

COMPONENTS OF A DIGITAL CLOSING:

eRECORDING



Part 3 of 5

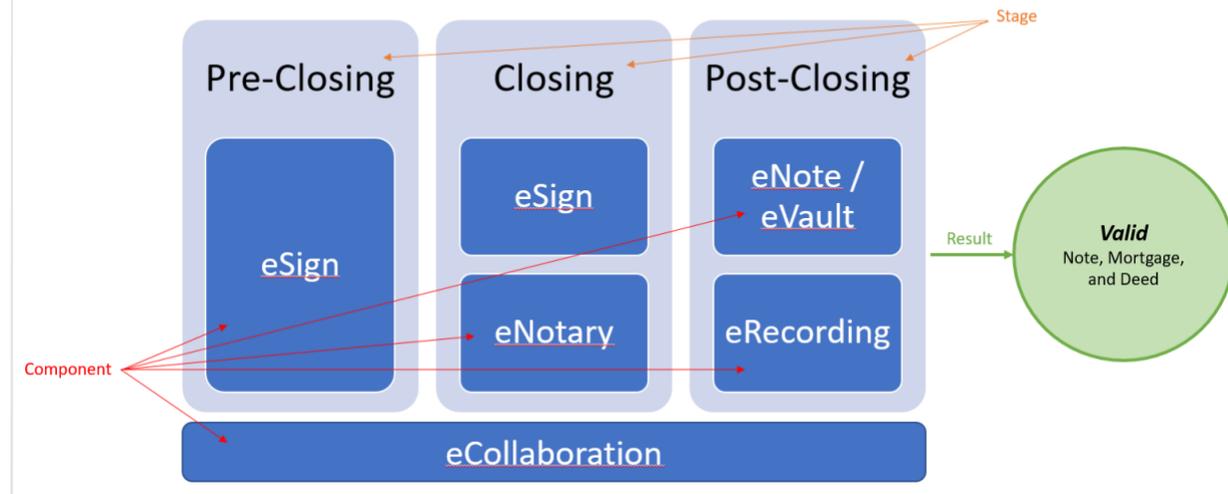


ALLIANT
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COMPONENTS OF A DIGITAL CLOSING

What does a Digital Closing actually involve?



This paper is one in a series of handbooks intended to familiarize Alliant National agents with the Digital Closing Process and its five major components: eSign, eNotary, eNote/eVault, eRecording and eCollaboration. Each handbook in this series explores one component. The purpose of the component is briefly described and placed within the context of the stages of the transaction (*i.e.* pre-closing, closing and post-closing) and within the context of the broader Digital Closing Process. Laws, regulations, technological requirements and specific technologies are discussed where appropriate.

It is our hope that you will find this collection of handbooks to be a comprehensive, ready reference as the industry transitions toward the digital closing environment.

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The information contained herein is not intended to serve as legal or financial advice and should not be relied upon for legal or financial decisions; consultation with a qualified professional for specific advice tailored to the user's situation is recommended.

Component: eRecording

Description: The Purpose of eRecording

Preface

Without the ability to eRecord or, in the alternative, to “paper-out” and then subsequently record a native digital (*i.e.* as originally created in the digital environment) deed and mortgage or deed of trust, a *full* Digital Closing would be contraindicated because of its inability to generate documents which put the public on notice of the parties’ interests in the real property. Thus, the importance of eRecording cannot be overstated.

For the purpose of this paper, as well as for the sake of simplicity, the terms “electronic document” (eDocument) and “digital document” are used interchangeably and refer to the same thing.

Definition

The [Property Records Industry Association \(PRIA\)](#) defines electronic recording, or “eRecording,” as “a method of delivering and returning documents electronically from a submitter to the recorder.”¹ The “recorder” is the county government official who records documents pertaining to real property in the public land records. The “recorder” is sometimes called a county clerk, register or registrar, or other name. The term “recorder” will be used in this document to refer to all such persons, regardless of what they may be called in their home jurisdictions.

PRIA is an association of government and business stakeholders who work together on issues relevant to the property records industry, including the development of standards and best practices. Like UETA and E-SIGN, PRIA’s definition of “eRecording” is technology-neutral in spirit.

Purpose and Benefits

The purpose of eRecording is for the recorder to accept, record and return eDocuments. There are many benefits of eRecording:

- Time between document submission, recording, indexing and return to the submitter is greatly reduced (*e.g.* days or weeks are reduced to minutes or hours)
- Time to correct errors and re-submit is greatly reduced (*e.g.* same day correction)
- Payment processing errors can be reduced, eliminated or quickly corrected since payment is (or can be) made electronically as part of the workflow (*e.g.* Automated Clearing House Transfers, credit card number)
- Improved document control decreases risk of lost documents
- Cost savings associated with elimination of traditional mail or courier transmission
- Ease of use when submitting or receiving through an eRecording portal (reduces implementation variance)
- Improved security due to ability to identify submitter based upon unique and trackable credentials for portal access
- Lower administrative costs as workflow tasks become automated

¹ PRIA Annual Conference Panel of “Experts”, Memphis, TN, August 30, 2012, Presentation: [eRecording: the Good, the Bad and the Ugly](#)

- Improved efficiency and data accuracy

eRecording as a Component of the Digital Closing Process

Does the recorder eRecord (Deeds, Mortgages and Deeds of Trust)?

Industry participants interested in conducting Digital Closings need to know whether eRecording is available in the jurisdictions in which they seek to record. The [PRIA Technology](#) website is a useful starting point for this inquiry. PRIA provides a monthly-updated list of counties that accept eRecording.² That said, the closing agent or attorney should *always directly contact the recorder* to make sure that **both** the deed, and the deed of trust or mortgage, are accepted for eRecording.

In the event that some, but not all of the eDocuments intended for recording are accepted for *eRecording* — and therefore one or the other of the documents needs to be generated in paper form for a *traditional recording* — there is a risk that they may not be recorded in the intended order. If contemplating different methods of recording for different documents from the same transaction (*e.g.* some to be eRecorded, while others to be recorded in paper form), then be sure to speak with your Underwriter in advance.

Bridging the Gap: Papering-Out

In those jurisdictions where the recorder does not eRecord, a viable alternative, *when provided by state law*, is the “papering-out” of the native digital document. This basically means that a properly created and executed eDocument can be printed out and submitted to the recorder as a hard-copy version for recording; the resulting recorded, papered-out document receives the same legal respect that would have been accorded to the original electronic version, had it been recorded. A security feature of the papering-out statute may include a requirement for an accompanying affidavit by a notary public stating that the eDocument was either printed by him or her, or was printed by someone else under the supervision of the attesting notary public.

eRecording Work Flow

There are a wide diversity of technology capabilities available and in use. However, here is a *generic* description of an eRecording workflow process:

1. A document is generated, executed and prepared for eRecording in one of three ways³, depending upon its original format:
 - A ***paper document*** is printed, and signed and notarized in the traditional manner, with ink, and then scanned for conversion into an electronic file (usually TIFF or PDF)
 - A ***paper document*** is printed, and signed and notarized in the traditional manner, with ink, and then scanned for conversion into an electronic file (usually TIFF or PDF), but also includes XML data for indexing the document
 - A native ***electronic document*** is generated, eSigned and eNotarized, and contains all of the data elements

² As of December 31, 2019, there were 2,061 counties in the United States who eRecord. Effective January 1, 2020, Kentucky came onboard with eRecording; Vermont is the only state not yet offering eRecording. See ALTA Blog, [The Basics of e-Recording](#), 6/25/2019.

³ See PRIA’s [Electronic Recording Models: Time to Move Forward](#), January 16, 2019.

2. The **Submitter** (the person who possesses the eDocument — typically closing agents, lawyers, mortgage companies, etc.) gives the eDocument to the **Submitter Agent** (i.e. the eRecording vendor), who then transmits the eDocument to the **Recorder** who is responsible for recording county land records.
3. Within the workflow described above, there may be an **Intermediate Receiver** (i.e. the County Treasurer) to electronically collect recording fees and taxes.
4. The **Recorder** reviews the eDocument to determine if it is acceptable for recording:
 - If accepted as recordable, then a recording endorsement (e.g. identification of OR Book and Page, or Registration Number) is affixed and the eDocument is returned to the **Submitter**. The recording, itself, occurs at the very moment that a recording instrument number or other recording identification is assigned to the eDocument with a time and date of recording.
 - If rejected as not recordable, then the eDocument is returned to the **Submitter** with a reason for the rejection.
5. After eRecording, the image of the eDocument is electronically sent for permanent archiving.

Rules: Federal and State Statutes and Regulations

Federal Law

[E-SIGN](#) — the federal law from which the state UETAs derive their authority — is discussed in greater detail within the **Component: eSign**.

E-SIGN addresses retention of contracts and records in electronic format but does not specifically state that these documents can be recorded electronically when a law requires a document — such as a deed, deed of trust, or mortgage — to be recorded in the county land records. However, based upon the language of the federal statute, especially the definition of “Electronic Record,” authority for eRecording arguably may be implied even in the absence of specific permissive language. The controversy over the interpretation of E-SIGN’s authority (and UETA’s authority) with regard to eRecording is discussed below in the section entitled, “[State Law](#).”

[E-SIGN](#), Title I, sec. 101 (d) (1) – (3) states as follows:

(d) RETENTION OF CONTRACTS AND RECORDS.—

(1) ACCURACY AND ACCESSIBILITY.—If a statute, regulation, or other rule of law requires that a contract or other record relating to a transaction in or affecting interstate or foreign commerce be retained, that requirement is met by retaining an electronic record of the information in the contract or other record that —

(A) accurately reflects the information set forth in the contract or other record; and

(B) remains accessible to all persons who are entitled to access by statute, regulation, or rule of law, for the period required by such statute, regulation, or rule of law, in a form that is capable of being

accurately reproduced for later reference, whether by transmission, printing, or otherwise.

(2) EXCEPTION.— A requirement to retain a contract or other record in accordance with paragraph (1) does not apply to any information whose sole purpose is to enable the contract or other record to be sent, communicated, or received.

(3) ORIGINALS.— If a statute, regulation, or other rule of law requires a contract or other record relating to a transaction in or affecting interstate or foreign commerce to be provided, available, or retained in its original form, or provides consequences if the contract or other record is not provided, available, or retained in its original form, that statute, regulation, or rule of law is satisfied by an electronic record that complies with paragraph (1).

[E-SIGN](#) , Title I, sec. 106 (4) states as follows:

SEC. 106. DEFINITIONS.

For purposes of this title:

(4) ELECTRONIC RECORD.—The term “electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

State Law

The state UETAs give legal effect to eDocuments and eSignatures as discussed in detail within **Component: eSign** and **Component: eNotary**. However, there was a difference of opinion with regard to whether UETA provided sufficient authority for recorders to accept scanned documents. The issue at large was whether scanned documents qualify as “*original*” documents, as the filing of *original* documents are a prerequisite under state law for the recording of documents.⁴

The Model UETA, Sections 2(7), 12, 17, 18 and 19, state:

SECTION 2. DEFINITIONS. In this [Act]:

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

⁴ In a 2005 PRIA Position Statement on the Uniform Real Property Electronic Recording Act, PRIA took the position that UETA and E-SIGN were intended to provide the authority to recorders to eRecord, and that UETA recognized scanned documents as eRecords and validated them to meet the “original” paper requirements. However, the Attorney Generals of California, New York and Texas disagreed and felt that UETA did not provide the recorders with authority to eRecord; see Journal article from [The Business Lawyer, volume 60, number 4 \(August 2005\)](#), published by the American Bar Association, “**It’s the Message, Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments,**” by David E. Ewan, John A. Richards, and Margo H. Tank. Also see [TX Atty Gen Op GA-0228 \(2004\)](#).

**SECTION 12. RETENTION OF ELECTRONIC RECORDS;
ORIGINALS.**

- (a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:
 - (1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
 - (2) remains accessible for later reference.
- (b) A requirement to retain a record in accordance with subsection (a) does not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.
- (c) A person may satisfy subsection (a) by using the services of another person if the requirements of that subsection are satisfied.
- (d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a).
- (e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a).
- (f) A record retained as an electronic record in accordance with subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after the effective date of this [Act] specifically prohibits the use of an electronic record for the specified purpose.
- (g) This section does not preclude a governmental agency of this State from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

**[SECTION 17. 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.]

**[SECTION 18. ACCEPTANCE AND DISTRIBUTION OF
ELECTRONIC RECORDS BY GOVERNMENTAL AGENCIES.**

- (a) Except as otherwise provided in Section 12(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.
- (b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a), the [governmental agency] [designated state officer], giving due consideration to security, may specify:
 - (1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems

- established for those purposes;
- (2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;
- (3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
- (4) any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.
- (c) Except as otherwise provided in Section 12(f), this [Act] does not require a governmental agency of this State to use or permit the use of electronic records or electronic signatures.]

[SECTION 19. INTEROPERABILITY. The [governmental agency] [designated officer] of this State which adopts standards pursuant to Section 18 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other States and the federal government and nongovernmental persons interacting with governmental agencies of this State. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this State may choose in implementing the most appropriate standard for a particular application.]

Recognizing the differing opinions, the National Conference of Commissioners on Uniform State Laws (NCCUSL) devised a solution, promulgating the [Uniform Real Property Electronic Recording Act \(Last Revised or Amended in 2005\)](#). Called “URPERA” for short, this Act explicitly bestows authority for eRecording. It states as follows (select sections excerpted below):

SECTION 3. VALIDITY OF ELECTRONIC DOCUMENTS.

- (a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this [act].
- (b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.
- (c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

SECTION 4. RECORDING OF DOCUMENTS.

- (a) In this section, “paper document” means a document that is received by the [recorder] in a form that is not electronic.
- (b) A [recorder]:

- (1) who implements any of the functions listed in this section shall do so in compliance with standards established by the [Electronic Recording Commission] [name of state agency].
- (2) may receive, index, store, archive, and transmit electronic documents.
- (3) may provide for access to, and for search and retrieval of, documents and information by electronic means.
- (4) who accepts electronic documents for recording shall continue to accept paper documents as authorized by state law and shall place entries for both types of documents in the same index.
- (5) may convert paper documents accepted for recording into electronic form.
- (6) may convert into electronic form information recorded before the [recorder] began to record electronic documents.
- (7) may accept electronically any fee [or tax] that the [recorder] is authorized to collect.
- (8) may agree with other officials of a state or a political subdivision thereof, 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 [and taxes].

The [Uniform Law Commission's \(ULC\) Real Property Electronic Recording Act Summary](#) best describes URPERA as follows:

The act does three fairly simple things that will ultimately have a monumental effect. First, it 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 express extension of the principles of UETA and E-SIGN to the specific requirements for recording documents related to real estate transactions. Second, URPERA establishes an Electronic Recording Commission to set statewide standards to be followed in every recording office that operates an electronic recording system. The state may create a new commission or designate its duties to an existing state agency. Third, URPERA gives local recording offices the discretionary authority to automate certain recording procedures, provided the office complies with the statewide standards.

At the time of this writing, a majority of states have adopted URPERA and others are currently considering it:⁵

- URPERA (or versions of it) has been adopted in: Alabama, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North

⁵ To track URPERA legislation see the [Uniform Law Commission's URPERA home page](#).

Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Virginia, Washington, Wisconsin, and Wyoming.

- Legislation introducing URPERA (or versions of it) has been introduced in 2020 in: Alaska and West Virginia.

See [ULC Legislative Fact Sheet – Real Property Electronic Recording Act](#).

URPERA is an *enabling* statute, not a *mandating* statute. So, while URPERA provides the legal authority for recorders to eRecord, it does *not* compel them to do so. Recorders *may* eRecord, *if willing and able* to do so. Additionally, the [PRIA Resource Library](#) offers a downloadable URPERA State-by-State Guide, published by the Real Property Law and Legal Issues Committee, March 2015, containing references to URPERA state statutes, URPERA state Commission Reports, State Administrative Codes and other relevant resources.

Links: Relevant Sources and Articles

- [13 Document Recording Resolutions for 2013](#), - [a discussion about] Developing and Implementing a Recording Process for Paper and Electronic Land Records – by Karl Klessig President, CSC Ingeo.
- [Electronic Recording Models: Time to Move Forward](#), Published by PRIA, January 16, 2019
- [Electronic Records Preservation Educational Model](#), Published by PRIA, May 20, 2019
- [Kansas eRecording Document](#)
- White Papers available for download from [Simplifile](#) webpage regarding eRecording, including article, [What Lenders Don't Know About E-recording](#)

Technology

Examining the Legal Demands Upon Technology

Based upon the plain language of section 12 of the Model UETA, PRIA takes the position that in order for an eRecord to qualify as an “original”:⁶

- The electronic record must accurately reflect the information in the record;
- The information reflected must be that of a record in its final form (where first generated in its final form as an electronic record, or otherwise); and
- The electronic record must remain accessible for later reference.

PRIA summarizes the ultimate objective of record-keeping (*eRecording*, in this discussion’s context) as the “preservation of both information and indicia of the integrity of the information.”⁷ Thus, the legal demands call for eDocument formation with tamper-evident sealing, audit trails and secure transmission (between all involved in the process) and storage in the archived recording system; see the Technology sections in **Component: eSign** and in **Component: eNotary** for more information regarding the technology referenced here.

⁶ See PRIA’s [URPERA Enactment and eRecording Standards Implementation Guide](#), December 6, 2005, page 161.

⁷ *Id.*

Other Technical Considerations

- Some states require a Submitter Agent to enter into a Memorandum of Understanding (or an agreement) with the recorder in order to become qualified as a “Trusted Submitter” who is allowed to submit documents for eRecording.
- Some states may have published specific eRecording rules (*e.g.* [Real Estate Electronic Recording Rules for the State of Georgia](#)) to provide guidance, with technical specifications, for eRecording.
- Some states may have published specific eRecording standards (*e.g.* [Real Estate Electronic Recording Standards for the State of Georgia](#)).
- Some recorders have published business rules, with technical specifications, for eRecording.

Vendors: Key Service Providers

There are eFiling (eDocument filing submission) specialty vendors (*e.g.* [Simplifile](#), [eRecording Partners Network \(ePN\)](#), and [Corporation Service Company \(CSC\)](#)) that facilitate the eRecording as the **submitter agent** (term discussed above). The technology closing platform vendor *may* be integrated with an eFiling specialty vendor(s) to allow for a seamless workflow from eDocument execution to eFiling.