

SUBJECT: Filing and recording of electronic documents with county clerks

COMMITTEE: Business and Industry — favorable, without amendment

VOTE: 6 ayes — Giddings, Elkins, Bohac, Solomons, Taylor, Zedler
0 nays
3 absent — Bailey, Martinez, Vo

SENATE VOTE: On final passage, March 17 — 30-0

WITNESSES: For — Jim Gosdin, Stewart Title Guaranty Company and the Texas Land Title Association; Val Perkins, Texas Business Law Foundation
Against — None

BACKGROUND: Art. 5, sec. 20 of the Texas Constitution requires a county clerk to record exactly and without delay the contents of each document that is filed for recording and that the clerk is authorized to record.

The Texas State Library and Archives Commission (TSLAC) administers the Local Government Records Act of 1989, which sets standards for minimum retention of public records. State law requires the TSLAC to work with other state agencies to help custodians of local government records establish and operate efficient, economical records-management programs, reduce paperwork, and preserve records of historical value.

In 1999, the Legislature enacted SB 888 by Harris, which authorized county clerks to accept and record documents filed electronically if the filing or recording complies with the rules adopted by TSLAC. The legislation was patterned after the Uniform Electronic Transaction Act (UETA), which the National Conference of Commissioners on Uniform State Laws adopted in 1999. The Legislature in 2001 enacted SB 393 by Carona that also related to the UETA and electronic filing. In 2000, Congress adopted the federal Electronic Signatures in Global and National Commerce Act (E-Sign).

Attorney general's opinion GA-228, issued in 2004, determined that nothing in the E-Sign Act, 15 United States Code chapter 96, or UETA, Texas Business and Commerce Code, ch. 43, requires a county clerk to accept real estate filings that contain copies of electronic signatures. Similarly, nothing in the UETA, nor in Government Code, sec. 406.013, requires a county clerk to accept real estate filings containing a copy of an electronically transmitted notary public seal.

DIGEST:

SB 335 would amend the Property Code, ch. 15, to include the Uniform Real Property Electronic Recording Act. The bill is intended to promote uniformity of the law with respect to recording real property documents electronically among states that enacted substantially similar laws.

Validity of electronic documents. If a law required as a condition of recording that a document be an original, be on paper or another tangible medium, or be in writing, the requirement would be satisfied by an electronic document that complied with the requirements of this legislation. An electronic signature would satisfy a requirement, as a condition of recording, that a document be signed.

A requirement that a document or a signature be notarized, acknowledged, verified, witnessed, or made under oath would be satisfied if the electronic signature of the person and other required information were attached to the document or signature. A physical or electronic image of a stamp, impression, or seal would not have to accompany an electronic signature.

Recording of documents. A county clerk who implemented these functions would act in compliance with rules and standards adopted by the TSLAC. A county clerk could:

- receive, index, store, archive, and transmit electronic documents;
- provide for access, search, and retrieval by electronic means;
- convert paper documents into electronic form;
- convert into electronic form information recorded before documents were recorded electronically;
- accept any authorized fee or tax electronically; and
- agree with other officials of a state, a political subdivision, or the United States on procedures to facilitate electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees and taxes.

A county clerk who accepted electronic documents for recording would continue to accept paper documents and would place entries for paper documents and electronic documents in the same index.

Uniform standards. The TSLAC would adopt standards to implement the provisions. To maintain compatible standards, practices, and technology, the TSLAC, so far as consistent with this bill, would consider:

- 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 persons and governmental officials and entities; and
- the needs of counties of varying size, population, and resources.

Relation to Electronic Signatures in Global and National Commerce Act. The bill would modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. sec. 7001, et seq., but would not modify section 101(c) on consent to electronic records nor authorize electronic delivery of notices described in sec. 103(b) involving exceptions to the act.

Construction with other law. Except as otherwise provided, Local Government Code, ch. 195, and the rules adopted by the TSLAC would apply to electronic documents filed in accordance with this bill.

A county clerk could accept and record electronic documents and other instruments electronically if the filing or recording complied with the rules adopted by the TSLAC.

TSLAC could adopt rules by which a county clerk could accept and record electronic documents and other instruments by electronic filing.

The bill would take effect September 1, 2005 and would apply only to a document that was filed for recording on or after that date. A rule adopted before the effective date by the TSLAC would apply to an electronic document filed on or after September 1, 2005.

SUPPORTERS
SAY:

SB 335 would clarify and build on existing state laws on electronic recordation of electronic transactions. The bill would complement the framework provided by the UETA and further clarify the authority of a recorder (county clerk) to receive and record documents and information in electronic form.

Electronic information technology has progressed rapidly in recent years, resulting in innovations in communications technology, hardware, software, and related security protocols. These technological advances have made it feasible to create, sign, and transmit real estate transactions electronically.

Even though documents resulting from electronic transactions are valid and enforceable between parties, some uncertainty and confusion exist over whether or how electronic documents may be recorded in land record offices. Existing laws and regulations have been interpreted to limit recordable documents to those in writing or on paper or to require the originals. SB 335 would maintain current requirements that a document be an original, on paper, or in writing but would ensure that an electronic document satisfied those standards in order to encourage broader acceptance of electronic filings. At least five counties currently accept electronic filings: Bexar, Denton, Nueces, Tarrant, and Webb. This bill would increase that number, giving county clerks flexibility while allowing them to take full advantage of new technology.

OPPONENTS
SAY:

Although SB 335 would not interfere with county clerks' filing and recording of paper documents, the bill could be one step toward exclusive electronic, or computer-only, filings. Some smaller counties have not incorporated computers into the day-to-day operations of their county clerks' offices. This bill could be viewed as pressure to computerize, especially if some title companies, for example, stopped generating paper documents.

OTHER
OPPONENTS
SAY:

A provision in SB 335 retaining current law that provided the same fee for filing or recording an electronic document as for a paper document would cause concerns. While counties likely would experience initial costs in implementing electronic filing and recording programs, ultimately fees for electronic filings should be lower because electronic filings would be cheaper. Filing fees now charged by county clerks have gotten out of hand. By expanding authority for electronic filings and recordings, the

bill should bring fees down and require lower fees rather than the same fees.

NOTES:

The fiscal note for SB 335 indicates the fiscal impact on counties would vary depending on existing electronic systems within each county and the county's decision whether to implement the authority granted by the bill. Small counties that do not now have electronic systems in place likely would experience the most significant fiscal impact for initial purchase of electronic systems, but electronic filing probably would lead to later administrative savings.

The effect on counties with larger populations would vary. Bexar County already receives and stores in electronic form and reports that its existing contract for supplies and storage would cover expenses associated with the bill. The Hidalgo County Clerk estimates that implementation would result in an insignificant overall positive fiscal impact based on a \$2 fee for each recording to offset related costs. Midland County expects that the fiscal impact for that county also would be insignificant.

The Harris County budget office reports that if the county were to implement the provisions of the bill, it likely would have to update its electronic filing systems. The county calculates that if all its systems had to be updated, the cost would be roughly \$1.5 million, less than 1 percent of its overall budget.