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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 31, 2005

F. Lee Prickett, Jr., Esquire
Calhoun County Attorney
102 Courthouse Drive, Suite 108
St. Matthews, South Carolina 29135

Dear Lee:

In a letter to this office you questioned the legality of recording deeds, mortgages or other land transactions by electronic means. Such question was raised in reference to the provisions of the "Uniform Electronic Transactions Act", hereafter "the UETA", which is codified as S.C. Code Ann. §§ 26-6-10 et seq. I am not aware of any counties in the State that are presently recording such documents by electronic means.

As to the matter of execution of deeds, no provisions of the UETA specifically reference the execution of deeds, mortgages or other land transactions. However, execution of such documents is also not specifically prohibited by the UETA. (See Section 26-6-30 which exempts certain transactions, such as the creation and executions of wills). As to the legality of electronic contracts or records, it is provided by Section 26-6-50 that the UETA "...applies only to transactions between parties who agree to conduct transactions by electronic means." Furthermore, Section 26-6-60 states that

> This chapter must be construed and applied to:
>
> (1) facilitate electronic transactions consistent with other applicable law;
> (2) be consistent with reasonable practice concerning electronic transactions and with continued expansion of these practices; and
> (3) effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

It is further provided by Section 26-6-70 that

> (A) A record or signature must not be denied legal effect or enforceability solely because it is in electronic form.
> (B) A contract must not be denied legal effect or enforceabilty solely because an electronic record is used in its formation.

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Request (Letter)

> (C) An electronic record satisfies a law requiring a record to be in writing.
> (D) An electronic signature satisfies a law requiring a signature.

As stated in Donan v. Mariner, 339 S.C. 621, 626, 529 S.E.2d 754, 757 (2000),

> [a] deed is not legally effective until it has been delivered...While there is no prescribed method for an effective delivery of a deed, manual transfer of the instrument into the hand of the grantee is neither required to effectuate a valid delivery, nor dispositive of the issue. The term delivery in this regard refers to "not so much a manual act but the intention of the maker...existing at the time of the transaction...and not subject to later change of mind."..."The controlling question of delivery in all cases is one of intention."

The UETA as set forth in Section 26-6-80 states that

> (A) If parties agree to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.

In the opinion of one author as set forth in a law review article titled "Digital Recording of Real Estate Conveyances" published at 32 John Marshall Law Review 227,

> The core concept of the UETA is that electronic documents should be recognized and enforced to the same extent as paper documents. The UETA specifically excludes wills and codicils, and trusts created in connection with wills and codicils, but there are no other broad exclusions. Thus, the act covers deeds, mortgages, releases, and other ordinary real estate documents. It does not cover "a provision in a rule of law relating to a specific mode of delivery or display of information." While deeds and other real estate conveyances must be delivered to take effect, the general rules of the common law do not provide for any "specific mode of delivery;" hence, this exclusion does not take real estate conveyances out of the act's coverage.
>
> The UETA does not require anyone to use an electronic document, but merely authorizes their use. Similarly, it does not require any particular mode of delivery or transmission, so long as the recipient of the document has the means reasonably available to retrieve and read it. For example, a grantor could deliver a deed to a grantee simply by e-mailing it to the grantee, provided that the grantee had the means for readily receiving and reading e-mails. Likewise, a deed could be transmitted to

> the recorder's office for recordation if the recorder was equipped to receive and process e-mail transmissions. The grantee or recorder could, however, expressly provide that it declined to receive e-mailed deeds, in which case some other form of delivery would be necessary.

32 J. Marshall L. Rev. 264-265.

Consistent with such, it may be argued that there is a basis to indicate that a deed may be executed consistent with the UETA. However, such a conclusion by this office is not free from doubt and express legislative clarification should be sought before adopting such a method for the execution of a deed. This is especially the case because of the present requirements for recording of deeds.

As to the matter of recording, in Milford v. Aiken, 61 S.C. 110 at 111, 39 S.E. 233 (1901) the State Supreme Court stated that the process of recording is "...purely the creation of the statute law, and therefore [is] subject to such variety as to form, methods, etc. as to the legislative mind may seem best." Generally, as referenced in an opinion of this office dated January 20, 1982,

> The General Assembly has...enacted several designated prerequisites to recordation. The principal authority for the recording officer to refuse recordation is § 30-5-30 which states that '[b]efore any deed or other instrument in writing can be recorded in this State', the enumerated statutory requirements must be fulfilled. These prerequisites, of course, include proof of execution, or compliance with the Uniform Recognition of Acknowledgments Act. Other prerequisites to recordation contained elsewhere are § 30-5-80 [auditor's endorsement], § 30-7-50 [execution and probate of assignments] and § 30-5-35 [requirement of a derivation clause, etc.]. With respect to these statutory requirements (and any other statutory requirements), there is no doubt that the recording officer is authorized and required to refuse recordation if the statutory requisites are not met.

As to the UETA, pursuant to Section 26-6-170, "(e)ach governmental agency of this State shall determine if, and the extent to which, it will create and retain electronic records and convert written records to electronic records."

In an opinion of the Texas Attorney General dated August 5, 2004, it was stated that

> Even though documents that result from electronic transactions are valid and enforceable between the parties [under the E-Sign Act[1] and the UETA], there is no broad agreement about whether those documents may be recorded in the various local land records offices in the several states. Laws and regulations in many states frequently limit a recordable document to one that is in writing or on paper. They may also require that the recorded document be an original document. Similar laws and regulations may require signatures to be in writing and acknowledgments to be signed. Being electronic and not on paper, being an electronic version of an original paper document, or having an electronic signature or acknowledgment instead of a handwritten one, an electronic document might not be recordable under the laws of these states....The NCCUSL[2] currently is drafting a Uniform Real Property Electronic Recording Act "to assist state and local government[s] in making a full transition to electronic media." The draft's prefatory note describes the UETA and the E-Sign Act as giving "legal effect to real estate transactions that are executed electronically and allow[ing] them to be enforced between the parties thereto."...Presumably, the new Uniform Real Property Electronic Recording Act, will, if adopted, further clarify a local recording officer's duties with respect to electronic transactions.

That opinion commented that the California Attorney General in an opinion had determined that a county recorder was not required to accept electronic documents which included electronic signatures. It was also noted that in 2001 the New York Attorney General had concluded that a county recording officer was not precluded from rejecting a filing which was submitted for recording that bore only an electronic signature.

The Texas Attorney General's opinion made reference to the "Uniform Real Property Electronic Recording Act", hereinafter "URPERA", which, according to the opinion, would clarify a recording officer's duties with respect to electronic transactions. The magazine *Texas Technology* in the August, 2005 edition also made reference to the URPERA stating that it was released in August, 2004 by the National Conference of Commissioners on Uniform State Laws. According to that article, the enactment of legislation based upon the URPERA would authorize electronic recording.

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[1]The E-Sign Act is the federal Electronic Signatures in Global and National Commerce Act (15 U.S. C. §§ 7001-7031).

[2]The NCCUSL is the National Conference of Commissioners on Uniform State Laws.

Based upon the foregoing, it is my opinion that until the General Assembly enacts legislation specifically authorizing the execution and recording of deeds and mortgages by electronic means, such method of execution and recording is not recognized in this State.

With kind regards, I am,

Sincerely,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General