

## REPRINT

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Regulations for California's Electronic Recording Delivery Act (ERDA) of 2004 are nearing completion following several years of debate and review of how to administer the law. If all goes as planned, the regulations should allow electronic recording to begin spreading throughout the largest real estate market in the country.

In 2005, California accounted for about 2.4 million of approximately 15.6 million mortgage originations (both purchase and refi) in the country, or 15.3 percent. In terms of dollar amount, it represented a little more than \$738 billion of a national total of \$2.8 trillion, or 26.2 percent. Heavy real estate volume in the state has created a hotbed of technological innovation, as businesses seek out ways to streamline lending transactions. One area where the state is just beginning to innovate is recording at the county level.

Whereas most states are embracing the Uniform Real Property Electronic Recording Act (URPERA) from the National Conference of Commissioners on Uniform State Laws (NCCUSL) — see the sidebars on pages 5 and 6 for a snapshot of that act's progression throughout the country — California is not following the crowd. Its own law spells out requirements that go above and beyond those in URPERA, including strict security requirements.

Perhaps the most significant difference between URPERA and California's Assembly Bill (AB) 578 is that with the latter, e-recording technology falls under the jurisdiction of the state attorney general. In particular, vendors have to obtain certification from the state attorney general's office before their systems can be used by counties recorders.

### **Tight reins on e-recording**

The attorney general's office has been working for several years to put the ERDA into effect. Its second round of comments for proposed regulations for e-recording technology is just wrapping up. It's been a long process, one that has puzzled many in the industry.

"We've been asked that a number of times: How did we end up with it?" said **Suzanne Wiggins**, a field representative for the Department of Justice's Electronic Recording Delivery System program. "This is so far out of our realm of knowledge."

When ERDA was originally being drafted, mortgage bankers, title insurance firms and recorders encountered fears on the part of district attorneys in the state who saw greater potential for fraud due to e-recording.

When the law was finally ready, "The only way the district attorneys would go forward with it is if the legislation said the attorney general would provide oversight and regulation," Wiggins said.

The DAs were especially concerned about high-volume counties such as Los Angeles and San Diego. In particular, they are nervous that should fraud occur, it would be difficult to produce evidence without paper.

The unique approach to e-recording in California today can be traced back several decades, when laws were passed to use county DA offices to set up real estate fraud units.

“There’s a long history of ensuring secure transactions,” said **Carmen Bramante**, principal with CDB Consultancy and an expert on e-mortgages and e-recording. Bramante was also a co-author of the Property Records Industry Association’s (PRIA’s) “URPERA Enactment and Standard Implementation Guide” and provides educational services to states that enact URPERA.

## Industry reactions

When the ERDA passed the state legislature, it had support from Realtor groups, the California Land Title Association, the County Recorders Association, the California Trustees Association and the California District Attorneys Association. The California Mortgage Bankers Association and the California Bankers Association were reportedly neutral on the topic.

However, some say the California law will make it much more difficult to begin e-recording in California.

“I think the industry — whether it’s lenders, title companies or recorders — would have liked a less arduous process for implementing e-recording,” Bramante said. “But I think the industry understands the history that existed in California.”

Members of the recording industry believe the district attorneys are out-of-touch with the true risk e-recording poses. According to **De Ana Thompson**, chief deputy recorder with San Bernardino County, their main failing is in not understanding the role of the recorder.

“The recorder does not verify that the signature that comes in is the signature we’re looking for,” she said.

Under current California law, recordings must have a wet signature. That will change if and when the new regulations are approved. Strict security requirements under the ERDA, as well as involvement by the attorney general, mean those signature requirements won’t apply, Thompson said. For example, everyone granted secure access to an e-recording delivery system will have to submit fingerprints to the attorney general for a criminal records check.

In addition, Thompson said, only a subset of documents will be eligible for electronic recording, which should lower perceived risk. The law authorizes “all 58 counties to record real property documents through an electronic delivery system in the form of a ‘digitized electronic record’ (i.e., a scanned paper document), but specifies that an instrument of reconveyance, a substitution of trustee or an assignment of deed of trust may be recorded in the form of a ‘digital electronic record’ (i.e., an electronically created document).”

## An e-recording outcast?

Nationwide adoption of standards for e-recording technologies and processes represents the Holy Grail for PRIA, which works through a partnership between business and government groups to facilitate recording.

For the states that start down the path toward standardization by enacting the URPERA law, PRIA offers education to set up e-recording technology standards — URPERA does not require but

strongly suggests working with PRIA standards. The organization is confident that most states will share that vision.

“We’re still concerned about California,” said PRIA President **Mark Monacelli**.

PRIA has no official position on the path the state has taken, but Monacelli said he personally believes problems lie ahead.

“I just don’t think anyone will do e-recording in California,” he said, “It’s cost-prohibitive, and the rules they have developed through the AG’s office are incredibly restrictive and expensive.”

Monacelli is hopeful the state might loosen regulations if e-recording is slow to advance under the ERDA.

“If the regulations were not as restrictive as they are, I know there’s a bunch of counties in California that would be e-recording tomorrow,” Monacelli said.

### **No state is an island (except Hawaii)**

The primary concern with California is that the state will become an e-recording “island” that varies from processes in the rest of the country. In a worst-case scenario, some say, recorders would only be able to accept documents from a few submitters.

Others point out that recording practices and specifications have never been uniform in the “paper” world, and there will continue to be variations in e-recording practices. A certain degree of flexibility is even built into PRIA-prescribed e-recording by design, Bramante said.

“Mortgage lenders, title companies and recorders recognize that other documents within the package could be some other variation of SMART Docs, a PDF document, a Word document or a TIFF document.”

PRIA and MISMO are now working together to create technical guidelines spelling out how to e-record different types of electronic documents.

According to Bramante, despite the higher bar counties and vendors will have to clear to get started with e-recording in California, the process should be similar to practices in other states once the process begins.

On the other hand, even within California, there will likely be various e-recording methods.

Consider San Bernardino and Orange counties, which are in an interesting position that should allow them to sidestep the new state requirements. San Bernardino County, for example, passed an e-recording law several years ago and has been recording electronically since 2004 — about 40 percent of recordings there now occur electronically.

Even as other counties clear AB 578 requirements and begin e-recording, San Bernardino might prefer to operate under its existing methods.

“We like what we have,” Thompson said. “The problem is if the other 56 counties end up becoming AB 578(-compliant). At some point the title company and the industry would say, ‘Why should we submit to you differently when everyone else had to abide by this?’ We would probably have to comply at some point.”

Large title companies that operate across the state — First American, Fidelity, etc. — would like an easy way to send documents to different counties without having to work with such discrepancies, according to Thompson, but AB 578 does not deal with that issue.

To make life easier for title companies, San Bernardino has taken an interest in e-recording portals popping up in New Jersey and Iowa, for example. Those portals are making headway in ensuring consistent submission guidelines for title companies, mortgage lenders, servicing firms and escrow companies, Thompson said.

## **Current status**

That state attorney general's office has been working on a resubmission package for its ERDA regulations to send to the Office of Administrative Law (OAL). That office rejected its first submission. With the latest attempt, there has been another review period with no comments. The AG office has addressed all the issues outlined in the disapproval, Wiggins said.

"We anticipate the package going back to the Office of Administrative Law on the 25th," she added. The OAL will then have a 30-day review period, after which the law would go to the secretary of state for filing and enactment.

"If that all falls in place, we're anticipating around August 22nd for it to be on the books," Wiggins said.

Technology vendors could then begin the system certification process, which is expected to take no longer than 90 days. Subsequent audits will be mandatory.

"We anticipate the first anybody could go live — that's if you already had a system built and ready to go, and I'm not sure anybody does — would be Jan. 1, 2008," Thompson said.

July of 2008 might be more realistic, she added. ■