



Realtor Use of the RPost[®] Registered E-mail[®] Service to Close Deals

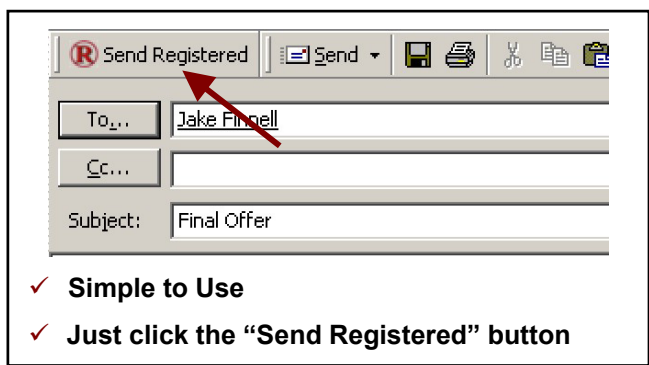
LEGAL ANALYSIS – Real Estate Transactions

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HIGHLIGHTS

The RPost[®] Registered E-mail[®] service, when used with electronic transaction and signature statutes:

- ❑ **Simplifies the bid, offer, counter-offer and acceptance process in real estate transactions, thereby increasing the likeliness of closing the deal.**
- ❑ **Ensures the confidentiality of the offer and counter-offer bidding process by exchanging e-mail for fax, eliminating faxes that can be read by anyone in the realtor's office.**
- ❑ **Enhances the ease of placing an offer, counter-offer, or acceptance at any time of the day or night.**



Background: In most real estate transactions there is an offer, counter-offer, and acceptance process. The longer it takes to close on an offer, the greater the risk that other parties might learn the details of the deal. Realtors can now avoid the risk of discovery by facilitating the offer/acceptance process with speed, ease, confidentiality, and accountability by using Registered E-mail[®] messages and taking advantage of the electronic signature statutes.

Realtors can use RPost[®] Registered E-mail[®] messages to transmit offers to sellers and other agents, to transmit counter-offers and changes in deal points, and accept offers in a manner that will be legally binding and can be verified if there is ever a dispute.

Electronic Law: The Uniform Electronic Transaction Act ("UETA") and the Electronic Signatures in Global and National Commerce Act ("ESIGN") define, in similar language, **"that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form."**¹ UETA goes further, affirmatively stating that **"if a law requires a record to be in writing, an electronic record satisfies the law,"** and both statutes state that **"if a law requires a signature, an electronic signature satisfies the law."**² These statutes guarantee e-mail messages the same legal weight and value as paper records. Indeed, courts have recently ruled that proposals tendered by e-mail can have the same force as written contracts;³ and that documents can be legally served by e-mail.⁴ To be enforceable under U.S. law, **E-SIGN** and **UETA** require that an electronic signature possess three elements:⁵ (1) A sound, symbol, or process, (2) attached to or logically associated with an electronic record, and (3) made with the intent to sign the electronic record.

In the case of Shattuck v. Klotzbach,⁶ the Plymouth Superior Court determined that using e-mail, the two parties settled on the price of a house; as the e-mail referred to the purchase and sale agreement that would be prepared. **All the e-mails exchanged by the two parties ended with the "typewritten" names of the senders.** The judge refused to dismiss the case because he believed that the parties' agreement to terms within an e-mail is in fact binding, even though there was no physical signature. The Court stated the following: **"Even though e-mail is in writing, most people still think of e-mail as an informal form of communicating. Now the Court is saying that it is a binding document."**

The relevance is that e-mail is binding without any special "digital signature" other than the author of the e-mail typing his or her name logically associated with the content of that e-mail.

¹ UETA § 7(a).

² UETA §§ 7(c) and 7(d). E-SIGN §101(a)

³ Nikoletta Banushi, "Can E-Mail Seal A Sales Deal?" Boston Globe, (March 16, 2002)

⁴ American Bar Association website (March 29, 2002)

⁵ **E-SIGN**, 15 U.S.C. § 7006(5) and **UETA** § 2(8) (definitions of "electronic signature").

⁶ Nikoletta Banushi, "Can E-Mail Seal A Sales Deal?" Boston Globe, (March 16, 2002)

While this decision and the enactment of UETA and ESIGN are great news for those who wish to use electronic methods to conduct business, one must be able to prove delivery and authenticate the original content of the e-mail and attachments (i.e. original terms and conditions) in order to protect against a dispute over the terms of a contract sent via e-mail. RPost **Registered Receipt™ e-mails provide transaction parties with accountability, irrefutable proof of delivery and receipt, official time stamp and non-repudiation.**

Registered E-mail®: RPost (www.rpost.com) invented the Registered E-mail® serviced that, among other things, is a deal-closing tool that provides the ability for parties to simplify the closing of transactions and extend goodwill to all participants. This is a critical advantage when executing transactions involving: **realtor and seller bids, offers, counter-offers, acceptance of offers, and consent to terms and conditions of a real estate transaction.**

RPost® Registered E-mail® is a service that has been **tested, accepted, and is used by the U.S. Government** to protect the sender and whenever desired, the receiver, in case of a dispute involving Internet e-mail. The service returns a Registered Receipt™ e-mail to the sender, and as an option, to the recipient as well. It is an open system where any e-mail user can participate. The receiver never needs to pre-enroll to receive Registered e-Mail® message and the receiver does nothing extra to generate the return of a Registered Receipt® e-mail to the sender. All information necessary to verify the integrity of the Registered Receipt™ e-mail and reconstruct the original content of the e-mail and all attachments, is embedded within the receipt itself. Unlike standard e-mail return receipts, RPost® Registered Receipt™ e-mails conform to the electronic commerce statute requirements, ESIGN and UETA, and provide legal proof of delivery and content, including attachments, delivered to any Internet address. The RPost® system does not store any e-mail, (the entire transaction is recorded and embedded within the Registered Receipt™ e-mail that is managed by the sender) so security and privacy are not compromised by threat of discovery in a dispute.

ELECTRONIC TRANSACTION PROCESS

A timely closing is always desirable to guard against the possibility of unforeseen market events having a negative impact on the terms of a business deal, price, or availability.

Generally, there are several communications that occur in a real estate transaction. A realtor can use RPost® Registered E-mail® technology to:

- 1) **Transmit the initial offer documents with the terms of the offer attached in any electronic format.**
- 2) **Accept or counter any return proposal from the buyer, seller, or agents.**
- 3) **Record acceptance.**
- 4) **Provide a signed record of acceptance for both parties.**
- 5) **Manage and archive the electronic signature files.**

1) Transmit initial offer to the seller by the realtor:

- a) The buyer's realtor prepares an offer memo with the details and terms of the offer. This is often a multiple page electronic document that is saved as a file on the realtor's computer. The realtor attaches this offer memo to an e-mail and in the body writes, "Attached are the terms of an offer for XXX property submitted by [buyer's realtor name] acting as the authorized agent on behalf of [buyer's name]. Signed [buyer's realtor name]."
- b) The buyer's realtor sends the e-mail using the RPost® Register ReplySM feature, and at the bottom of the e-mail, provides instructions for the seller or seller's agent on how to accept the offer electronically. The buyer's realtor includes the following text, "If you accept and agree to the attached offer file, please reply to this e-mail; Type 'I hereby represent that [type the seller's name] has provided me the power to bind this agreement on their behalf and they have notified me that they agree to and approve all of the terms and conditions as set out in this e-mail, associated e-mails and attachments. I have the authority to accept for and bind this agreement on behalf of [seller's name]. Signed [agent name].' and send."
- c) The buyer's realtor might also add some educational information about the process, such as, "this e-mail offer will be sent 'Registered' with the Register ReplySM service. After you reply as noted above, you will receive a Registered Receipt™ e-mail that you can save in electronic format as your counterfeit-proof, time-stamped, electronic record of this agreement. Attachments are incorporated by reference."
- d) The buyer's realtor will receive a Registered Receipt™ e-mail, providing them with the following information for each offer:
 - The time the offer was sent and received,
 - The level of legal delivery as defined by UETA (server, mailbox, opened, or delivery failure), and

- The precise content associated with the original e-mail and all of its attachments.

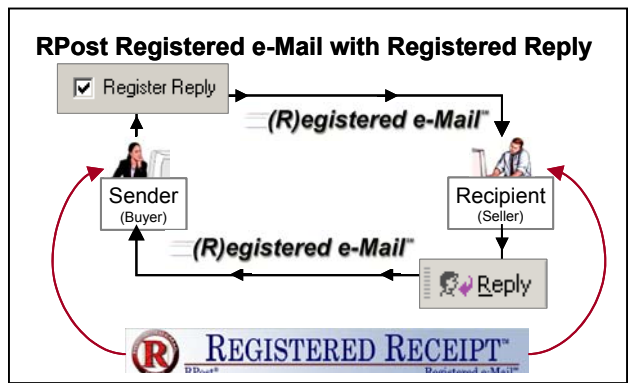
2) Associating the offer documents to the e-mail is accomplished as simply as attaching the document to the transmitted Registered E-mail® message. In case of a possible future dispute, the principals would need to be able to prove the precise content of each offer and counter-offer proposal. As standard formats could easily be altered by recipients - PDF, Word, etc. – one might have concern about proving the authenticity of the offer details in the future.

By using the Registered E-mail® service, the buyer's realtor is able to send the e-mail with all of the closing or offer documents attached in Word format, without concern about a possible challenge to the integrity of the content of these documents. If the recipient ever questioned the integrity of these attachments, the Registered Receipt™ e-mail, returned to the sender, could be used to verify the authenticity and reconstruct the original e-mail, with all attachments as initially sent and received by each recipient.

3) Record seller acceptance. The electronic signature statutes and case law provide that typing of one's name, associated logically with the material being signed, is a valid electronic signature. Non-repudiation techniques enhance validity, such as time sealing the electronic records; rendering them counterfeit-proof or tamper-detectable; and ensuring that the integrity of the original documents can be verified at any time.

When the buyer's realtor sends the offer details by e-mail to the seller via Registered E-mail® message, with the "Register Reply™" option engaged, the body of the e-mail explains the process.

Because the Registered e-Mail service employed the Register Reply™ function, a unique and proprietary feature to RPost® Registered E-mail® services, Registered Receipt™ e-mails are **returned to both the buyer and seller agents by e-mail.**



The Register Reply™ function enables a recipient to automatically receive a Registered Receipt™ e-mail when

the recipient simply replies to the Registered E-mail® message – **and does not require any extra software or know-how for the recipient.** These Registered Receipts™ e-mails become the verifiable, counterfeit-proof, tamper-detectable electronic record of the transaction as approved by all parties, by means of electronic signature.

The Register Reply™ feature protects both parties to an agreement by providing Registered Receipt™ e-mails to both sender and recipient, should a future dispute arise.

4) Counter-offers via electronic signature. If the seller's agent wishes to submit a counter-offer, they can simply reply to the buyer's agent e-mail that had been sent via the "Register Reply™" service, with the new deal points in the body of the e-mail.

Each e-mail sent back and forth along the e-mail string initiated by the buyer's agent using the "RPost® Register Reply™" feature is recorded and associated with each other. At the end of the negotiation, and final acceptance memorialized by the buyer and seller agents typing their names, accepting on behalf the buyer and seller, a Master Registered Receipt™ e-mail is returned to both parties for their record of agreement.

5) Authorization of agent by buyer and seller. The buyer's agent may wish to retain a verifiable record, in the form of a Registered Receipt™ e-mail, of the buyer empowering them to sign and accept offers and counter offers, use of electronic signature, and use of the "Register Reply™" process. This will provide the buyer's agent the authority to conduct the transaction on behalf of the buyer. They would use a similar "Register Reply™" process.

Likewise, the seller's agent may wish to retain a verifiable record, in the form of a Registered Receipt™ e-mail, of the seller empowering the seller's agent to sign and accept offers and counter offers, use of electronic signature, and use of the "Register Reply™" process. They would use a similar "Register Reply™" process as well.

6) Signing the offer. As an alternative, and to provide greater accountability, the initiator of the "Register Reply™" e-mail (the buyer's agent in this case) can electronically sign the original outbound e-mail sent to the seller by using the RPost® Digital Seal™ service.

This technique allows the buyer's agent to electronically sign the outbound e-mail and all attachments. Consequently, **any recipient, or future recipient,** is provided the ability to verify authorship or integrity of the Digitally Sealed™ e-mail at any time.

7) Record and maintain records only in electronic form. To create a "closing volume" for record keeping, either party or all can simply store the Registered Receipt™ e-mails in electronic form.

The original outbound Registered E-mail[®] message offers, the counter offer reply returned "Registered," along with the acceptance e-mail and countersigned copy are all linked by identification reference codes in their corresponding Registered Receipts[™] e-mail. [The reference codes allow a reviewer after the fact to trace the principal e-mail with all associated attachments, and all associated Registered Receipt[™] e-mails.]

There is NO need to store ANY paper copies of any agreements, records, and signatures.

NOTE: The Registered E-mail[®] service stores no information and therefore is not discoverable in a legal dispute. Any holder of the Registered Receipt[™] message can verify the details of the business transaction at any time. The Registered Receipt[™] e-mail itself contains the encrypted information necessary to verify a transaction.

CONCLUSION

Simple e-mail transmission poses inherent problems:

- ❑ **If a future dispute arises, there is no way to authenticate and prove what the precise content was of each page of transaction agreements that were sent by e-mail to each party, and**
- ❑ **There is no way to prove that all parties received the original e-mail offer and when.**

Without using the Registered E-mail[®] service, one would be hard-pressed to defend successfully against a legal challenge that arose from one of the problems inherent with simple e-mail transmissions.

- ❑ **The Registered E-mail[®] service is a powerful deal-closing tool for offers, counter offers, acceptance, and required notifications.**
- ❑ **Further, there is NO need to store ANY paper copies of any agreements, records, and signatures in a transaction that uses Registered E-mail[®] techniques to close the deal. There is no need to use couriers or faxes.**

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REFERENCES:

Requirements for creation of electronic contracts are based on the Uniform Electronic Transactions Act (UETA), the E-Sign Act, among others.

A contract may be made in any manner sufficient to show agreement, including offer and acceptance,⁷ or conduct that recognizes the existence of a contract.⁷ There are

⁷ UCC 2-204.

fundamental provisions in E-SIGN, UETA, and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce that support the validity of electronic contracts.

E-SIGN provides that "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."⁸ Similarly, UETA provides that "a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation."⁹ Finally, the UNCITRAL Model Law on Electronic Commerce goes a bit further by providing both that "an offer and the acceptance of an offer may be expressed by means of data messages", and "where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."¹⁰

An offer may be accepted "in any manner and by any medium reasonable in the circumstances."¹¹ Typical offline acceptances include written and oral communications, as well as acceptance by conduct. Their online counterparts include acceptance by e-mail or other form of electronic message, by electronic agent, and by conduct such as clicking on a button or downloading content.

Thus, if an offer is made by e-mail, one should be able to accept it by the same means.¹²

UETA provides that an electronic record is considered received only when it enters a computer system "that the recipient has designated or uses for the purpose of receiving electronic records of the type sent."¹³ Thus, if the parties have regularly corresponded in the past by e-mail, an e-mail acceptance sent to the offeror's e-mail address will presumably be effective.

UETA provides that the time at which an electronic record is considered to have been sent is the time that the record "enters an information processing system outside the control of the sender" (in the case where a message is sent from one computer system to another), or "enters a region of the information processing system designated or used by the recipient which is under the control of the recipient" (in the case where a message is sent from one person to another on the same system, such as where

⁸ E-SIGN, § 101(a)(2).

⁹ UETA, § 7(b).

¹⁰ UNCITRAL Model Law on Electronic Commerce, Article 11(1).

¹¹ UCC 2-206(1)(a).

¹² It is well established that an acceptance may properly be sent by the same means as the offer, unless the offer says otherwise. See Restatement (Second) of Contracts § 65.

¹³ UETA § 15(b)(1).

both parties are on AOL). An electronic record will be considered to have been sent as of that time, provided that it is addressed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records and from which the recipient is able to retrieve the electronic record, and provided further that it is in a form capable of being processed by that system.^{14 15}

Further, The U.S. National Archives and Records Administration Modern Records Program¹⁶ has provided the following guidelines for electronic records:

For a record to remain reliable, authentic, with its integrity maintained, and useable for as long as the record is needed, it is necessary to preserve its content, context, and sometimes its structure. A trustworthy record preserves the actual content of the record itself and information about the record that relates to the context in which it was created and used. Specific contextual information will vary depending upon the business, legal, and regulatory requirements of the business activity (e.g., issuing land use permits on Federal lands). It also may be necessary to preserve the structure or arrangement of its parts. Failure to preserve the structure of the record will impair its structural integrity. That, in turn, may undermine the record's reliability and authenticity.

Non-repudiation is one of the essential security services in computing environments, being mainly applied in message handling systems and electronic commerce. The non-repudiation services that are being used in e-commerce can also be used in ascertaining the reliability of electronically-signed records. Non-repudiation services provide irrefutable evidence that an action took place. The services protect one party to a transaction (e.g., electronically signing a record) against the denial of the other party that a particular event or action took place. The services also provide safeguards that protect all parties from a false claim that a record was tampered with or not sent or received.

Similarly, the European Union Electronic Signature Directive requires member states to “ensure that an electronic signature is not denied legal effectiveness solely on the grounds that it is in electronic form.”¹⁷

In the European Union, the enforceability of electronic transactions is governed by the Electronic Signatures Directive adopted in 1999, and the Electronic Commerce Directive adopted in 2000. Internationally, model laws governing the enforceability of electronic transactions

have also been developed by the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group on Electronic Commerce, which completed work on its Model Law on Electronic Commerce in 1996, and finalized and approved its Model Law on Electronic Signatures in 2001. These model laws have served as the basis for legislation enacted in several countries.

The term “electronic signature” means “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”¹⁸ Under the European Union Electronic Signature Directive, “electronic signature” means “data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication.”¹⁹

The term “transaction” is defined in the E-SIGN Act as “an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct: (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof.”²⁰ UETA defines “transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.”²¹

Each of these legal definitions and statutes support the RPost Registered E-mail® and the RPost Register Reply™ service's basis of enabling a legal electronic transaction by the Registered E-mail® service. Each support the use of RPost® Registered E-mail® for electronic signature, service, delivery, time, non-repudiation and content authentication, for offers, counter-offers, and acceptance of offers in real estate transactions.

This Article is not legal advice, but is an analysis of the application of existing legal principles regarding e-commerce to the business of real estate. If you have any questions as to how these principles apply to you or your transactions or business, you should consult qualified legal advice, including if you wish, the author.

¹⁴ UETA § 15(3).

¹⁵ UETA § 15(a)(1) and 15(a)(2).

¹⁶ The National Archives and Records Administration, Policy and Communications Staff, Office of Records Services, Modern Records Program, Washington, D.C.

¹⁷ Electronic Signature Directive, Article 5(2)

¹⁸ E-SIGN, 15 U.S.C. § 7006 (5); UETA § 2(8).

¹⁹ Electronic Signatures Directive, 1999/93/EC (13 December 1999), Article 2(1).

²⁰ E-SIGN, 15 U.S.C. § 7006(13).

²¹ UETA § 2(16).