

COMMENTS TO PROPOSED RULEMAKING
Electronic Recording Delivery Act (ERDA)
Electronic Recording Delivery System (ERDS)
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We (Carmelo D. Bramante, Yuriy Dzambasow, David E. Ewan, and John L. Jones) are pleased to submit the following comments regarding the Electronic Recording Delivery Act (ERDA) of 2004 and the proposed regulations for California's establishment of an Electronic Recording Delivery System (ERDS).

While it is laudable that the State of California seeks to broaden and encompass electronic recording of land records in electronic commerce, we feel that the Electronic Recording Delivery Act of 2004 (ERDA) and the proposed regulations authorizing this expansion are actually a barrier to the expansion they seek to achieve.

More importantly, we detect friction and substantial departure from the federal Electronic Signatures In Global and National Commerce (ESIGN) act. The departure from ESIGN is significant enough to jeopardize the statutory scheme by the preemptive provisions of ESIGN. By the preemptive provisions of ESIGN, we mean the express Congressional directive to allow no State or administrative agency to enact laws or regulations at variance with ESIGN.

What Does ESIGN have to do with ERDA?

While applicable state law may dictate the contents of the document (e.g. name, address, property description), state law may not preclude electronic forms of what have been traditionally paper-based documents. Thus, the recordation process of a paper document should be similar to that of an electronic document – similar fees, requirements, and safeguards should be employed so that no discrimination between paper and electronic documents exists. The federal ESIGN act established such legal parity between electronic records and signatures and their paper and ink counterparts when it became effective on October 1, 2000.

Throughout the following analysis, it must be acknowledged that the underlying documents, i.e. those that are to be recorded in the land records, are documents generated by private parties involving representatives of business entities, such as title companies and mortgage lenders, and consumers in commercial transactions. The California ERDA itself states in Section 1(a), "It is the intent of the Legislature to enact legislation to develop a system to permit the electronic delivery, recording, and return of instruments affecting right, title, or interest in real property." Significantly, these documents are explicitly included within the scope of transactions covered by ESIGN. Section 106(13) of ESIGN defines "transaction" as "an action or set of actions *relating*

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to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct – ... (B) the sale, lease, exchange, or *other disposition of any interest in real property*, or any combination thereof.” (Emphasis added).

Thus, by its own terms, the ERDA positions itself as conflicting with ESIGN Section 101 which preempts any “statute, regulation, or other rule of law ... with respect to any transaction in or affecting interstate or foreign commerce” and establishes parity between paper transactions and their electronic equivalents. Accordingly, some analysis is required to ascertain whether the ERDA and any regulations adopted pursuant to the ERDA would be permissible under ESIGN.

BACKGROUND

In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) issued its final draft of the Uniform Electronic Transactions Act (UETA). Since that time, approximately 47 states and the District of Columbia have enacted the UETA in some form. Some states, however, have enacted non-uniform versions of the UETA. The differences range from minor stylistic changes to significant variations from the NCCUSL text.

Due in part to concerns about non-uniform UETA enactments, Congress passed a federal electronic signature and record statute. ESIGN borrowed many concepts from UETA. It also contained some significant differences. Most importantly, ESIGN places special obligations on those who wish to electronically provide disclosures to a consumer, if the disclosures are otherwise required to be provided to the consumer “in writing.”

Both UETA and ESIGN are technology neutral statutes designed to put electronic records and signatures on equal footing with their paper counterparts. Accordingly, they both operate as “overlay” statutes amending thousands of state and federal laws. Neither statute changes the substance of underlying laws. For example, all of the elements of a contract (such as offer, acceptance, capacity and consideration) must be present in an electronic context. UETA and ESIGN also do not change the standards for validity of a signature, except to allow the signature to be in electronic form.

UETA and ESIGN have three main precepts:

- Electronic records and signatures cannot be denied legal effect or enforceability solely because they are in electronic form;
- If a law requires a record to be in writing, an electronic record satisfies the law; and
- If a law requires a signature, an electronic signature satisfies the law.

Together, these principles provide for the equality of electronic and non-electronic records and signatures.

However, because some states had enacted electronic signature (and electronic records) legislation that varied from the text of ESIGN and the UETA as reported, it was necessary for Congress to set out rules for when ESIGN will preempt contradictory state laws and to describe the appropriate interaction between ESIGN and UETA.

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ESIGN PREEMPTION

CONSTITUTIONAL DOCTRINE OF PREEMPTION

Congress has the ability, rooted in the supremacy clause of the United States Constitution, to preempt state law. The preemption doctrine arises in three main situations:

- where Congress explicitly states it has preempted state law;
- where federal law dominates or occupies a particular field (the inference being that Congress intended to preempt state law); and
- where state law is nullified because it conflicts with federal law.

For the purposes of the ERDA (and any regulations adopted under ERDA), Congress has explicitly preempted any state law at variance with ESIGN. See, ESIGN Section 101(a). Note additionally that ESIGN’s preemption covers not only state statutes, but regulations and other rules of law.

ESIGN’s unique approach to the interplay of federal and state law is a core element of the legislative approach Congress adopted to permit nationwide use of electronic signatures and records. ESIGN allows a state to modify or “supersede” ESIGN only if certain federally mandated requirements as set forth in ESIGN Section 102 are met.

Thus, the ERDA would be preempted by ESIGN if it conflicts with any of the provisions of ESIGN. Since there is significant overlap between ESIGN and the ERDA, ESIGN would prevail and, in fact, preclude the ERDA from varying the underlying electronic landscape, since Congress has completely preempted this field, except as otherwise permitted in ESIGN. Congress did, however, exempt certain parallel state laws from federal preemption. The question then becomes whether the ERDA is exempt from preemption as specified in ESIGN. The requirements for exemption from preemption are found in Section 102 of ESIGN.

EXEMPTION TO PREEMPTION – ESIGN Section 102(a)

Section 102(a) of ESIGN provides:

A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of Section 101 [of ESIGN] with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this title or title II, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to

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establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this title (I) and title II; and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures; and

(B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

Thus, there are two areas where ESIGN does not preempt state law: where a state enacts the UETA (ESIGN Section 102(a)(1)) and where a state enacts another law (ESIGN Section 102(a)(2)). These two exemptions to preemption will be examined in turn.

Section 102(a)(1) – UETA ALLOWED

The first exemption to preemption allowed under ESIGN is embodied in Section 102(a)(1), which allows states to enact a uniform enactment of the UETA (i.e. an unmodified version of the UETA which was proposed for adoption by NCCUSL in 1999). Despite the fact that California's enactment of the UETA pre-dated the effective date of ESIGN, and because California's enactment of the UETA was not an unmodified version of the UETA, California's version of the UETA is preempted. Additionally, the ERDA does not purport to be an adoption of the UETA, so it cannot rely on the Section 102(a)(1) exemption to preemption.

Section 102(a)(2) – OTHER PROCEDURES OR REQUIREMENTS

The second and only other exemption to preemption is specified in Section 102(a)(2). This section allows a state to specify “alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish legal effect, validity, or enforceability of contracts or other records” if both of two requirements specified are met.

Section 102(a)(2)(A)

The first requirement for exemption under Section 102(a)(2) is embodied in Section 102(a)(2)(A), which itself is divided into two subsections. Subsection 102(a)(2)(A)(i), requires that the alternative procedures be consistent with ESIGN; and subsection 102(a)(2)(A)(ii) mandates that the alternative procedures or requirements can not “require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures” Taken together, the two subsections of 102(a)(2)(A) reiterate the theme of ESIGN – the parties can do business as they see fit under a nationwide set of uniform rules.

Additionally, the tenor of the two subsections of 102(a)(2)(A) indicates that Congress left to the states only the opportunity to “fine-tune” electronic record and signature law. This allowance,

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however, is not without limit. If the state law is one that facilitates or clarifies electronic records or signatures, then it would be permissible under ESIGN. Conversely, if the state law attempted to establish new burdens or roadblocks by adding complexity or state-specific burdens that do not apply to paper transactions, that law would be preempted by ESIGN.

The language and the structure of the ERDA and the proposed regulations under the ERDA are not consistent with ESIGN, and accordingly do not pass muster under Section 102(a)(2)(A)(i). Moreover, since the regulations contemplate only specific technologies in implementing the regulatory scheme (see discussion below), the regulations do not comply with the provisions of Section 102(a)(2)(A)(ii) because they afford greater legal status through the use of specific technology or specifications for performing the functions of storing, generating, receiving, communicating, and authenticating the electronic records covered therein.

Section 102(a)(2)(B)

An additional requirement to claiming an exemption to ESIGN is that the state statute or regulation seeking to be exempt from ESIGN preemption must “make specific reference to” ESIGN as provided in Section 102(a)(2)(B). Since neither the ERDA nor the regulations proposed under ERDA make this necessary reference, they are preempted by ESIGN and are invalid.

ESIGN IN A REGULATORY SCHEME

ESIGN recognizes that state agencies may have authority under any valid state law to issue orders or guidance regarding the interaction of a state law and ESIGN. However, the regulatory scheme is still preempted by ESIGN, and ESIGN itself provides necessary guidance on the ability of regulators to interpret authority under any statute.

The limitations to regulatory interpretation are contained in ESIGN Section 104(b). Specifically, state agencies are preempted under Section 101 from adopting any regulation, order, or guidance unless:

- The regulation, order, or guidance is consistent with Section 101, **and** it does not add to the requirements of Section 101, **and** the agency finds that there is substantial justification for issuing the regulation, order, or guidance; **and**
- The methods selected to carry out the regulation are substantially equivalent to the requirements imposed on records that are not electronic records, **and** will not impose unreasonable costs on the acceptance and use of electronic records, **and** the method selected does not require or accord greater legal status or effect to the implementation or application of a specific technology or technology application. (Emphasis added.)

It is in this area that the proposed regulations under ERDA truly run afoul of ESIGN. The proposed regulations rely on only one technology, Public Key Infrastructure (PKI), to establish what the regulations contemplate as “secure” transmissions between a submitter and the ERDS. (See Section 509 of the proposed regulations.) Other examples of conflicting provisions (by no

means intended to be an exhaustive list) are: Section 200(a)(6) definition of “Certificate Authority” (implicating the use of a single technology); Section 200(a)(12) definition of “Digital Signature” (same); Section 200(a)(26) definition of “Instrument” (defines two types of electronic documents with differing legal requirements for each, however no such distinction exists for non-electronic documents); Section 200(a)(39) definition of “RSA” (implies the use of a single technology); Section 300 imposing vendor fees (no analogue exists for non-electronic documents); Section 301 imposing recorder fees to be paid by the public (no analogue exists for non-electronic documents); Sections 400 and 401 imposing fingerprinting and criminal records checks (no analogue exists for non-electronic documents); Section 502 affording differing legal significance to different document types (no analogue exists for non-electronic documents); Sections 508 and 509 setting forth differing standards for security based upon document type (i.e. “digitized” as opposed to “digital” documents) (no analogue exists for non-electronic documents, and the required security dictates required software/hardware for regulatory compliance).

While different types of documents may require differing levels of security, the proposed regulations draw an impermissible distinction when classifying documents as Type 1 (“digitized”) and Type 2 (“digital”) documents. The distinction is impermissible because no such distinction currently exists for non-electronic documents. Such a distinction in a regulatory scheme affords greater legal status to one class of documents over another class of documents, and further only affords this greater legal status once technology-specific security requirements have been satisfied. We also note that current industry standard documents (SMART Document™ format documents and Intelligent PDF documents) cannot be utilized under the regulatory scheme for consumer transactions further limiting market adoption.

Additionally, taken as a whole, the ERDA and the proposed regulations are not consistent with ESIGN as required by Section 104(b)(2)(A) and 104(b)(2)(B), and do not contain the findings necessary pursuant to Section 104(b)(2)(C). To be valid regulations under Section 104(b)(2)(C), the issuing agency must find that there is substantial justification for the regulations; that the requirements imposed on the use of electronic media under the regulations are substantially equivalent to those imposed on non-electronic records; that the requirements will not impose unreasonable costs on the acceptance and use of electronic records; and that the regulations do not require (or accord greater legal status or effect to) the use of any specific technology. None of the mandatory findings or reasoning required by ESIGN appears in either the proposed regulations or the ERDA.

Significantly, the ERDA and the proposed regulations seek to achieve exactly the opposite of what ESIGN permits. The ERDA and the proposed regulations impose additional costs on the acceptance and use of electronic records, afford greater legal status or effect to particular technologies, and require certain technologies for regulatory compliance, all of which are not imposed on a similar paper (non-electronic) transaction.

Additionally, state regulatory agencies cannot “bypass” ESIGN through the use of performance standards. A state regulatory agency is permitted by Section 104(b)(3) to specify performance standards to assure accuracy, record integrity, and accessibility of records if the performance standard serves an important governmental objective and is substantially related to the achievement of that objective. A further restriction, evidencing Congress’s strong intent to hold

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state agencies to a very high standard when seeking to impose regulatory schemes, is embodied in Section 104(b)(3)(A)(ii) which prohibits the requirement of a particular type of software or hardware in order to comply with any regulation.

Again, the proposed regulations in the 500 Series of the ERDA regulations run afoul of ESIGN's technology neutrality core and specifically violate Section 104(b)(3)(A)(ii) by requiring a particular type of software to achieve regulatory compliance. Thus, the proposed regulations would be invalid and preempted by ESIGN.

CONCLUSION

Congress reserved to the people the freedom to voluntarily conduct their business in an electronic environment free from unreasonable interference by either state or federal authorities. The congressional embodiment of this principle is the ESIGN legislation. Through its unique interweaving with consistent state law, it provides for a comprehensive, uniform nationwide system of acceptance of electronic records and signatures. Through its preemptive provisions, ESIGN also prevents deviation from the uniform system by nullifying inconsistent state activities, whether through statute, regulation, or other method.

For the reasons set forth above, the ERDA should be modified or amended to conform it to ESIGN's provisions. Further, we respectfully suggest that the ERDS regulations should not be adopted until the underlying legislative authority in the ERDA conforms to federal law.

NOTES:

For further information on preemption under ESIGN, see Jeremiah S. Buckley and R. Colgate Selden, *Federal Preemption under the ESIGN Act*, Vol. 9 No. 8 Electronic Banking Law and Commerce Report 6 (Feb. 2005).

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In March 2004, Carmen started his company, CDB Consultancy LLC. Carmen brings about nineteen (19) years of real estate and mortgage experience to CDB Consultancy LLC in the areas of Asset Servicing, Operations, Credit Policy and Counter-Party Risk, as well as electronic mortgage (eMortgage) origination, closing, investor delivery and servicing, and electronic recording (eRecording). CDB Consultancy LLC provides strategic and business planning services to organizations in the real estate finance industry.

CDB Consultancy LLC recent successes include:

- Conducting *eMortgage Market Segmentation Research* for Fannie Mae, Washington, DC.
- Providing *Strategic Planning, Business Process Analysis, and Industry and Policy Analysis Services* to Wachovia Retail Credit Services, Charlotte, NC.
- Developed the *eNote Process Maps* and the *Lender Value Proposition Analysis of the eNote (Costs and Benefits)* for the MERS® eRegistry.
- Co-authored the *Uniform Real Property Electronic Recording Act Enactment (URPERA) and Standards Implementation Guide* for a not-for-profit organization.
- Provided *eMortgage Advisory Services* to Navy Federal Credit Union in the following areas:
 - eRecording of electronic lien releases
 - eRecording of eMortgage SMART Document™ formatted documents in the real estate closing process
- Analyzed the *Impact of Various Electronic Notarization (eNotarization) Solutions* across the country; research support came from three national real estate finance organizations.

Prior to CDB Consultancy LLC, Carmen was with Fannie Mae; he spent the last 5 years at Fannie Mae in its eBusiness Division focusing on new technology development and implementation in the areas of eMortgages and eRecording. Carmen was successful in rolling out to mortgage servicers a solution that records lien releases electronically with county recorders using the latest in eSignature, eXtensible Markup Language (XML), and ePayment technologies. He was also a major contributor to the development of eClosing technology solutions and eMortgage investor delivery requirements.

Carmen has his Master's Degree in Public Policy Analysis from New York University's Robert F. Wagner School of Public Service. He also worked six years in the United States Senate as a legislative assistant developing policy and legislation in the areas of housing and community development, banking, healthcare (including Medicare and Medicaid), and Social Security. Early in his career, Carmen was the Assistant Town and City Clerk in Hartford, Connecticut, responsible for the recording and maintenance of real estate documents in the municipality's Land Records Division. Carmen sits on a number of State Task Forces that deal with the implementation of eMortgages, eRecording and eNotarization and was an Official Observer to the National Conference of Commissioners of Uniform State Laws (NCCUSL) Uniform Real Property Electronic Recording Act (URPERA) Drafting Committee from 2002-2004.

YURIY DZAMBASOW
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Mr. Dzambasow is a Principal Consultant with A&N Associates, Inc., a consulting firm specializing in Information Assurance (IA) management and technology consulting services. He has fifteen years of IA experience, specializing in system security architectures, identity management, and electronic authentication technologies and applications. His accomplishments include establishing the Federal and Commercial Security Services Business Operation within A&N, serving on the Mortgage Industry Secure Identity Services Accreditation Corporation (SISAC) Advisory Group, serving as the CTO for Digital Signature Trust Co., and leading the definition, development, and implementation of security architectures for Federal and State Government agencies, the Department of Defense, the Real Estate & Finance Industry, and various healthcare and financial services institutions. In addition to these accomplishments, Mr. Dzambasow has written technical papers, chaired working groups and workshops, participated in the development of industry accepted security specifications, and participated in panel discussions regarding identity management technology and its use in e-business applications.

DAVID E. EWAN
Attorney and Land Title Consultant

David has been involved in real estate transactions for over fifteen years. His initial involvement was as a transactional real estate attorney in New Jersey and Pennsylvania. David was responsible for examining and clearing title for residential real estate owned or administered by large corporate clients such as Fannie Mae, GE Capital Mortgage Services, and Prudential Relocation. David's volume of real estate transactions exceeded 600 closings per year.

David currently is a Consultant to the New Jersey Land Title Association where he works with the Association on recording practices in New Jersey. David also provides consultancy services to lawyers, title companies and realtors. He is a Microsoft Certified Systems Engineer.

David is a member of the American Bar Association (ABA) and the Chair of the ABA's eTrust Subcommittee. David is also a member of the Institute of Electrical and Electronics Engineers (IEEE) Computer Society, and the Association for Information and Image Management (AIIM). He is a member of the Bar in four states (New Jersey, Pennsylvania, Florida, and Colorado) as well as a member of the Bar of the United States Court of Appeals for the Third Circuit. David is also a Senior Adjunct Professor at Burlington County College where he teaches Legal Research and Legal Writing in the College's ABA approved Paralegal program.

JOHN L. JONES
President
Arion Zoe Corp.

Mr. Jones is a fourth generation land title person, with 30 years experience in land title and real estate related industries. His experience ranges from an operations-level job in the family title business to national system management for Lawyers Title Insurance Corporation, now LandAmerica Financial Group.

While with Lawyers Title Mr. Jones managed its automated land records system covering 16 counties in the South and Mid-West, of which he also was responsible for paper-to-computer system conversions in 6 major markets. During that time he developed and implemented control systems, including cost controls, expense allocation and project management for software development. In addition he planned, implemented and managed the consolidation of regional data entry operations into single data entry facilities, saving 25% of the separate annual operating expenses, and standardizing formats to improve inter-county use.

In 1983, Mr. Jones joined Title Data Inc as Eastern US Regional Manager where he worked to integrate mission-critical systems for title companies. His job included responsibility for business analysis, workflow, planning and implementation of systems for real estate closing, document preparation, escrow accounting and title plants. While at Title Data he was responsible for founding a national user group for the company's title plant system that later grew into the Association for Title Information Managers (ATIM). He served as president in 1988.

Mr. Jones owned several title insurance agencies in Florida before founding Arion Zoe Corp. (AZC) in 1993. AZC provides strategic consulting services for real estate related businesses and county recorders that work with real estate-related transactions. He specializes in strategic planning, business and workflow processes, and policy analysis, development and implementation centered on the Uniform Electronic Transactions Act (UETA), the Electronic Signatures In Global and National Commerce Act (ESIGN), and the Uniform Real Property Electronic Recording Act (URPERA). Among his current projects are the components of the electronic real estate transaction – document formats, electronic and digital signatures, electronic notarial functions, data recognition and exchange, electronic recordings, electronic payments, and transactional security. Mr. Jones co-authored the *URPERA Implementation and Enactment Guide* on behalf of an industry organization.

Mr. Jones is a member of the American Bar Association's Science and Technology Section eTrust Subcommittee of the eCourt Filing Committee and is the American Land Title Association's voice on the eTrust's eNotary Work Group. The later developed a policy framework for electronic notarizations. He is also a member of the National Association of Secretaries of State's Notary Public Administrators Section, the notary commissioning and regulatory entities within the respective state Secretaries of State offices.

Mr Jones is an active member of the American Land Title Association. He previously served on the board of directors of the Florida Land Title Association (1978, 1993-1994), was chair of the FLTA Technology Committee from 1995-1997. In 1997 he served on the Florida Secretary of State's Digital Signature Advisory Committee. In 1999 he was instrumental in establishing the Florida Electronic Recording Work Group that moved the adoption of the Uniform Electronic Transactions Act (UETA) in Florida. He is also active with the Mortgage Bankers Association efforts in eMortgages and eRecording, as well as its Security WorkGroup. He is a Member of the MBA's subsidiary, Secure Identity Services Accreditation Corporation (SISAC), Advisory Group.

Mr. Jones is a Certified Land Searcher (CLS), a professional designation recognizing proficiency and expertise by the Florida title industry. He has a B.S. in business from Florida State University and did graduate studies in political science at the University of South Florida.