Michigan.

THE CONTENT OF THE BILL:

Senate Bill 791 (H-1) would create the *Uniform Real Property Electronic Recording Act* to provide for the recording of electronic documents by a county register of deeds. Specifically, the bill would:

- Provide that an electronic document would satisfy any requirement that a document be an original for the purpose of recording.
- Provide that an electronic signature would satisfy a requirement that a document be signed for the purpose of recording.
- Effective January 1, 2011, create an Electronic Recording Commission and require it to adopt standards to implement the proposed new act, keeping the standards in harmony with those of other jurisdictions that enacted it.
- Require a county register of deeds who implemented functions related to the recording of electronic documents to do so in compliance with the standards established by the commission.
- Require a county register of deeds who accepted electronic documents to also continue to accept paper documents, and to place entries for both types of documents in the same index.

A more detailed summary of the bill follows.

Under the proposed act, if a law required as a condition for recording that a document be an original, be on paper or in another tangible medium, or be in writing, then the requirement would be satisfied by an electronic document. Also, if a law required as a condition for recording that a document be signed, then that requirement would be satisfied by an electronic signature.

(The term "document" refers to information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form, and that is eligible to be recorded in the land records maintained by the county register of deeds. "Electronic document" means a document that the county register of deeds receives 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.)

Notarization, Verification, Witnessing, etc. A requirement that a document or signature associated with a document be notarized, acknowledge, verified, witnessed, or made under oath would be satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, were attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal would not have to accompany an electronic signature.

Electronic Documents Not Required. The bill would not require a register of deeds to accept electronic documents for recording. A county register of deeds who accepted electronic documents for recording would have to continue to accept paper documents as authorized by state law, and place entries for both types of documents in the same index.

Electronic Documents before Commission's Standards. The bill specifies that this new legislation would not invalidate electronic documents recorded under this act, the Uniform Electronic Transactions Act, or the federal Electronic Signatures in Global and National Commerce Act, before the establishment of standards under this act by the Electronic Recording Commission.

Powers of County Register of Deeds. A county register of deeds could do any of the following:

- Receive, index, store, archive, and transmit electronic documents.
- Provide for access to, and for search and retrieval of, documents and information by electronic means.
- Convert paper documents accepted for recording into electronic form.
- Convert into electronic form information recorded before the register of deeds began to record electronic documents.
- Accept electronically any fee or tax that the register of deeds was authorized to collect.

A register of deeds also could agree with other officials of a state or a political subdivision of a state, or of the United States, on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees or taxes.

Electronic Recording Commission. A county register of deeds who implemented any of those functions would have to do so in compliance with standards established by the proposed Electronic Recording Commission. Effective January 1, 2011, this commission would be created within the Department of Technology, Management, and Budget. It would consist of eight members, including the DTMB Director or a designee (who would be a non-voting member) and seven members appointed by the governor, as follows:

- Four county registers of deeds.
- One individual engaged in the land title profession.
- One individual engaged in the business of banking.
- One licensed attorney whose practice emphasized real property matters.

The appointed members would serve for a term of two years or until a successor was appointed, whichever was later, except that the members first appointed would serve staggered terms. The governor could remove an appointed member for being incompetent, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

Under the bill, the DTMB director would call the first commission meeting. At that meeting, the commission members would elect a chairperson and other officers as it considered necessary or appropriate. The commission would have to meet at least quarterly, or more frequently at the call of the chairperson or if requested by at least five members. The commission would be subject to the Open Meetings Act and to the Freedom of Information Act. Members would serve without compensation, but could be reimbursed for their actual and necessary expenses incurred in the performance of their official duties as commission members.

Standards to Implement the Act. The commission would have to adopt standards to implement the proposed act. To keep the standards and practices of county registers of deeds in Michigan in harmony with those of county registers of deeds in other jurisdictions that substantially enacted the proposed act, and to keep the technology they used compatible with technology used by offices of county registers of deeds in those other jurisdictions, the commission would have to consider all of the following:

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

In applying and construing the proposed act, consideration would have to be given to the need to promote uniformity of the law with respect to its subject matter among states that enacted it.

The bill provides that the proposed act would modify, limit, and supersede the federal *Electronic Signatures in Global and National Commerce (E-Sign) Act*, but would not modify, limit, or supersede Section 101(c) of that act, or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

[The E-Sign Act provides that, with respect to any transaction in or affecting interstate or foreign commerce, a signature, contract, or other record may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and a contract may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation. Section 101(c) provides that if a statute, regulation, or other rule of law requires that information relating to a transaction in or

affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record satisfies the requirement if the consumer has consented affirmatively to such use and has not withdrawn consent, and the consumer, before consenting, is informed of his or her rights regarding consent and the ability to obtain the information on paper or in other non-electronic form.

Section 103(b) lists documents that are not subject to Section 101. These include court orders or notices or official court documents required in connection with court proceedings, and specified notices pertaining to the termination of utility services, action taken under a credit agreement secured by or a rental agreement for an individual's primary residence, and other matters.]

HOUSE COMMITTEE ACTION:

The House Committee on Intergovernmental and Regional Affairs adopted an H-1 Substitute for Senate Bill 791. There are three changes to the Senate-passed version of the bill. Senate Bill 791 (H-1) does the following:

- 1) Updates the references to the Department of Information Technology to refer, instead, to the Department of Technology, Management and Budget.
- 2) Sets a January 1, 2011, effective date for the creation of the eight-member Electronic Recording Commission.
- 3) Adds a provision to specify that *"this act would not invalidate electronic documents recorded under this act, the Uniform Electronic Transactions Act, or the federal Electronic Signatures in Global and National Commerce Act, before the establishment of standards under this act by the Electronic Recording Commission."*

Information in this analysis is derived from the Senate Fiscal Agency analysis dated 11-19-09.

ARGUMENTS:

For:

The bill would remove any confusion about whether electronic documents and electronic signatures can be accepted as records of real estate transactions, building on the legal authority established under the state UETA and the federal E-Sign Act.

The definitions and other provisions in the proposed act would be consistent with those in UETA. While UETA gives legal effect to electronic documents and signatures, the law does not explicitly deal with real estate transactions or whether those electronic documents carry the same weight in the public record as paper records.

Michigan law requires the Registers of Deeds to keep public records of all property sales and conveyances. The purpose of that requirement is to establish a clear chain of title, specifying each prior property owner and recording the transfer of the property from one to the next. State law requires that the documents be original and signed as a means to verify their legitimacy.

The bill would establish procedures that would meet the same objectives while allowing Registers of Deeds to take advantage of new technologies for accepting, storing, and transmitting documents electronically.

Electronic documents can be generated in a number of ways: Paper documents can be scanned and then stored electronically, or documents can be generated, signed, and stored electronically, with no paper original. Additionally, formatting and other information can be incorporated into electronic records, enabling them to be transmitted, stored, and printed more easily. For example, if all electronic records were formatted in a uniform manner, then the information in those documents could be automatically imported into an index without the need to re-enter the data, saving time and improving accuracy. Those efficiencies could not only reduce costs for registers of deeds, but also make the entire real estate transaction faster and more efficient.

The bill would not require the use of any particular technology, but instead would allow the proposed Electronic Recording Commission to determine suitable standards that were consistent with standards in other states and jurisdictions. As the use of electronic documents expands, the bill would provide the framework for an orderly transfer from the current system based on paper documents to greater reliance on electronic records.

At least 19 other states have already implemented similar legislation. Michigan should do the same to help avoid adoption of inconsistent or incompatible standards that could cause problems in the future.

Against:

Although this bill is a good one, some have noted that Registers of Deeds in Oakland and Macomb Counties have already begun accepting electronic records, based on the authority granted under the federal E-Sign Act and the state UETA. They have argued that bill should specify that documents already recorded under those laws are valid and would not have to comply with any additional requirements under the proposed act. In addition, since the bill would require that one member of the Electronic Recording Commission be engaged in the "land title profession," the bill should define that term.

Response:

The House Committee on Intergovernmental and Regional Affairs reported out a substitute version of that bill to address the first of these concerns. Senate Bill 791(H-1) adds a provision to specify that *"this act would not invalidate electronic documents recorded under this act, the Uniform Electronic Transactions Act, or the federal Electronic Signatures in Global and National Commerce Act, before the establishment of standards under this act by the Electronic Recording Commission."*

POSITIONS:

The Department of Technology, Management, and Budget supports the bill. (5-18-10)

The Uniform Law Commission supports the bill. (5-18-10)

The Real Property Law Section of the State Bar of Michigan supports the bill. (5-18-10)

The Michigan Association of Registers of Deeds supports the bill. (5-18-10)

The Registers of Deeds from Allegan, Newaygo, Lenawee, Livingston, and Saginaw Counties support the bill. (5-18-10)

The Michigan Land Title Association supports the bill. (5-18-10)

Legislative Analyst: J. Hunault
Fiscal Analyst: Jim Stansell

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.